

ESSAY

Nixon/Trump: Strategies of Judicial Aggrandizement

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In Trump v. Vance and Trump v. Mazars, the Supreme Court applied very different standards for subpoenas issued for the personal papers of the president, making it easier for a grand jury to acquire such materials than a congressional committee. The two opinions, both authored by Chief Justice Roberts, have been widely praised for suggesting that the president is not wholly above the law; indeed, they have been treated as the second coming of the Nixon Tapes Case.

This Essay argues that while the Trump subpoena cases do have an important kinship with the cases concerning access to White House tapes during Watergate, this similarity is not quite as flattering as commentators imagine. What the cases surrounding access to Donald Trump's financial records and the cases surrounding access to Richard Nixon's White House tapes have in common above all else is a project of judicial self-empowerment at Congress's expense. What distinguishes them, on the other hand, is the immediate result of the two sets of cases: whereas the Nixon Court acted to push a lawless president out of office, the Trump Court acted to ensure that the information sought by other institutional actors could not have electoral consequences for another lawless president.

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INTRODUCTION

On the final day of its 2019 Term, the Supreme Court decided two landmark cases regarding access by other governing institutions to the personal papers of the president. In *Trump v. Vance*, the Court held both that there is no constitutional bar on a state grand jury's subpoena for a president's financial records and that there is no heightened standard for the issuance of such a subpoena.¹ Writing for the Court, Chief Justice Roberts insisted that, "Two hundred years ago, a great jurist of our Court [Chief Justice Marshall in the Aaron Burr treason trial] established that no citizen, not even the President, is categorically above the common duty to produce evidence when called upon in a criminal proceeding. We reaffirm that principle today"²

In *Trump v. Mazars USA, LLP*, the Court faced subpoenas for nearly the same material as in *Vance*, but here the subpoenas had been issued by three congressional committees.³ In *Mazars*, the Court—again, per the Chief Justice—applied a much more demanding standard, insisting that "significant separation of powers issues [are] 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."⁴ As a result, congressional subpoenas for presidential information are subject to higher standards than congressional subpoenas for information relating to other individuals. In addition to the "valid legislative purpose" requirement that the Court has applied to all congressional subpoenas,⁵ the Court in *Mazars* enumerated four nebulous (and non-exclusive) factors to be considered in weighing the permissibility of congressional subpoenas specifically for presidential materials.⁶

Immediate reaction to the decisions was largely adulatory: the *New York Times* splashed a six-column headline across the front page, reading, "President Is Not 'Above the Law,' Justices Decide."⁷ The *Washington Post*'s headline announced, "Justices Reject Trump's Immunity Claims."⁸ Legal elites took much the same

1. 140 S. Ct. 2412 (2020).

2. *Id.* at 2431 (citing *United States v. Burr*, 25 F. Cas. 30, 34 (C.C.D. Va. 1807)).

3. 140 S. Ct. 2019 (2020).

4. *Id.* at 2033–34 (quoting THE FEDERALIST NO. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961)).

5. *See id.* at 2031–32 (quoting *Quinn v. United States*, 349 U.S. 155, 161 (1955)).

6. *Id.* at 2035–36. There is some irony in this multi-factor analysis being announced by a justice who, only days earlier, had strongly criticized such tests. *See June Med. Servs. L. L. C. v. Russo*, 140 S. Ct. 2103, 2136 (2020) (Roberts, C.J., concurring in the judgment) ("There is no plausible sense in which anyone, let alone this Court, could objectively assign weight to such imponderable values and no meaningful way to compare them if there were. Attempting to do so would be like 'judging whether a particular line is longer than a particular rock is heavy.' Pretending that we could pull that off would require us to act as legislators, not judges, and would result in nothing other than an 'unanalyzed exercise of judicial will' in the guise of a 'neutral utilitarian calculus.'" (citations omitted)).

7. Adam Liptak, *President Is Not 'Above the Law,' Justices Decide: Court Backs a Subpoena on Trump's Tax Records, With Some Limits*, N.Y. TIMES, July 10, 2020, at A1.

8. Robert Barnes, *Justices Reject Trump's Immunity Claims*, WASH. POST, July 10, 2020, at A1.

tack, describing the decisions as “Solomonic,”⁹ “a victory for the rule of law,”¹⁰ and so on.¹¹ A few commentators struck a more critical note,¹² but the predominant sentiment was that the Supreme Court had brought a lawless president to heel—and even more impressively, had done so with a president of the same party as the Court’s majority.¹³ *Vance* and *Mazars* are, in other words, the second coming of the *Nixon Tapes Case*,¹⁴ a comparison Roberts encouraged by citing the *Nixon Tapes Case* nearly two dozen times across the two majority opinions.¹⁵

The comparison is illuminating, but perhaps not quite in the way that Roberts or his boosters imagine. What the cases surrounding access to Donald Trump’s financial records and the cases surrounding access to Richard Nixon’s White House tapes have in common above all else is judicial disdain for Congress and its representative role¹⁶ and an architectonic project of judicial empowerment at

9. Jack Goldsmith (@jackgoldsmith), TWITTER (July 10, 2020, 9:04 AM), <https://twitter.com/jackgoldsmith/status/1281575027108962305> [<https://perma.cc/8DXC-8CZS>].

10. Quinta Jurecic, *Mazars Is a Victory for Rule of Law*, ATLANTIC: IDEAS (July 11, 2020), <https://www.theatlantic.com/ideas/archive/2020/07/mazars-victory-rule-law/614026/>.

11. See, e.g., Jonathan H. Adler, *All the President’s Papers*, 19 CATO SUP. CT. REV. 31, 33 (2020); Akhil Reed Amar, *The Roberts Court Is Nothing Like America*, N.Y. TIMES (July 14, 2020), <https://www.nytimes.com/2020/07/14/opinion/john-roberts-supreme-court-partisanship.html>; Neal Katyal & Joshua A. Geltzer, *Presidents Don’t Usually Lose as Badly at the Supreme Court as Trump Did*, WASH. POST (July 9, 2020, 9:08 PM), <https://www.washingtonpost.com/outlook/2020/07/09/trump-loses-supreme-court/>; @marty_lederman, TWITTER (July 9, 2020, 11:07 AM), https://twitter.com/marty_lederman/status/1281243510419701766 [<https://perma.cc/R6EY-ZQRQ>]; Laurence Tribe (@tribelaw), TWITTER (July 16, 2020, 5:26 AM), <https://twitter.com/tribelaw/status/1283694465379708928> [<https://perma.cc/M76Z-6WX6>].

12. See, e.g., Josh Chafetz, *Don’t Be Fooled, Trump Is a Winner in the Supreme Court Tax Case*, N.Y. TIMES (July 9, 2020), <https://www.nytimes.com/2020/07/09/opinion/trump-taxes-supreme-court.html>; Leah Litman, *Opinion, Think This Was a Liberal Term at the Supreme Court? You Probably Missed Some Cases*, WASH. POST (July 12, 2020, 8:00 AM), <https://www.washingtonpost.com/opinions/2020/07/12/think-this-was-liberal-term-supreme-court-you-probably-missed-some-cases/>; Allen Sumrall, *The Supreme Court Is Aggrandizing Itself and the Presidency, in that Order*, HOUSE DIVIDED (July 17, 2020), <https://ahousedividedapd.com/2020/07/17/the-supreme-court-is-aggrandizing-itself-and-the-presidency-in-that-order/> [<https://perma.cc/RC2L-KDJ9>] (last visited July 13, 2021).

13. See Judge Thomas B. Griffith, *The Degradation of Civic Charity*, 134 HARV. L. REV. F. 119, 131–32 (2020) (insisting that in both *Vance* and *Mazars*, “the Court did not split along ‘political’ lines. Far from it. . . . *Mazars* and *Vance* demonstrate the Justices’ willingness to vote against the President who appointed them when the law demands it.”).

14. *United States v. Nixon (Nixon Tapes Case)*, 418 U.S. 683 (1974).

15. See *Trump v. Vance*, 140 S. Ct. 2412, 2424 (2020) (seven citations); *id.* at 2425 (two citations); *id.* at 2427 (three citations); *id.* at 2430 (one citation); *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2026 (2020) (one citation); *id.* at 2032 (four citations); *id.* at 2034 (one citation); *id.* at 2035 (one citation); *id.* at 2036 (one citation). The *New York Times* compared the decisions to the *Nixon Tapes Case* in the second paragraph of its front-page report. See Liptak, *supra* note 7.

16. On this disdain more broadly, see generally Josh Chafetz, *Governing and Deciding Who Governs*, 2015 U. CHI. LEGAL F. 73; Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2001); Pamela S. Karlan, *The Supreme Court, 2011 Term — Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1 (2012); Richard H. Pildes, *Democracy and Disorder*, 68 U. CHI. L. REV. 695 (2001); Jonathan S. Gould & Olatunde C. A. Johnson, *SCOTUS Doesn’t Trust Congress—And That’s a Problem for American Government*, ATLANTIC: IDEAS (July 21, 2020), <https://www.theatlantic.com/ideas/archive/2020/07/scotus-congress-trust/614380/>.

the legislature's expense.¹⁷ In both contexts, the courts worked assiduously to position themselves as standing outside of—indeed, above—separation-of-powers conflicts. The judiciary, in its own self-presentation, is simply a neutral arbiter between the contending sides. Information demands from Congress to the president are therefore suspicious: why should one side get free rein to make demands of the other? But information demands from the courts present no such problems: there's nothing wrong with the referees taking a hard look to make sure that the game is being played fairly.

Of course, this is nonsense: there are *three* branches in the federal system, and there is no reason to think that one of them is free of institutional interests and agendas merely by virtue of the fact that its members wear robes. But it is nonsense with a purpose: institutions in the American constitutional order gain power over time as a function of their successful contention for public support.¹⁸ The judiciary's self-presentation as standing outside of the interbranch contest for power is meant to make it appear more trustworthy, and the courts therefore accrue more power precisely to the extent that the public buys into this self-presentation. As Part I of this Essay shows, in both the Nixon cases and the Trump cases, the courts have been highly successful in convincing both the political media and legal elites—the two groups that most shape the public's conception of the judiciary—to accept their self-serving self-presentation. Moreover, in both situations, this judicial self-aggrandizement has come at the expense of Congress, which has not only been described in uniformly unflattering terms in the opinions but has also been impeded from carrying out one of its central functions: the use of oversight in ways specifically intended to shape public opinion and inform voters.¹⁹

But there is also a crucial difference between the Trump cases and the Nixon cases. As Part II explores, the long-term strategy of judicial empowerment was put to very different immediate use in the two situations. Whereas the Nixon Court acted to push a lawless president out of office, the Trump Court acted to ensure that the information sought by other institutional actors could not have electoral or institutional consequences for another lawless president.

