Nos. 19-715, 19-760

IN THE

Supreme Court of the United States

DONALD J. TRUMP, *et al.*,
Petitioners,

v.

MAZARS USA, LLP, *et al.*,
Respondents.

DONALD J. TRUMP, *et al.*,
Petitioners,

v.

DEUTSCHE BANK AG, *et al.*,
Respondents.

On Writ of Certiorari to the United States Courts of Appeals for the District of Columbia and the Second Circuits

BRIEF OF *AMICI CURIAE* FORMER NATIONAL SECURITY OFFICIALS IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

Amici curiae ("amici") are former national security, foreign policy, homeland security, intelligence, and other public officials.[2] They have worked on these matters at the senior-most levels of the U.S. government, in presidential administrations of both major political parties. They have held the highest security clearances in the U.S. government, and devoted their careers to combating the security threats that the United States faces in an interconnected and dynamic world. These include the dangers posed by money laundering and other forms of illicit finance, and influence campaigns on the part of foreign adversaries. Amici respectfully submit this brief to offer the Court their perspective on the implications of this case for the security of the nation. In particular, amici write to describe the indispensable role that Congress plays in protecting the nation and the integrity of its government from these global threats, and why, from the perspective of national security, the judicial creation of the proposed exception to Congressional oversight in these areas would leave the United States vulnerable to harm.

SUMMARY OF ARGUMENT

Amici take no position on the factual allegations that underlie the Congressional subpoenas at issue in these cases. But as former senior Executive Branch officials who have long worked to safeguard the nation

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[1] No counsel for a party to this case authored this brief in whole or in part, and no such counsel or party contributed monetarily to the preparation or submission of any portion of this brief. Petitioners and Respondents provided blanket consent to file *amicus curiae* briefs or filed letters of non-participation in this matter.

[2] A complete list of signatories can be found in the Appendix.

from sensitive and pressing security challenges, amici believe the sudden creation of a novel judicial exception to Congressional oversight in the areas of national security encompassed by these subpoenas would leave the nation exposed to particularly virulent threats.

First, in amici's experience, illicit finance and foreign influence operations pose grave and ongoing threats to national security. Particularly when they implicate U.S. officials or the integrity of our government and its national security apparatus, they present a serious danger to the safety of our citizens and the rule of law. *Second*, Congress plays an indispensable constitutional role in protecting the nation from those threats, including through the use of subpoenas to further its oversight and investigative powers. As Executive Branch officials, amici understood that, even when burdensome, Congressional oversight of their actions was vital to the effective performance of the country's national security agencies and to protect the nation from malign actors and corrupt influence. *Third*, in amici's experience, these national security areas cannot tolerate significant blind spots. The sudden creation of a new judicial exception to otherwise legitimate Congressional subpoenas would harm those security interests, creating a risk that our founders did not intend, and that recent history teaches would be imprudent.

ARGUMENT

I. The Subpoenas Seek Information on Matters of Serious National Security Concern.

In these consolidated cases, the D.C. and Second Circuits upheld Congressional subpoenas from the House Committee on Oversight and Reform directed at the president's accounting firm, Mazars USA, LLP, and from the House Committee on Financial Services ("Financial Services Committee") and the House Permanent Select Committee on Intelligence ("Intelligence Committee") directed at the president's lenders (Deutsche Bank AG and, in the case of the Financial Services Committee, Capital One). The subpoenas direct these companies to turn over, among other things, unprivileged financial records currently in their possession concerning the president and his businesses spanning years both before and during his presidency. The Committees have explained that the information sought is needed, in part: first, to illuminate acts of money laundering or other corrupt and illicit finance; second, to clarify whether there are ongoing efforts by foreign adversaries to interfere with our internal or governmental affairs or influence our political processes; and third, to inform potential legislation and additional oversight on these matters, including actions to protect the integrity of the executive branch from financial or foreign influence.[3] In amici's experience, these issues rank among the most grave and enduring threats to U.S. national security.[4]

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[3] Resp. Br. 23-25, 27-29, 32-35.

[4] These national security areas are covered not only by the House Financial Services and Permanent Select Committees' subpoenas, but also by the Oversight Committee subpoena, insofar as it addresses conflicts of interests from relations with foreign nations or officials, and changes to the disclosure, ethics or other

A. Money laundering and illicit finance pose grave threats to the security of the United States.

Money laundering and other forms of illicit financial activities are among the world's most widespread and persistent criminal threats. The United Nations estimates that between $800 billion and $2 trillion USD is laundered globally every year, or 2 to 5 percent of global GDP.[5] These threats bear an especially close nexus to the United States, in light of its central role in global financial markets. In 2015, the Treasury Department estimated that some $300 billion USD was laundered each year in the United States alone.[6]

Money laundering and illicit finance are destructive practices in their own right, with a damaging impact on countless victims and a corrosive effect on the rule of law and the stability of global financial markets.[7] But these practices also fuel a wide range of other illegal and corrupt enterprises—facilitating the flow of money needed for corrupt and dangerous activities to take hold and flourish, and transforming illicit

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laws that might remediate that threat. See *infra* notes 29-30 and accompanying text.

[5] U.N. Office of Drugs & Crime, *Money-Laundering and Globalization* (2020), https://www.unodc.org/unodc/en/money-laundering/globalization.html; EUROPOL, *Money Laundering*, https://www.europol.europa.eu/crime-areas-and-trends/crime-areas/economic-crime/money-laundering.

[6] U.S. Dep't of Treasury, *National Money Laundering Risk Assessment 2015*, at 2 [hereinafter NMLRA 2015]; see also U.S. Dep't of Treasury, *National Money Laundering Risk Assessment 2018*, at 2 [hereinafter NMLRA 2018] (relying on the 2015 figures).