* * *

To fully understand these points, we need to begin by broadening our scope. The universe of Nixon Tapes Cases should include not only *United States v. Nixon* but also *Senate Select Committee on Presidential Campaign Activities v. Nixon*,²⁰ a D.C. Circuit case denying the Senate committee investigating Watergate access to White House tapes that it had subpoenaed. Likewise, the

17. See JUSTIN CROWE, BUILDING THE JUDICIARY: LAW, COURTS, AND THE POLITICS OF INSTITUTIONAL DEVELOPMENT (2012). For an insightful recent comparative treatment of the ways that apex courts around the world have constructed their own authority, see Yvonne Tew, *Strategic Judicial Empowerment*, AM. J. COMPAR. L. (forthcoming).

18. See JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 15–26 (2017).

19. See generally Josh Chafetz, *Congressional Overspeech*, 89 FORDHAM L. REV. 529 (2020).

20. 498 F.2d 725 (D.C. Cir. 1974).

universe of Trump cases should include not only *Vance* and *Mazars* but also the congressional suits against the Treasury for Trump's tax returns,²¹ against the Justice Department for the Mueller grand jury materials,²² against the General Services Administration for materials related to the Trump Hotel lease,²³ and against former White House Counsel Don McGahn seeking to compel his testimony in the first set of impeachment proceedings against Trump.²⁴ With this fuller universe of cases in hand, we can begin to see the patterns and strategies identified above.

I. CONGRESS DOWN, JUDGES UP

At a deep level, the Nixon and Trump cases share a kinship: In both, the judiciary empowered itself by disempowering Congress. This judicial self-aggrandizement was achieved through several strategies. One set of strategies involved how the judges wrote their opinions—how they chose to frame the issues involved, and how they described the interests and motivations of the various actors. A second set of strategies had to do with manipulation of the timeframe of decisions. In particular, by slowing down attempts at congressional oversight while simultaneously speeding up consideration of grand jury proceedings, courts were able to make judicial institutions appear to be in the vanguard of checking the president, even if in fact they were relative latecomers.

A. THE NIXON CASES

The Watergate scandal began in 1972, when employees of Richard Nixon's reelection campaign burgled and wiretapped the Democratic National Committee headquarters in the Watergate Office Building in Washington, D.C. The burglars were arrested, and there began a concerted effort, involving Nixon himself and his top aides, to cover up the Administration's involvement in the crime. Some of those efforts were captured on a secret White House tape-recording system, the

21. Memorandum and Order at 1, *Comm. on Ways & Means, U.S. House of Representatives v. U.S. Dep't of Treasury*, No. 1:19-cv-01974 (TNM), 2019 WL 4094563 (D.D.C. Aug. 29, 2019) (denying the Committee's motions to expedite proceedings and for summary judgment).

22. *In re Committee on the Judiciary, U.S. House of Representatives*, 951 F.3d 589 (D.C. Cir. 2020) (ordering the materials turned over), *vacated and remanded with instructions to dismiss as moot*, No. 19-1328, 2021 WL 2742772 (U.S. July 2, 2021).

23. *Maloney v. Murphy*, 984 F.3d 50 (D.C. Cir. 2020) (holding that members of the House Oversight Committee had standing to sue to enforce an information request pursuant to the statutory "rule of seven," 5 U.S.C. § 2954, and remanding for further proceedings).

24. *Comm. on the Judiciary of the U.S. House of Representatives v. McGahn*, 951 F.3d 510 (D.C. Cir.) (holding the suit nonjusticiable), *rev'd and remanded en banc*, 968 F.3d 755 (D.C. Cir. 2020); *Comm. on the Judiciary of the U.S. House of Representatives v. McGahn*, 973 F.3d 121 (D.C. Cir. 2020) (holding, after the remand from the en banc D.C. Circuit, that the case must be dismissed for lack of a cause of action), *vacated*, No. 19-5331, 2020 U.S. App. LEXIS 32573 (D.C. Cir. Oct. 15, 2020) (granting rehearing en banc yet again); *Comm. on the Judiciary of the U.S. House of Representatives v. McGahn*, No. 19-5331, 2021 U.S. App. LEXIS 20759 (D.C. Cir. July 13, 2021) (en banc) (per curiam) (dismissing the case as moot).

existence of which became known in July 1973.²⁵ Almost immediately after knowledge of the tapes' existence became public, Special Prosecutor Archibald Cox subpoenaed nine of them for presentation to the grand jury he had impaneled to investigate Watergate.²⁶ Nixon refused to produce the tapes, and after both the district court and the court of appeals ruled against him,²⁷ he attempted to moot the issue by having Cox fired in the infamous "Saturday Night Massacre" of October 20, 1973.²⁸ The ensuing public and congressional backlash was so intense that Nixon was quickly forced not only to agree to the appointment of a new special prosecutor, Leon Jaworski,²⁹ but also to agree to turn the tapes over to the district court overseeing the grand jury, for *in camera* review for privileged material (minus two subpoenaed tapes that had mysteriously gone missing, as well as an eighteen-minute gap in one of the produced tapes).³⁰ The material was subsequently presented to the grand jury.³¹

On March 1, 1974, the grand jury returned indictments against seven of Nixon's associates, alleging various offenses related to the Watergate break-in, and it named Nixon himself as an unindicted co-conspirator.³² The next month, Jaworski asked the judge overseeing the criminal trial to issue a subpoena requiring Nixon to produce sixty-four additional tapes.³³ Nixon moved to quash the trial subpoena, and the *Nixon Tapes Case* quickly³⁴ made its way to the Supreme Court.

The unanimous Court, per Chief Justice Burger, ordered the White House to comply with the subpoena.³⁵ In doing so, Burger missed no opportunity to describe the judicial role in as laudatory a language as possible. Perhaps no pronouncement in American constitutional law is more frequently, and more vacuously, cited than *Marbury*'s statement that, "[i]t is emphatically the province and duty of the judicial department to say what the law is,"³⁶ and the *Nixon Tapes Case* dutifully reprints it not once but twice in opposition to Nixon's claim that presidential communications enjoy an absolute privilege of confidentiality.³⁷ But

25. See *infra* text accompanying notes 49–52.

26. R. W. Apple Jr., *President Refuses to Release Tapes; Senate Unit and Cox Serve Subpoenas; White House Expected to Ignore Them: Court Test Seen*, N.Y. TIMES, July 24, 1973, at 1.

27. *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973) (en banc); *In re Subpoena to Nixon*, 360 F. Supp. 1 (D.D.C. 1973).

28. See Richard L. Madden, *Nixon Discharges Cox for Defiance; Abolishes Watergate Task Force; Richardson and Ruckelshaus Out: Outcry in House*, N.Y. TIMES, Oct. 21, 1973, at 1.

29. John Herbers, *Nixon Names Saxbe Attorney General; Jaworski Appointed Special Prosecutor*, N.Y. TIMES, Nov. 2, 1973, at 1.

30. See Lesley Oelsner, *Nixon Agrees to Give Tapes to Sirica in Compliance with Orders of Court: Abrupt Reversal*, N.Y. TIMES, Oct. 24, 1973, at 1; see also JOHN J. SIRICA, *TO SET THE RECORD STRAIGHT: THE BREAK-IN, THE TAPES, THE CONSPIRATORS, THE PARDON* 180–86, 189–99 (1979).

31. See SIRICA, *supra* note 30, at 217.

32. *Nixon Tapes Case*, 418 U.S. 683, 687 (1974); see also SIRICA, *supra* note 30, at 215–16.

33. *Nixon Tapes Case*, 418 U.S. at 687–88; SIRICA, *supra* note 30, at 219–20.

34. See *infra* text accompanying notes 93–95.

35. *Nixon Tapes Case*, 418 U.S. at 716.

36. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

37. *Nixon Tapes Case*, 418 U.S. at 703, 705.

as is so frequently the case with judicial invocations of the *Marbury* dictum, Burger omitted the next two sentences: “Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.”³⁸ The *Marbury* Court was making a straightforward claim about conflict-of-laws principles to be applied to cases already before a court;³⁹ the *Nixon Tapes Case* Court, like so many before and after, shorn it of context and made it into a grandiose claim of judicial supremacy.

Insofar as the judicial department *must* say what the law is, an absolute presidential immunity would interfere in the “primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions [and] would plainly conflict with the function of the courts under Art. III.”⁴⁰ But the determination that there was no absolute presidential privilege did not end the inquiry, as a narrower privilege might still defeat specific subpoenas. However, any specific claim of privilege with respect to particular communications

must be considered in light of our historic commitment to the rule of law. This is nowhere more profoundly manifest than in our view that ‘the twofold aim [of criminal justice] is that guilt shall not escape or innocence suffer.’ . . . The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.⁴¹

Given Burger’s description of the importance attached to the judicial function, it is unsurprising that he found that it outweighed the specific privilege claims at issue in the case:

[W]hen the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.⁴²

Notice how the language Burger used in the *Nixon Tapes Case* serves to ennoble judicial proceedings. The opinion hinges on “our historic commitment to the

38. *Marbury*, 5 U.S. (1 Cranch) at 177.

39. See Sylvia Snowiss, *Text and Principle in John Marshall’s Constitutional Law: The Cases of Marbury and McCulloch*, 33 J. MARSHALL L. REV. 973, 986–87 (2000).

40. *Nixon Tapes Case*, 418 U.S. at 707.

41. *Id.* at 708–09 (alteration in original) (citations omitted).

42. *Id.* at 713.

rule of law,”⁴³ but there is an unresolved ambiguity in that “our.” Are “we” the American people or the Supreme Court?⁴⁴ On the one hand, it is plausible to associate a commitment to “the rule of law” with broader American political norms; on the other hand, is that *popular* conception of the rule of law really “nowhere more profoundly manifest”⁴⁵ than in a commitment to criminal justice rather than, say, an opposition to centralized, arbitrary, and/or totalizing state power?⁴⁶ And yet the Court not only treats the rule of law as a paramount value, rather than one to be balanced against others (oddly, the words “democracy” and “democratic” nowhere appear in this opinion about a president’s involvement in covering up an attempt at election interference by that president’s subordinates), it also treats the rule of law as being centrally concerned with that most paradigmatically judicial of proceedings, the criminal trial. The repeated, if vague, references to *Marbury*⁴⁷ serve to imbue this juricentric conception of the rule of law with a Founding-era patina. Other considerations “must yield” to the demands of criminal proceedings, overseen by a federal judge.⁴⁸

But the *Nixon Tapes Case* was not the only case about access to Nixon’s tapes. It was in fact congressional oversight, not the special prosecutor’s investigation, that was central in bringing the tapes to light. The existence of White House recordings potentially relevant to the Watergate investigation only became known to people outside of the White House when former administration staffer Alexander Butterfield mentioned them to staffers on the Senate Select Committee on Presidential Campaign Activities (popularly known as the Watergate Committee) on July 13, 1973.⁴⁹ Three days later, Butterfield testified about the tapes in an explosive open session of the Committee.⁵⁰ After Nixon refused to

43. *Id.* at 708.

44. On the Court’s often squirrely use of the first-person plural, see Chafetz, *supra* note 16, at 76–90.

45. *Nixon Tapes Case*, 418 U.S. at 709.

46. Jeremy Waldron takes the core of the concept of the rule of law to be that “people in positions of authority should exercise their power within a constraining framework of well-established public norms rather than in an arbitrary, *ad hoc*, or purely discretionary manner on the basis of their own preferences or ideology.” Jeremy Waldron, *The Rule of Law*, STANFORD ENCYCLOPEDIA OF PHIL. (June 22, 2016), <https://plato.stanford.edu/archives/sum2020/entries/rule-of-law/> [<https://perma.cc/A4HM-G6Z5>]. Paul Gowder, in a recent treatment, understands the concept in terms of publicly available reason-giving. See PAUL GOWDER, *THE RULE OF LAW IN THE REAL WORLD* 4 (2016) (offering weak and strong conceptions of the rule of law as “a normative principle regulating political states, according to which coercive power — in the first, weaker, version of the rule of law — must be used under rules that give those over whom that power is exercised the opportunity to call the users of the power to account on the basis of reasons; in the second (stronger) version, those rules must be actually justifiable to all on the basis of reasons that are consistent with the equality of all”). Note that both Waldron’s and Gowder’s conceptions have *implications* for criminal law, but neither of them is *centered* around criminal law in the way that Chief Justice Burger assumes.

47. See *supra* text accompanying notes 36–38.

48. *Nixon Tapes Case*, 418 U.S. 683, 713 (1974).

49. See KEVIN M. KRUSE & JULIAN E. ZELIZER, *FAULT LINES: A HISTORY OF THE UNITED STATES SINCE 1974*, at 8–9 (2019); BOB WOODWARD & CARL BERNSTEIN, *THE FINAL DAYS* 15, 459 (1976).

50. WOODWARD & BERNSTEIN, *supra* note 49, at 15; James M. Naughton, *Nixon Wired His Phone, Offices to Record All Conversations; Senators Will Seek the Tapes: Surprise Witness*, N.Y. TIMES, July 17, 1973, at 1.

turn over the tapes voluntarily, both the Committee and Special Prosecutor Archibald Cox issued subpoenas for them a week after their existence had been publicly revealed.⁵¹ Nixon, citing executive privilege, refused to turn them over to either the Committee or to Cox.⁵² (As we have already seen, the Watergate grand jury would eventually get these tapes, but only after Cox had been fired.⁵³)

The Senate Select Committee had been one of the primary investigative engines behind the Watergate scandal. Not only had it begun its hearings the day before a special prosecutor was even appointed,⁵⁴ but those hearings were nationally televised, closely followed, and full of revelations damning to the Nixon Administration.⁵⁵ But when it went to court seeking to compel production of the tapes—tapes, recall, whose very existence the Committee had brought to light—it was told in no uncertain terms that its investigation just wasn't that important.⁵⁶

What *was* important to the district court, as to the Supreme Court in the trial subpoena case, were courts. In a near-parody of institutional self-importance, Judge Gerhard Gesell insisted that, “A country’s quality is best measured by the integrity of its judicial processes.”⁵⁷ With nothing less than the quality of the country in the balance, Gesell *sua sponte* asked the special prosecutor whether turning over the tapes to the Senate Select Committee was a good idea;⁵⁸ unsurprisingly, Jaworski agreed with Nixon that allowing the Committee access to the tapes would be a mistake, as it would make it harder to empanel an unbiased jury in the ongoing criminal proceedings.⁵⁹ And nothing could be allowed to stand in the way of that: “Clearly the public interest demands that the charges and countercharges engendered be promptly resolved by our established judicial

51. Apple Jr., *supra* note 26.

52. Susanna McBee, *Court Battle Set as Nixon Defies Subpoenas*, WASH. POST, July 27, 1973, at A1.

53. See *supra* text accompanying notes 27–31.

54. The Committee was created by S. Res. 60, 93d Cong. (agreed to Feb. 7, 1973), and it began open hearings on May 17, 1973, the day before Cox was named as special prosecutor. WOODWARD & BERNSTEIN, *supra* note 49, at 459.

55. See KRUSE & ZELIZER, *supra* note 49, at 9 (“The televised hearings before Congress, conducted with equal measures of prosecutorial professionalism and folksy charm by North Carolina’s Democratic senator Sam Ervin Jr., brought the drama directly into [Americans’] living rooms. . . . Day after day, in a steady drumbeat of dramatic headlines, [the Senate investigation and the press] revealed the secrets of what the president and his men had done behind closed doors, all in the pursuit of power. The nation was stunned to hear all manner of criminal activity—bribery, burglary, wiretapping, intimidation, etc.—casually discussed as business-as-usual inside the Oval Office.”). The Senate Select Committee’s hearings were, among other things, an exemplar of Congress’s “overspeech” function. See Chafetz, *supra* note 19, at 567–69.

56. Indeed, it was first told that the courts could not hear the case for want of subject matter jurisdiction. Senate Select Comm. on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51 (D.D.C. 1973). Congress then passed a bill—which Nixon allowed to become law without his signature, see U.S. CONST. art. I, § 7, cl. 2—conferring subject matter jurisdiction on the district court. An Act to Confer Jurisdiction Upon the District Court of the United States of Certain Civil Actions Brought by the Senate Select Committee on Presidential Campaign Activities, Pub. L. No. 93-190, 87 Stat. 736 (1973). The court *then* told the Committee that its investigation just wasn’t that important. See Senate Select Comm. on Presidential Campaign Activities v. Nixon, 370 F. Supp. 521 (D.D.C. 1974).

57. *Senate Select Comm.*, 370 F. Supp. at 524.

58. See *id.* at 522.

59. See *id.* at 522–23.

processes.”⁶⁰ Judicial process is figured as truth-seeking,⁶¹ “orderly[,] and fair.”⁶² By contrast, turning the tapes over to the Senate Committee would merely “furnish fuel for further hearings which cannot, by their very nature, provide the procedural safeguards and adversary format essential to fact-finding in the criminal justice system.”⁶³ Congressional oversight is here analogized to a fire—one that throws off more heat than light and threatens to burn out of control, consuming everything in its path. Given these very different conceptions of judicial and legislative processes, little wonder that Gesell found that “[i]t has not been demonstrated *to the Court’s satisfaction* that the Committee has a pressing need for the subpoenaed tapes or that further public hearings before the Committee concerning the content of those tapes will at this time serve the public interest.”⁶⁴

The D.C. Circuit, sitting en banc, affirmed, in a decision released almost exactly two months before the Supreme Court’s ruling in the trial subpoena case.⁶⁵ Judge David Bazelon, for a unanimous court, insisted that the congressional subpoena should be enforced only if the evidence were “demonstrably critical to the responsible fulfillment of the Committee’s functions.”⁶⁶ Bazelon and his colleagues decided that the Committee did not need the tapes that badly: “While fact-finding by a legislative committee is undeniably a part of its task, legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events.”⁶⁷ Again explicitly contrasting the Committee with a grand jury, which needs “the most precise evidence,” the court saw “no comparable need in the legislative process.”⁶⁸

Bazelon was bolstered in this conclusion by the fact that copies of the tapes subpoenaed by the Senate Select Committee had recently come into the possession of the House Judiciary Committee.⁶⁹ In fact, the Judiciary Committee had received the tapes with the aid of the federal judge overseeing the Watergate grand jury. When that grand jury indicted the Watergate conspirators and named Nixon as an unindicted co-conspirator, it requested that its report and supporting evidence, including the tapes, be sent to the House Judiciary Committee.⁷⁰ Judge Sirica agreed to turn them over, and, perhaps to appear cooperative, the White House turned over its copies, as well.⁷¹

60. *Id.* at 523.

61. *Id.* at 524 (“[N]ot only the truth but the whole truth emerges” from “adversary proceedings before neutral fact finders”).

62. *Id.* at 523.

63. *Id.*

64. *Id.* at 522 (emphasis added).

65. Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974) (en banc).

66. *Id.* at 731.

67. *Id.* at 732.

68. *Id.*

69. *Id.*

70. SIRICA, *supra* note 30, at 217.

71. *Id.* at 217–19; H.R. REP. NO. 93-1305, at 191 (1974).

The fact that Sirica played a role in one congressional committee's gaining access to the tapes could have served as a model of legislative-judicial cooperative oversight. But instead, the D.C. Circuit chose to go the other way. In Bazelon's view, the fact that a House Committee had the tapes made the Senate Committee's need for them "from a congressional perspective, merely cumulative."⁷² True, the House Committee had not publicly released the tapes (nor had it shared them with the Senate Committee),⁷³ but the White House had released partial transcripts, which, Bazelon suggested, should satisfy the Senate Committee.⁷⁴ (As the House Judiciary Committee would later note, those partial transcripts all contained "significant omissions, misattributions of statements, additions, paraphrases, and other signs of editorial intervention . . . Presidential remarks are often entirely omitted from the White House version, or significantly reworded, or attributed to another speaker."⁷⁵) One could scarcely imagine the court accepting a claim that a grand jury had no need for evidence because another grand jury in a different jurisdiction had access to the evidence, and besides the party from whom the evidence had been subpoenaed had published a redacted and inaccurate summary of it. And yet it had no problem accepting the analogous claim with respect to congressional committees, because congressional committees simply—in the judges' view—do not need "the most precise evidence."⁷⁶

The combination of the Supreme Court's decision in the trial subpoena case and the lower courts' decisions in the Senate Committee case makes a clear statement about the courts' view of whether Congress or the judiciary is best equipped to oversee a lawless president. Unsurprisingly, the judges thought that courts were the right institution for the job, and they used rhetoric that not only elevated their own branch but also simultaneously belittled its rival for the role.

This contrast, drawn by the courts, was amplified by the media. The Supreme Court's decision ordering the tapes turned over for the federal criminal trial made an immediate splash. The *New York Times* headline ran three oversize rows across the top of the entire front page and read, "Nixon Must Surrender Tapes, Supreme Court Rules, 8 to 0; He Pledges Full Compliance."⁷⁷ Star journalist James Reston's front-page commentary was headlined simply, "The Imperatives of Law."⁷⁸ The headlines about the Supreme Court decision completely overshadowed the news that, on the same day, the House Judiciary Committee had

72. *Senate Select Comm.*, 498 F.2d at 732.

73. It would not do so for over a month after the D.C. Circuit's decision. *See Transcripts of Eight Recorded Presidential Conversations: Hearings Pursuant to H. Res. 803 Before the H. Comm. on the Judiciary*, 93d Cong. iv (1974).

74. *Senate Select Comm.*, 498 F.2d at 732–33.

75. H.R. REP. NO. 93-1305, at 129 (1974); *see also* SIRICA, *supra* note 30, at 221.

76. *Senate Select Comm.*, 498 F.2d at 732.

77. Warren Weaver, Jr., *Nixon Must Surrender Tapes, Supreme Court Rules, 8 to 0; He Pledges Full Compliance: Opinion by Burger*, N.Y. TIMES, July 25, 1974, at 1.

78. James Reston, *The Imperatives of Law: Court's Decision Against Nixon Cuts Through to Heart of Issue*, N.Y. TIMES, July 25, 1974, at 1.

begun its final debate on the articles of impeachment against Nixon.⁷⁹ (Images of Chief Justice Burger, President Nixon, and Special Counsel Leon Jaworski appeared above the fold; pictures of Judiciary Committee Chairman Peter Rodino and Ranking Member Edward Hutchinson were relegated to the bottom of the page.⁸⁰) Indeed, a breathless recounting of the decision in *Time* magazine took the contrast from subtext to text: “As if to emphasize the strictly legal, nonpolitical nature of its decision, the court did not once refer to the ongoing impeachment inquiry.”⁸¹

By contrast, the D.C. Circuit’s decision two months earlier declining to order the tapes turned over to the Senate Committee was banished to a single column on page twelve of the next day’s *New York Times*.⁸² In both the subhead and the first paragraph, the *Times* described the Committee’s need for the tapes as “marginal.”⁸³ The *Washington Post* at least gave the case front-page treatment, but its article referred to the decision as “a sharp blow for the Senate committee,”⁸⁴ and the vast majority of the article was given over to quotes from Bazelon’s opinion, thereby amplifying that sharp blow. In short, the press at the time bought into the judiciary’s presentation of the two cases: in the trial subpoena case, the Supreme Court made a heroic stand for the rule of law; in the Senate Committee case, the appeals court slapped down the Senate’s “marginal” need for the materials.

That differential treatment was not limited to the immediate reaction to the decisions, nor was it limited to the popular press. Christopher Eisgruber has described the Supreme Court’s decision in the *Nixon Tapes Case* as one of its “greatest moments” because “the justices insisted that a sitting President answer a subpoena,”⁸⁵ although he nowhere mentions the *Senate Select Committee* case, and therefore never specifies that the courts ruled that Nixon had to answer only *certain types* of subpoenas.⁸⁶ The Supreme Court’s decision has been discussed in over 3,300 law review articles,⁸⁷ often with an almost reverent tone. “Both the substance of the ‘Nixon tapes case’ and its authorship by a Nixon appointee bespoke the independence of the judiciary and America’s commitment to the rule of law,” wrote Albert Alschuler in the *Harvard Law Review*.⁸⁸ Erwin Chemerinsky listed the case as one of the “five most important cases in the last fifty years” (as of 2016) because it “stands for the proposition that no one—not

79. See James M. Naughton, *House Committee Begins Debate on Impeachment: 2 Charges Listed*, N.Y. TIMES, July 25, 1974, at 1.

80. See Weaver, Jr., *supra* note 77, at 1; Naughton, *supra* note 79, at 1.

81. *The Supreme Court: A Unanimous No to Nixon*, TIME, Aug. 5, 1974, at 20.

82. Anthony Ripley, *Senate Unit’s Bid for Tapes Denied*, N.Y. TIMES, May 24, 1974, at 12.

83. *Id.*

84. George Lardner, Jr., *Court Nips Senate Bid for Tapes*, WASH. POST, May 24, 1974, at A1.

85. CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 73 (2001).

86. The only other mention of the *Nixon Tapes Case* in Eisgruber’s book occurs at *id.* at 4–5. There, too, there is no mention of who issued the subpoena.

87. A Westlaw search of Citing References to the case performed on September 9, 2021, found 3,306 law review articles citing the case.

88. Albert W. Alschuler, *Failed Pragmatism: Reflections on the Burger Court*, 100 HARV. L. REV. 1436, 1436 (1987).

even the president of the United States—is above the law.”⁸⁹ Judge Diane Wood likewise referred to it as a “landmark ruling[] . . . emphasis[ing] that even the President is not above the law.”⁹⁰ One could multiply examples almost indefinitely.

The D.C. Circuit’s opinion in the *Senate Select Committee* case has received considerably less attention in the law reviews than the Supreme Court’s opinion in the *Nixon Tapes Case* has.⁹¹ Those articles that do mention the *Senate Select Committee* case are not as effusive as those celebrating the *Nixon Tapes Case*—but neither are they as a whole condemnatory. In general, they simply report the holding as settled law.⁹² The immanent consensus view, then, is something like this: the Supreme Court heroically stood up for the rule of law in ordering the tapes turned over to judicial institutions, while the D.C. Circuit, workmanlike, stated the law in withholding those tapes from the Senate Committee.

In short, the judiciary in the Nixon cases clearly and repeatedly put forward a message that judicial institutions could be trusted to rein in a lawless president, and legislative institutions could not. In order to fulfill their vital role, courts had a need for evidence, and so the evidence must be turned over to them. Congressional committees not only did not have the same need for evidence, but indeed giving them access to evidence risked interfering with the (much more important) role played by the judicial institutions. As a result, judges were comfortable overriding congressional claims to the tapes. Not only was this self-aggrandizing message assiduously put forward by the courts, it was clearly picked up, both by national media at the time and by the legal culture subsequently, as evinced by the law review literature.

But the courts’ framing of the issues and the parties was only half of the story. There is also the immediate effect of what the courts did—or, perhaps more

89. Erwin Chemerinsky, *Fifty Years of Constitutional Law: What’s Changed?*, 2016 UTAH L. REV. 689, 705.

90. Diane P. Wood, *The Rule of Law in Times of Stress*, 70 U. CHI. L. REV. 455, 468 (2003).

91. A Westlaw search of Citing References to the *Senate Select Committee* case performed on September 9, 2021, found 133 law review articles citing the case, which is about 1/25th of the 3,306 articles citing the Supreme Court case. See *supra* note 87. Of course, one might reply that it is no surprise that a Supreme Court case would be cited more than an appeals court case, but it is worth noting that strategic judicial choices are one reason why the *Senate Select Committee* case never made it to the Supreme Court. See *infra* text accompanying note 96.

92. See, e.g., Tara Leigh Grove & Neal Devins, *Congress’s (Limited) Power to Represent Itself in Court*, 99 CORNELL L. REV. 571, 601 (2014) (“In the Senate committee’s lawsuit, the D.C. Circuit held that Nixon’s claim of executive privilege trumped the committee’s need for the material.”); Roberto Iraola, *Congressional Oversight, Executive Privilege, and Requests for Information Relating to Federal Criminal Investigations and Prosecutions*, 87 IOWA L. REV. 1559, 1580–81 (2002) (summarizing the holding); Kenneth A. Klukowski, *Making Executive Privilege Work: A Multi-Factor Test in an Age of Czars and Congressional Oversight*, 59 CLEV. ST. L. REV. 31, 39 (2011) (“Congressional hearings are designed to elicit information. Some of that information from the executive is of a nature that the executive seeks to keep confidential, and the D.C. Circuit has held that there is a “great public interest” in safeguarding the confidentiality of the President’s conversations concerning his official duties. Thus, executive privilege must accommodate the legitimate needs that both branches have regarding information, recognizing ‘the fundamental constitutional principle that “[t]he power to make the necessary laws is in Congress; the power to execute in the President.”’” (footnote omitted)).

precisely, the timeframe in which they did it. Specifically, the congressional subpoenas case proceeded on a much slower timeline than the criminal trial subpoenas case. The subpoenas at issue in the *Nixon Tapes Case* were issued on April 18, 1974, and the Supreme Court issued its decision in the case on July 24 of that year⁹³—a mere ninety-seven days from issuance to final resolution. By contrast, the Senate Select Committee subpoenas were issued on July 23, 1973, and the case was decided by the D.C. Circuit on May 23, 1974⁹⁴—a span of 304 days for a process that ended one judicial level lower. While the courts went out of their way to speed the determination that material must be turned over to the courts,⁹⁵ they showed no such haste in determining whether material should be turned over to Congress.

What's more, by going slowly, the lower courts essentially ensured that the Senate Select Committee could not seek Supreme Court review: by the terms of its authorizing resolutions, the Committee was scheduled to cease operations by the end of September 1974.⁹⁶ Especially given the pace at which the case had proceeded to that point, it seems highly unlikely that the Committee could have waited on the Supreme Court—and, indeed, it never sought certiorari.

More to the point, the divergent timelines of the two lawsuits allowed the judicial proceedings to catch up to, and then hurtle past, the congressional proceedings. As noted previously, the Senate Committee had begun its blockbuster public hearings in mid-May of 1973, and the House Judiciary Committee began preliminary impeachment proceedings in late October of that year.⁹⁷ The Senate hearings, in particular, attracted massive amounts of media attention,⁹⁸ and the

93. *Nixon Tapes Case*, 418 U.S. 683, 687–88 (1974).

94. *Appendix to the Hearings of the Select Comm. on Presidential Campaign Activities of the U.S. S.: Legal Documents Related to the Select Comm. Hearings*, 93d Cong. 216–17 (1974); Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 726–27 (D.C. Cir. 1974).

95. See *Nixon Tapes Case*, 418 U.S. at 686–87 (noting that the Supreme Court granted certiorari before the Court of Appeals could render judgment in the case); see also Gerald Gunther, *Judicial Hegemony and Legislative Autonomy: The Nixon Case and the Impeachment Process*, 22 UCLA L. REV. 30, 31 (1974) (describing the Court's haste to decide the grand jury case).

96. The original authorizing resolution provided for it to submit a final report by the end of February 1974 and cease all operations three months later. S. Res. 60, 93d Cong. §5 (agreed to Feb. 7, 1973). A subsequent resolution extended the deadline for the final report to the end of June 1974, with the same three month wrapping-up period, although it allowed the Committee to remain in existence for longer than that if it was still awaiting “final adjudication” of its suit to compel production of the tapes. S. Res. 327, 93d Cong. (agreed to May 21, 1974). The Senate Select Committee's final report is dated June 27, 1974. S. REP. NO. 93-981, at v (1974).

97. On the Senate Committee, see WOODWARD & BERNSTEIN, *supra* note 49; on the House Judiciary Committee, see Chafetz, *supra* note 19, at 567–69.

98. See Brian R. Fry & John S. Stolarek, *The Impeachment Process: Predispositions and Votes*, 42 J. POLITICS 1118, 1119 (1980) (“Media coverage was intense, with more than half of the front pages of major American newspapers concerned with Watergate stories during days when the Senate Select Committee was in session, and more than one-third of major network news programming was devoted to the Watergate affair.”); see also KRUSE & ZELIZER, *supra* note 49, at 9 (“The televised hearings before Congress . . . brought the drama directly into [Americans'] living rooms. The nightly news and morning papers, building on each other's reporting and amplifying their findings, combined to form a single voice.”).

public evinced a high level of trust in both the Senate Committee and the House Committee.⁹⁹ Unsurprisingly, then, the Senate Committee's open hearings were demonstrably moving public opinion against Nixon.¹⁰⁰ Nixon's fall was already on the horizon.¹⁰¹

The judiciary, then, effectively jumped the queue to make itself the hero of the story. As Gerald Gunther wrote at the time, the Supreme Court set itself up as a “knight[] in shining armor,” riding to the nation's rescue in a moment of crisis.¹⁰² In doing so, it “push[ed Congress] off center stage” and “short-circuited” the ongoing impeachment proceedings.¹⁰³ Gunther's brief treatment does not mention the *Senate Select Committee* case, but it only strengthens his argument. Together, the cases both forestalled congressional action and expedited judicial action so as to bring Nixon down. The courts deliberately sidelined Congress in order to play the lone hero, and they were richly rewarded, with the resulting lionization increasing their prominence and power in American political life.

B. THE TRUMP CASES

Nearly half a century later, the Court played the same game in the Trump cases, again aggrandizing judicial institutions at the expense of Congress. In *Vance*, Chief Justice Roberts, like Chief Justice Burger before him,¹⁰⁴ began by wrapping his decision in the mantle of Chief Justice Marshall. Here, the reference point was not *Marbury* but rather the 1807 treason trial of Aaron Burr¹⁰⁵ (thus allowing Roberts to also wrap himself in the mantle of Lin-Manuel Miranda). Marshall, presiding over that trial, ruled that President Jefferson was required to comply with a subpoena for exculpatory evidence.¹⁰⁶ Roberts described the *Nixon Tapes Case* as the “bookend” to *Burr*¹⁰⁷—thus figuring his own opinion as the third in a canonical trifecta of cases authored by chief justices subjecting presidents to the rule of law.

99. Gladys Engel Lang & Kurt Lang, *Polling on Watergate: The Battle for Public Opinion*, 44 PUB. OP. Q. 530, 536 (1980).

100. John P. Robinson, *Public Opinion During the Watergate Crisis*, 1 COMMC'N RSCH. 391, 395–99, 403 (1974). In this, the Watergate hearings were relatively conventional, in that congressional hearings targeting a president generally decrease approval of that president. See DOUGLAS L. KRINER & ERIC SCHICKLER, *INVESTIGATING THE PRESIDENT: CONGRESSIONAL CHECKS ON PRESIDENTIAL POWER* 86–103 (2016); DAVID R. MAYHEW, *DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946–2002*, at 8–33 (2d ed. 2005).

101. Cf. CHAFETZ, *supra* note 18 (arguing that institutional power is largely accrued through successful engagements with the public and is largely squandered through unsuccessful ones).

102. Gunther, *supra* note 95, at 33. Robert Burt also employed a chivalric metaphor, writing that the Court “galloped into the midst” of the conflict between Nixon and Congress. ROBERT A. BURT, *THE CONSTITUTION IN CONFLICT* 320 (1992).

103. Gunther, *supra* note 95.

104. See *supra* text accompanying notes 36–38.

105. *Trump v. Vance*, 140 S. Ct. 2412, 2421–23 (2020) (discussing *United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807)).

106. *Id.*

107. *Id.* at 2424.

But of course, *Vance* was not squarely on point with *Nixon*, because the grand jury subpoena issued in *Vance* was from a *state* grand jury.¹⁰⁸ Trump, not implausibly, argued that the narrower constituencies to which state judges, prosecutors, and grand juries were accountable made state subpoenas to a president more likely to be used for purposes of (to borrow one of the president's favorite Twitter phrases) "presidential harassment."¹⁰⁹ But Roberts suggested that this worry was overblown: grand juries generally are "prohibited from engaging in 'arbitrary fishing expeditions' and initiating investigations 'out of malice or an intent to harass,'"¹¹⁰ and "[w]e generally 'assume[] that state courts and prosecutors will observe constitutional limitations.'"¹¹¹ State judicial institutions, in other words, deserve the benefit of the doubt. But in the unlikely event that they do go off the rails, there is a federal judicial backstop: "in the event of such harassment, a President would be entitled to the protection of federal courts."¹¹²

In addition to arguing that a president's records should be absolutely immune from state criminal subpoenas, Trump also argued that subpoenas for such records should have to satisfy a higher-than-usual standard.¹¹³ Roberts rejected this claim too, insisting that a "double standard" for subpoenas aimed at the president as opposed to any other citizen "has no basis in law."¹¹⁴ Most importantly, "the public interest in fair and effective law enforcement cuts in favor of comprehensive access to evidence. Requiring a state grand jury to meet a heightened standard of need would hobble the grand jury's ability to acquire 'all information that might possibly bear on its investigation.'"¹¹⁵ Note, as in the *Nixon* cases, the centrality of the importance of judicial proceedings. For Roberts, as for Burger before him, this was the core of the rule of law: "no citizen, not even the President, is categorically above the common duty to produce evidence when called upon in a criminal proceeding."¹¹⁶

But while *Vance* holds that the president is a citizen like any other for purposes of grand jury subpoenas, *Mazars* holds that congressional subpoenas for the president's records must receive especially skeptical treatment by the courts. Importantly, unlike in the *Senate Select Committee* case, the president here did not assert executive privilege. Indeed, it would have been nonsensical for him to have done so, as the subpoenas were issued to private third parties seeking

108. *Id.* at 2416.

109. *Id.* at 2427–29. Trump's counsel was, in effect, noting the dynamics of partisan federalism that Jessica Bulman-Pozen has so insightfully explicated. See generally Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077 (2014). On Trump's use of "presidential harassment," see TRUMP TWITTER ARCHIVE v2, <https://www.thetrumparchive.com/?searchbox=%22%5C%22presidential+harassment%5C%22%22> [<https://perma.cc/PR4T-GEZQ>] (last visited Aug. 29, 2021) (finding thirty-eight uses of that phrase before Twitter suspended Trump's account).

110. *Vance*, 140 S. Ct. at 2428 (citation omitted).

111. *Id.* (citation omitted).

112. *Id.*

113. *Id.* at 2429.

114. *Id.*

115. *Id.* at 2430 (citation omitted).

116. *Id.* at 2431. Compare with *supra* text accompanying notes 41–48.

records relating to the president in his private capacity. Nevertheless, above and beyond the “valid legislative purpose” requirement that the Court has attached to all congressional subpoenas,¹¹⁷ Roberts contended that special additional constraints applied here. “We would have to be ‘blind’ not to see what ‘[a]ll others can see and understand’: that the subpoenas do not represent a run-of-the-mill legislative effort but rather a clash between rival branches of government over records of intense political interest for all involved,” he wrote.¹¹⁸ The fact that the papers sought were personal rather than official was irrelevant:

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. . . . [C]ongressional demands for the President’s papers can implicate the relationship between the branches regardless whether those papers are personal or official. Either way, a demand may aim to harass the President or render him “complaisan[t] to the humors of the Legislature.”¹¹⁹

The judiciary thus must closely scrutinize congressional subpoenas for the president’s materials to ensure that Congress does not “‘exert an imperious controul’ over the Executive Branch and aggrandize itself at the President’s expense.”¹²⁰ Without such scrutiny, Congress might “declare open season on the President’s information.”¹²¹

Just as the courts did in the Nixon cases, Roberts went out of his way to contrast judicial proceedings with legislative ones:

117. *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031–32 (2020) (quoting *Quinn v. United States*, 349 U.S. 155, 161 (1955)). The “valid legislative purpose” language first appears in *Quinn*, although the concept appears earlier. *See, e.g.*, *McGrain v. Daugherty*, 273 U.S. 135, 172–74 (1927); *In re Chapman*, 166 U.S. 661, 668–70 (1897); *Kilbourn v. Thompson*, 103 U.S. 168, 189–91 (1880). The basic idea underlying the language is that, because the congressional power to investigate is not explicitly mentioned in the Constitution, it must exist only as an aid to powers that are explicitly enumerated, and therefore it can extend no further than Congress’s enumerated powers. *Mazars*, 140 S. Ct. at 2031. As the Court is fond of stating, a house of 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.’” *Id.* at 2032 (quoting *Quinn*, 349 U.S. at 161).

Even if one accepts that any given exercise of the congressional investigatory power must be justified with respect to some explicitly enumerated congressional power, however, it does not follow that there is any matter beyond Congress’s capacity to investigate. After all, the houses of Congress are explicitly given a role in proposing constitutional amendments. U.S. CONST. art. V. It would seem to follow that even an investigation for a (currently) unconstitutional purpose could be justified as an investigation that might potentially lead to a constitutional amendment, making that (formerly) unconstitutional purpose constitutional. That, however, is an argument to be more fully developed elsewhere.

118. *Mazars*, 140 S. Ct. at 2034 (citation omitted).

119. *Id.* at 2034 (quoting THE FEDERALIST NO. 71, at 483 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)). This passage nicely illustrates what Daphna Renan, following Kantorowicz, has referred to as “the president’s two bodies.” Daphna Renan, *The President’s Two Bodies*, 120 COLUM. L. REV. 1119 (2020).

120. *Mazars*, 140 S. Ct. at 2034 (quoting THE FEDERALIST NO. 71, at 484 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).

121. *Id.* at 2035.

Unlike in criminal proceedings, where “[t]he very integrity of the judicial system” would be undermined without “full disclosure of all the facts,” efforts to craft legislation involve predictive policy judgments that are “not hamper[ed] . . . in quite the same way” when every scrap of potentially relevant evidence is not available. While we certainly recognize Congress’s important interests in obtaining information through appropriate inquiries, those interests are not sufficiently powerful to justify access to the President’s personal papers when other sources could provide Congress the information it needs.¹²²

Judicial institutions, the Court says, need this information to do justice; Congress, on the other hand, is likely to just be engaged in fishing expeditions—and, anyway, the legislative job doesn’t actually require access to *all* “potentially relevant evidence.”¹²³

Unlike in *Vance*, where Roberts’s first move is to accept that state courts and prosecutors will act in good faith,¹²⁴ in *Mazars* he begins in a tone of weary realism:¹²⁵ the Court simply cannot “blind” itself to the obvious fact that there is an interbranch power struggle.¹²⁶ In *Mazars*, it is the obligation of the Court, figured as a neutral arbiter, to protect the president from a legislature that seeks “control” and “advantage” over other institutions.¹²⁷ Congress, as Roberts presents it, is feral—driven by emotion (“humors”¹²⁸) rather than reason and seeking dominance rather than accommodation.¹²⁹

122. *Id.* at 2036 (citations omitted).

123. *Id.*

124. *Trump v. Vance*, 140 S. Ct. 2412, 2428 (2020).

125. I emphasize that, while Roberts’s *tone* is one of realism, in the sense that it purports to “adapt legal doctrine to take account of how [governing] institutions actually function in, and over, time,” Richard H. Pildes, *Institutional Formalism and Realism in Constitutional and Public Law*, 2013 SUP. CT. REV. 1, 2, his actual institutional analysis is not only dismissive, but also notably thin and therefore does not in fact present a realistic picture of how Congress actually works. *See infra* note 129; *see also* Abbe R. Gluck, *Congress, Statutory Interpretation, and the Failure of Formalism: The CBO Canon and Other Ways that Courts Can Improve on What They Are Already Trying to Do*, 84 U. CHI. L. REV. 177, 180–81 (2017) (“[T]o the extent that a Congress-oriented interpretive approach is what is really animating many judges, we are not doing very well in achieving it. Judges, including and especially textualist-formalists, have devoted decades’ worth of attention to the link between the statutory interpretation presumptions and Congress’s drafting assumptions and practices And yet, federal judges have been generally uninterested in actually verifying the connections that they claim. Perhaps unsurprisingly, recent empirical work illustrates that many of these long-standing interpretive assumptions are deeply mistaken, unknown, or unused by congressional drafters.”); Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 72–73 (2012) (noting the general phenomenon of judicial ignorance as to the workings of the legislature).

126. *Mazars*, 140 S. Ct. at 2034 (citation omitted).

127. *Id.* at 2034, 2036 (citation omitted).

128. *Id.* at 2034 (citation omitted).

129. Roberts, of course, never inquires as to the current plausibility of fears of an imperial legislature. In this regard, his opinion partakes of the judicial tendency, recently identified by David Pozen and Adam Samaha, to engage in sweeping analysis regarding institutions without paying any attention to the voluminous literatures on institutional design and operation. *See* David E. Pozen & Adam M. Samaha, *Anti-Modalities*, 119 MICH. L. REV. 729, 775–76 (2021).

Note the contrast here with Roberts's portrayal of the judiciary. Courts are deliberative and make decisions based on "all the facts."¹³⁰ They are "assume[d to] . . . observe constitutional limitations."¹³¹ And most importantly, Roberts figures the judiciary, not as a *player* in the separation of powers, but rather as a neutral arbiter—an umpire, if you will.¹³² Congress and the president have an ongoing institutional rivalry;¹³³ the Court just calls balls and strikes.¹³⁴ Thus, it is unproblematic when a judicial institution seeks access to the president's records—the president stands on the same footing as any other actor with regard to the judiciary, because the judiciary is the institution of law, and the president is not above the law.¹³⁵ But when Congress seeks the president's records, then special judicial intervention is required, to make sure that the "political branches" stay in their lanes.

Once again, the national political media and legal elites largely bought into the Court's self-presentation.¹³⁶ The Supreme Court had held that Trump is not "above the law."¹³⁷ Roberts rejected Trump's "anti-democratic conception of the American presidency."¹³⁸ He "has seen Trump's contempt for the rule of law, and he has made it his business to try and do something about it."¹³⁹ The decisions were not only "a sound defeat for the White House's claims for aggrandized executive power," but also a demonstration of "extraordinarily strong and effective

130. *Mazars*, 140 S. Ct. at 2036 (citations omitted).

131. *Trump v. Vance*, 140 S. Ct. 2412, 2428 (2020) (citation omitted).

132. *Cf. Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) ("Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire." (statement of John G. Roberts, Jr.)).

133. *Mazars*, 140 S. Ct. at 2033–34.

134. *See generally* Chafetz, *supra* note 16 (describing how the Court's self-presentation, including by drawing flattering contrasts between itself and elected political actors, serves its own institutional interests).

135. It should be noted that, while these decisions empower the judiciary across the board—apparently even a *state* grand jury deserves greater deference than a house of Congress—they especially empower the *federal* judiciary, atop which sits the Supreme Court. In *Vance*, the Court went out of its way to emphasize that the federal courts must be available for presidents to raise specific objections to state grand jury subpoenas. *Vance*, 140 S. Ct. at 2428–29. Indeed, the remand in *Vance* is not to the state court supervising the grand jury, but rather to a federal district court. *Id.* at 2431.

136. *See supra* text accompanying notes 7–11.

137. Matt Ford, *The Supreme Court Brings the Presidency Back From a Lawless Brink*, NEW REPUBLIC (July 9, 2020), <https://newrepublic.com/article/158156/supreme-court-trump-mazars-vance> [<https://perma.cc/29U8-AKXX>]; Liptak, *supra* note 7, at A1; David G. Savage, *Trump Loses Bid to Keep Taxes Secret: Justices Reject Claim of Immunity From Grand Jury Subpoenas. He Wins a Partial Victory in Congressional Case*, L.A. TIMES, July 10, 2020, at A1.

138. Katyal & Geltzer, *supra* note 11.

139. Noah Feldman, *Trump Tax Cases are a Win for Supreme Court Credibility*, BLOOMBERG (July 9, 2020, 2:00 PM), <https://www.bloomberg.com/opinion/articles/2020-07-09/supreme-court-rulings-on-trump-taxes-vance-and-mazars-explained>. For another suggestion that the decisions vindicated "the rule of law," see Marc Spindelman, *Embracing Casey: June Medical Services L.L.C. v. Russo and the Constitutionality of Reason-Based Abortion Bans*, 109 GEO. L.J. ONLINE 115, 141 n.95 (2020).

leadership of the court” by Roberts.¹⁴⁰ They “demonstrate the Justices’ willingness to vote against the President who appointed them when the law demands it.”¹⁴¹ Again, similar examples could be spun out almost indefinitely.

In short, the commentariat bought what Roberts was selling: an exalted view of judicial process, coupled with a degraded view of congressional process. As in the Nixon cases, the judiciary has received public adulation for reining in a lawless executive, and, as in the Nixon cases, the courts orchestrated this praise by promoting their own institution ahead of Congress. Whether or not these cases are victories for the rule of law, they are certainly institutional victories for the judiciary.¹⁴²

II. A PRESIDENT OUSTED, A PRESIDENT PROTECTED

There is, however, one crucial difference between what the courts did in 1974 and what they did in 2020. In the Nixon cases, the judiciary seized for itself a key role in bringing down a president; in the Trump cases, it protected one by ensuring that potentially damaging information would not be released until after the 2020 elections, too late to affect voters’ decisions on whether to entrust Trump with a second term.

Once again, the question of timing is central. As noted above, there elapsed only ninety-seven days between the Watergate trial court’s subpoena for the White House tapes and the Supreme Court’s decision in the *Nixon Tapes Case*.¹⁴³ By contrast, three-and-a-half times as long (343 days) elapsed between the Vance grand jury’s first challenged subpoena (August 1, 2019) and the Supreme Court’s decision in *Vance* (July 9, 2020).¹⁴⁴ And over 450 days elapsed between the issuance of the congressional subpoenas (issued between April 11 and April 15, 2019) and the Supreme Court’s decision in *Mazars* (July 9, 2020).¹⁴⁵ Clearly, the judiciary felt none of the urgency to decide the Trump cases that it had felt to decide the Nixon ones.

Moreover, material produced to the Watergate district court was likely to be introduced into evidence in the criminal trial of Nixon’s co-conspirators and therefore to become public relatively quickly. The White House forestalled that process by releasing the tapes publicly less than two weeks after the Supreme Court’s decision (and a little over a week after the House Judiciary Committee

140. Harry Litman, *SCOTUS to Trump—You’re Not Above the Law*, L.A. TIMES, July 10, 2020, at A11.

141. Griffith, *supra* note 13, at 132.

142. It is not a coincidence that Roberts, who sees himself as the guardian of the Court’s institutional prestige, kept both opinions for himself. See Jeffrey Rosen, *Roberts’s Rules*, ATLANTIC, Jan./Feb. 2007, at 104.

143. See *supra* text accompanying note 93.

144. *Trump v. Vance*, 395 F. Supp. 3d 283, 291 (S.D.N.Y. 2019) (noting the dates of the subpoenas); *Trump v. Vance*, 140 S. Ct. 2412, 2412 (2020) (reporting the date of decision as July 9, 2020).

145. *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2027 (2020) (noting the date of decision as July 9, 2020 and the dates of the subpoenas).

adopted the first article of impeachment against Nixon).¹⁴⁶ Three days later, Nixon announced his resignation.¹⁴⁷ The Supreme Court in the *Nixon Tapes Case* may have jumped the queue, but it at least jumped the queue in the service of pushing Nixon from office.¹⁴⁸

Now consider the Trump cases. They not only took significantly longer to be decided than the *Nixon Tapes Case*, but they also ensured that none of the subpoenaed information would become public before the 2020 presidential election, in which Trump sought reelection. The *Mazars* decision remanded the case for further consideration in light of a four-part nonexclusive balancing test.¹⁴⁹ It was entirely clear that the district court could not perform that test, have its result affirmed by a court of appeals, and either have certiorari denied or have the result affirmed by the Supreme Court in the four months between when the decision came down and Election Day. Indeed, the Court guaranteed as much by denying the House's motions to issue the judgments immediately after the decision, which would have allowed proceedings in the lower courts to restart immediately.¹⁵⁰ Instead, the Court insisted (without explanation) that the parties wait the usual twenty-five days before resuming proceedings in the courts below,¹⁵¹ meaning that the earliest the lower courts could even take up the case was August 3, 2020. Indeed, it was not until December 30, 2020—nearly two months after Election Day and less than a month before Joe Biden's presidential inauguration—that the D.C. Circuit remanded the case back to the district court to begin applying the test the Supreme Court announced.¹⁵² Even then, the Court of Appeals stayed the issuance of the mandate for a week to allow for the possibility of a petition for rehearing, and it “express[ed] no view as to whether this case will become moot when the subpoena expires” at the end of the 116th Congress on January 3, 2021,¹⁵³ which was less than a week away when the order came down. The district court did not think the end of the 116th Congress mooted the case: on August 11, 2021, it ordered some, but not all, of the subpoenaed material to be

146. See John Herbers, *Nixon Admits Order to Halt Inquiry on Watergate 6 Days After Break-In; Expects Impeachment; Support Ebbs: Tapes Released*, N.Y. TIMES, Aug. 6, 1974, at A1.

147. See John Herbers, *Nixon Resigns: He Urges a Time of 'Healing'; Ford Will Take Office Today: The 37th President is First to Quit Post*, N.Y. TIMES, Aug. 9, 1974, at A1.

148. Indeed, Akhil Amar has suggested that the *Nixon Tapes Case* is best explained by the Court's desire to push Nixon out of office. See Akhil Reed Amar, *Nixon's Shadow*, 83 MINN. L. REV. 1405, 1407, 1420 (1999).

149. The four enumerated factors are: (1) “whether the asserted legislative purpose warrants the significant step of involving the President and his papers”; (2) whether the subpoena is “no broader than reasonably necessary to support Congress's legislative objective”; (3) whether “detailed and substantial . . . evidence” has been adduced to support the congressional claim that the subpoena “advances a valid legislative purpose”; and (4) whether the subpoena imposes serious “burdens” on the president. *Mazars*, 140 S. Ct. at 2035–36. On top of all that, “[o]ther considerations may be pertinent as well.” *Id.* at 2036.

150. *Comms. of the U.S. House of Representatives v. Trump*, 141 S. Ct. 196 (2020) (mem.); *Comms. of the U.S. House of Representatives v. Trump*, 141 S. Ct. 197 (2020) (mem.).

151. See SUP. CT. R. 45.2–45.3.

152. *Trump v. Mazars USA, LLP*, 832 Fed. App'x 6 (D.C. Cir. 2020) (per curiam).

153. *Id.* at 7.

turned over.¹⁵⁴ Both sides have appealed. Plainly, however—and whenever—the appeals end, the congressional subpoenas at issue in *Mazars* did not result in the production of any information in time either to inform the voters in the 2020 presidential election or to assist the House in conducting oversight of the Trump Administration.¹⁵⁵ All of this was clear from the moment that the Supreme Court handed down its decision in early July.¹⁵⁶

Of course, in the Nixon cases, too, the courts forestalled the congressional subpoenas from playing a role in the president's fall.¹⁵⁷ But whereas the criminal trial subpoenas stepped into the breach in 1974, in 2020 those too were unavailing on an electoral calendar. The decision in *Vance* not only took much longer to arrive than the *Nixon Tapes Case* decision, but it also remanded the case to a federal district court to consider subpoena-specific objections,¹⁵⁸ an invitation that Trump immediately took up.¹⁵⁹ The district judge in fact moved with remarkable speed, rejecting all of Trump's specific arguments and granting the state's motion to dismiss the case a mere six weeks after the Supreme Court's decision.¹⁶⁰ Trump appealed, and the Second Circuit, too, moved with remarkable alacrity, affirming the district court's decision about nine weeks later, on October 7, 2020.¹⁶¹ However, the appeals court also stayed enforcement of the subpoena "until a decision is issued by the Supreme Court denying [Trump's] request for interim relief," provided that Trump made such a request expeditiously.¹⁶² Trump did, filing an emergency petition for a stay pending the filing and disposition of a certiorari petition on October 13.¹⁶³ And then the Supreme Court sat on it, doing nothing until February 22, 2021, when it finally denied the stay.¹⁶⁴ In other words, the Supreme Court ensured that the Second Circuit's stay would remain in place, not only through Election Day, but through President Biden's Inauguration Day, as well. But even if the Supreme Court had denied the application for a stay soon after it was submitted, it is almost inconceivable that the subpoenaed information

154. *Trump v. Mazars USA, LLP*, No. 19-cv-01136 (APM), 2021 WL 3602683 (D.D.C. Aug. 11, 2021).

155. These are, of course, not entirely separate functions. Informing voters is a central role of congressional oversight. See generally Chafetz, *supra* note 19.

156. See Chafetz, *supra* note 12 (predicting this state of affairs on the day the Court's decision came down).

157. See *supra* text accompanying notes 93–96.

158. *Trump v. Vance*, 140 S. Ct. 2412, 2431 (2020).

159. Joint Submission on Need for Further Proceedings, *Trump v. Vance*, 480 F. Supp. 3d 460 (S.D.N.Y. 2020) (No. 1:19-cv-08694-VM) (filed on July 15, 2020); Benjamin Weiser & William K. Rashbaum, *Trump Lawyers Call Demand for Taxes 'Wildly Overbroad'*, N.Y. TIMES, July 28, 2020, at A21.

160. *Trump v. Vance*, 480 F. Supp. 3d 460 (S.D.N.Y. 2020).

161. *Trump v. Vance*, 977 F.3d 198 (2d Cir. 2020).

162. *Id.* at 215–16.

163. Emergency Application for a Stay Pending the Filing and Disposition of a Petition for Writ of Certiorari, *Trump v. Vance*, 141 S. Ct. 1364 (2021) (mem.) (No. 20A63) (filed on Oct. 13, 2020).

164. *Trump v. Vance*, 141 S. Ct. 1364 (2021) (mem.). The material was turned over to the New York prosecutors almost immediately thereafter. See Jonah E. Bromwich, *Prosecutors Poring Over Tax Records from Trump*, N.Y. TIMES, Feb. 26, 2021, at A19.

would have been available to the public before Election Day. Because no indictment had yet issued in the case, grand-jury secrecy rules¹⁶⁵ would have remained in effect for some time after the grand jury received the documents, thus keeping them shielded from the voters.

Equally importantly, the Supreme Court's plodding pace both extended to other cases seeking information from and about the Trump Administration and also signaled to lower courts that such cases need not be rushed. On the former point, after the D.C. Circuit ordered certain Mueller grand jury materials turned over to the House Judiciary Committee in March 2020,¹⁶⁶ the Supreme Court stayed the D.C. Circuit decision, granted certiorari, and scheduled oral argument for December 2—nearly a month after the presidential election.¹⁶⁷ After the election, but before the scheduled argument date, the Court removed the case from its calendar,¹⁶⁸ and in July 2021, it summarily vacated the decision below and remanded with instructions to dismiss the case as moot in light of the inauguration of a new president and seating of a new Congress.¹⁶⁹

Lower courts seem to have received the message that there was no hurry to resolve disputes over congressional oversight of the Trump Administration. Consider the *McGahn* case: on April 22, 2019, the House Judiciary Committee, as part of its first impeachment proceedings against Trump, subpoenaed former White House Counsel Don McGahn to testify.¹⁷⁰ Citing executive privilege, he refused, and the Committee sued.¹⁷¹ On November 25, 2019, the district court ruled in the Committee's favor;¹⁷² on February 28, 2020—nearly three weeks after Trump was acquitted in the Senate impeachment trial¹⁷³—a D.C. Circuit panel vacated the decision and ordered the case dismissed as nonjusticiable.¹⁷⁴ The full D.C. Circuit vacated the panel decision and reheard the case en banc on April 28, 2020;¹⁷⁵ a little over three months later, it rejected the panel's reasoning, holding

165. See N.Y. PENAL LAW ANN. § 215.70 (McKinney 2021).

166. *In re* Comm. on the Judiciary, U.S. House of Representatives, 951 F.3d 589 (D.C. Cir. 2020), *vacated and remanded*, No. 19-1328, 2021 WL 2742772 (U.S. July 2, 2021).

167. DOJ v. House Comm. on the Judiciary, 140 S. Ct. 2800 (2020) (mem.) (granting stay); DOJ v. House Comm. on the Judiciary, 141 S. Ct. 185 (2020) (mem.) (granting cert.); SUP. CT. OF THE U.S., <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-1328.html> [<https://perma.cc/RR9D-KLBQ>] (last visited Sept. 13, 2021).

168. DOJ v. House Comm. on the Judiciary, 141 S. Ct. 870 (2020) (mem.).

169. DOJ v. House Comm. on the Judiciary, No. 19-1328, 2021 WL 2742772 (U.S. July 2, 2021).

170. See Comm. on the Judiciary, U.S. House of Representatives v. McGahn, 415 F. Supp. 3d 148, 157 (D.D.C. 2019).

171. *Id.* at 157, 162.

172. *Id.* at 214–15.

173. Nicholas Fandos, *Split Senate Clears Trump on Each Count in Finale of a Bitter Impeachment Battle: 'Country's Victory,' President Says—Democrats Call Trial a Cover-Up*, N.Y. TIMES, Feb. 6, 2020, at A1.

174. Comm. on the Judiciary of the U.S. House of Representatives v. McGahn, 951 F.3d 510 (D.C. Cir. 2020).

175. U.S. House of Representatives v. Mnuchin, No. 19-5176, 2020 WL 1228477 (D.C. Cir. Mar. 13, 2020).

that the case was justiciable.¹⁷⁶ The case was then remanded to the same panel, which promptly ordered the case dismissed for want of a cause of action.¹⁷⁷ The full D.C. Circuit then *again* vacated the panel decision and ordered rehearing en banc, with a scheduled argument date well after the 2021 presidential inauguration.¹⁷⁸ In May 2021, the Biden Administration reached a deal with the Judiciary Committee for McGahn's testimony, thereby mooting the case,¹⁷⁹ and McGahn testified in a closed session on June 4¹⁸⁰—over two years after the subpoena issued and seven months after Trump lost reelection.

Consider also congressional attempts to obtain Trump's tax returns. In April 2019, the House Ways and Means Committee demanded that the Department of the Treasury turn them over, pursuant to a provision of federal law stating that the Treasury "shall furnish" the Committee with "any return or return information specified" in a written request from the Committee chair.¹⁸¹ The Treasury refused; the Committee sued; and in August 2019, the district court hearing the case refused to expedite it.¹⁸² In March 2020, it stayed the proceedings pending the outcome of the *McGahn* case in the D.C. Circuit.¹⁸³ On July 30, 2021, the Biden Administration's Office of Legal Counsel issued an opinion concluding that the Treasury "must comply" with the Ways and Means Committee's demand.¹⁸⁴ On August 9, the district court set a hearing for November 8 on Trump's attempt to block Treasury from complying.¹⁸⁵

Judicial pacing also stymied efforts to investigate the lease of the Old Post Office Building in Washington, D.C. (currently, the Trump Hotel) by the federal government to an entity owned by Trump and his children. Pursuant to a

176. Comm. on the Judiciary of the U.S. House of Representatives v. McGahn, 968 F.3d 755 (D.C. Cir. 2020) (en banc).

177. Comm. on the Judiciary of the U.S. House of Representatives v. McGahn, 973 F.3d 121 (D.C. Cir. 2020).

178. Comm. on the Judiciary of the U.S. House of Representatives v. McGahn, No. 19-5331, 2020 U.S. App. LEXIS 32573 (D.C. Cir. Oct. 15, 2020) (setting en banc oral argument for Feb. 23, 2021); Comm. on the Judiciary of the U.S. House of Representatives v. McGahn, No. 19-5331 (D.C. Cir. Feb. 18, 2021) (granting motion to postpone oral argument until Apr. 27, 2021); Comm. on the Judiciary of the U.S. House of Representatives v. McGahn, No. 19-5331 (D.C. Cir. Apr. 22, 2021) (granting another motion to postpone oral argument until May 19, 2021).

179. Comm. on the Judiciary of the U.S. House of Representatives v. McGahn, No. 19-5331, 2021 U.S. App. LEXIS 20759 (D.C. Cir. July 13, 2021) (en banc) (per curiam) (granting the parties' joint motion to dismiss the case as moot).

180. See Charlie Savage, *Trump Pushed to Remove Mueller, Ex-Counsel Testifies*, N.Y. TIMES, June 10, 2021, at A16.

181. 26 U.S.C. § 6103(f)(1).

182. Comm. on Ways & Means, U.S. House of Representatives v. U.S. Dep't of Treasury, No. 1:19-cv-01974, 2019 WL 4094563 (D.D.C. Aug. 29, 2019).

183. Comm. on Ways & Means v. U.S. Dep't of Treasury, No. 1:19-cv-01974 (TNM) (D.D.C. Mar. 20, 2020). On the *McGahn* case, see *supra* text accompanying notes 170–80.

184. Ways and Means Committee's Request for the Former President's Tax Returns and Related Tax Information Pursuant to 26 U.S.C. § 6103(f)(1), 45 Op. O.L.C. ____ (2021), <https://www.justice.gov/olc/file/1419111/download> [<https://perma.cc/NS4J-Z5CW>].

185. See Katelyn Polantz, *House Democrats Won't Have a Shot at Getting Trump's Tax Returns from the IRS Until at Least November*, CNN (Aug. 10, 2021, 6:33 AM), <https://www.cnn.com/2021/08/09/politics/trump-taxes-november/index.html> [<https://perma.cc/F5EP-EJVT>].

provision of federal law requiring any executive agency to “submit any information requested” by seven or more members of the House Oversight Committee,¹⁸⁶ eighteen members of the Committee in June 2017 demanded information from the General Services Administration related to the terms of the lease. When that demand was ignored, they filed suit. The district court in August 2018 dismissed the case on the grounds that the members lacked standing.¹⁸⁷ The D.C. Circuit reversed the district court on December 29, 2020—three weeks before President Trump’s term ended—but then remanded to the trial court for further proceedings.¹⁸⁸

In short, the courts used a combination of “shadow docket” techniques¹⁸⁹ (such as stays, holding cases in abeyance pending the outcome of other cases, and refusals to expedite the issuance of judgments) and “passive virtue” techniques¹⁹⁰ (such as standing and justiciability), as well as simply taking their time to decide cases, to refrain from ordering Trump or other members of his Administration to turn over information pursuant to congressional demands. The haste with which the judiciary proceeded in the *Nixon Tapes Case* helped push a president out; by contrast, the relatively leisurely pace of the Trump cases helped to ensure that none of the records sought by other governing institutions could cost him the presidency. Joe Biden’s victory in the 2020 presidential election came despite the courts’ best efforts to shield his opponent from public and congressional scrutiny.

CONCLUSION

In late February 2021, a New York grand jury received theretofore private financial information regarding Donald Trump and his businesses and perhaps some of his family members as well.¹⁹¹ In July 2021, that grand jury indicted the Trump Organization and one of its top executives, alleging that they had engaged in a long-running tax-evasion scheme.¹⁹² Eventually, Trump himself may even face criminal sanction. And if that day comes, it may well provide a measure of catharsis for those who opposed his Administration, not simply as wrong on policy, but as lawless and fundamentally at war with liberal democratic norms.¹⁹³ If that day comes, many may well be tempted to again give credit to John Roberts

186. 5 U.S.C. § 2954.

187. *Cummings v. Murphy*, 321 F. Supp. 3d 92 (D.D.C. 2018).

188. *Maloney v. Murphy*, 984 F.3d 50 (D.C. Cir. 2020).

189. On the “shadow docket,” see William Baude, *Foreword: The Supreme Court’s Shadow Docket*, 9 N.Y.U. J. L. & LIBERTY 1 (2015); Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123 (2019).

190. On the “passive virtues,” see Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

191. See Bromwich, *supra* note 164, at A19.

192. See Ben Protess, William K. Rashbaum & Jonah E. Bromwich, *Trump Business Charged With ‘Audacious’ Tax Fraud*, N.Y. TIMES, July 2, 2021, at A1.

193. For discussions of Trump’s posture with respect to democratic norms, see Josh Chafetz & David E. Pozen, *How Constitutional Norms Break Down*, 65 UCLA L. REV. 1430, 1450–58 (2018); Katherine Shaw, *Conventions in the Trenches*, 108 CALIF. L. REV. 1955 (2020); Neil S. Siegel, *Political Norms, Constitutional Conventions, and President Donald Trump*, 93 IND. L.J. 177 (2018).

and his colleagues for standing up for “the rule of law” and for putting the good of the country above partisan interest.

And there is a sense in which partisanship was overcome in the Trump subpoena cases—after all, the Court’s four Democrats all signed on to both opinions authored by the Republican Chief Justice. Something did indeed trump partisanship, but it was not so much the greater public good as it was the good of the Justices’ own institution. Across partisan lines, the Justices signed on to opinions that exalted judicial institutions as neutral arbiters, concerned only with getting to the truth and preserving institutional balance. Congress, by contrast, was repeatedly figured as opportunistic, power-hungry, and in need of careful supervision. Only the courts could save us, so the opinions not only lauded their ability to do so and denigrated Congress’s but also put those words into action, making it significantly harder for Congress to carry out presidential oversight.

But of course, the courts are not neutral arbiters of separation-of-powers conflicts; they are *players* in separation-of-powers conflicts. The judiciary, too, is a governing institution, with institutional goals and agendas.¹⁹⁴ The Trump subpoena cases, like the Nixon tapes cases, serve those goals by allowing the courts to claim for themselves the mantle of the defenders of democracy against a lawless president. And both the enduring response to the Nixon cases and the immediate response to the Trump cases attest to the success of that strategy of institutional aggrandizement. Little wonder, then, that both sets of cases garnered bipartisan votes.

In the Nixon cases, one could plausibly describe the Republican Justices as having sacrificed partisan goals to institutional ones, if not to more broadly public-spirited ones. After all, it was a Nixon appointee who wrote the opinion that in short order pushed Nixon out of office.¹⁹⁵ But if anyone was sacrificing partisan goals to institutional ones in the Trump cases, it was the Democratic Justices, who signed on to opinions that ensured that damaging information about Trump would be safely hidden from the public until after he could no longer be voted out of office.

As it did in the Nixon cases, the judiciary in the Trump cases aggrandized its own power at congressional expense. But unlike in the Nixon cases, the Trump cases did so in the interests of preserving the electoral power of the incumbent president and his party. That Roberts and his Court have thus far reaped widespread praise for these decisions speaks powerfully to the success of his dual project.

194. See Chafetz, *supra* note 16, at 90–110; David Fontana & Aziz Z. Huq, *Institutional Loyalties in Constitutional Law*, 85 U. CHI. L. REV. 1, 30–33 (2018).

195. Recall that Albert Alschuler emphasized Burger’s authorship of the opinion as evidence of its “commitment to the rule of law.” Alschuler, *supra* note 88.