[7] John McDowell & Gary Novis, *The Consequences of Money Laundering and Financial Crime*, 6 Economic Perspectives, (State Dept. ed., 2001), https://www.hsdl.org/?view&did=3549.

profits into seemingly legitimate funds.[8] The threat posed by these practices is only growing in scope and sophistication. Rapid changes in technology and communication and developments in global financial markets, including the rise of virtual currencies, are making it easier than ever to move staggering amounts of money around the world in service of illicit ends.[9] Active U.S. leadership in combating this threat is essential, as other countries often "lack the necessary authorities, capabilities, or motivation to help U.S. law enforcement pursue money laundering investigations."[10]

Money laundering and illicit finance lie at the heart of many of our most dangerous and pressing na-

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[8] NMLRA 2015, *supra* note 6, at 2.

[9] NMLRA 2018, *supra* note 6, at 2, 12, 26; Fin. Action Task Force, *Professional Money Laundering* 6 (July 2018) [hereinafter FATF Report], http://www.fatf-gafi.org/media/fatf/documents/Professional-Money-Laundering.pdf; Alan Rappeport & Nathaniel Popper, *Cryptocurrencies Pose National Security Threat, Mnuchin Says*, N.Y. Times (July 15, 2019).

[10] NMLRA 2018, *supra* note 6, at 5; see also U.S. Dep't of Justice, *Strategy to Combat Transnational Organized Crime* (2011), https://www.justice.gov/sites/default/files/criminal-ocgs/legacy/2011/08/31/08-30-11-toc-strategy.pdf.

tional security threats. Transnational criminal organizations,[11] proliferators of weapons of mass destruction,[12] terrorist groups and their facilitators,[13] corrupt regimes and officials,[14] and foreign intelligence services[15] all rely on illicit finance to undertake activities that endanger the security of the United States and its people, and the safety of countless others. U.S. national strategy documents routinely discuss money laundering and illicit finance as national security threats.[16] The current administration is no different,

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[11] U.S. Dep't of Treasury, *National Strategy for Combating Terrorist and Other Illicit Financing* 2020 [hereinafter 2020 National Strategy], at 7-10; Angel Rabasa et al., RAND Corp., *Counternetwork: Countering the Expansion of Transnational Criminal Networks* (2017); White House, *Strategy to Combat Transnational Organized Crime: Addressing Converging Threats to National Security* 10, 15 (July 2011).

[12] U.S. Dep't of Treasury, *National Proliferation Financing Assessment* 2-4 (2018).

[13] 2020 National Strategy, *supra* note 11; Emanuele Ottolenghi, *To Fight Terrorists, Follow the Money*, Foreign Policy (July 19, 2019).

[14] See, *e.g.*, *Combating Money Laundering and Other Forms of Illicit Finance: Regulator and Law Enforcement Perspectives on Reform*, S. Banking, Hous., & Urban Affairs Comm., 115th Cong. (2018) (statement of Steven M. D'Antuono, Section Chief of FBI Criminal Investigative Division); NMLRA 2018, *supra* note 6, at 16.

[15] See, *e.g.*, Mark B. Skerry, *Financial Counterintelligence: How Changes to the U.S. Anti-Money Laundering Regime Can Assist U.S. Counterintelligence Efforts*, 53 Santa Clara L. Rev. 205, 235-237 (2013).

[16] See, *e.g.*, 2020 National Strategy, *supra* note 11; U.S. Dep't of State, *2 International Narcotics Control Strategy Report* (March 2019); White House, *National Security Strategy* 21 (February 2015); *Strategy to Combat Transational Organized Crime*, *supra* note 11; White House, *National Security Strategy* 33 (May 2010);

having underscored as recently as last year that "[r]educing money laundering's threat to U.S. interests is a national security priority."[17]

Money laundering and other financial crimes present an additional danger when they implicate U.S. officials. Allowing officials with a history of illicit financial relationships to hold national security positions introduces a danger that their judgment might be impaired by their personal interests, or their allegiance compromised by malign actors. Money laundering magnifies these risks, because it inherently masks the source of financial conflicts, making it difficult to determine who may be in a position to exercise improper influence over any specific official.

For these reasons, the national security clearance process for Executive Branch officials—to which we were all subjected, some of us on multiple occasions, and which some of us also supervised—is devoted in large measure to the potentially corrupting influence of financial relationships. Financial considerations are one of the most common reasons for denying a security clearance.[18] The disclosure of detailed financial information was routinely sought of amici and their family members to expose activities that could lead to

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U.S. Dep't of Treasury, *2007 National Money Laundering Strategy*; White House, *The National Strategy for Combating Terrorism* 5-6 (Sept. 2002).

[17] *International Narcotics Control Strategy Report*, *supra* note 16, at 16 (describing this priority as one "reflected in the 2018 National Security Strategy and the 2017 Executive Order 13773, Enforcing Federal Law with Respect to Transnational Criminal Organizations and Preventing International Trafficking").

[18] See Letter from Daniel E. Payne, Dir., Def. Sec. Serv., to Representative Elijah E. Cummings, Comm. on Oversight & Gov't Reform (Oct. 13, 2017).

divided allegiances, the appearance of impropriety, or susceptibility to manipulation, pressure, or coercion.[19] Amici voluntarily produced such information, because they understood that such inquiries are necessary to produce confidence that any and all of the national security actions in which they participated were taken exclusively in the public interest.

B. Foreign influence operations pose a grave threat to the security of the United States.

Attempts by foreign nations to interfere in the affairs of our country and its allies pose an especially serious and pervasive threat to U.S. national security interests. The U.S. intelligence community has assessed that an array of foreign nations, including Russia, China, and Iran, are undertaking activities to "weaken democratic institutions" and "shape policy outcomes in the United States," as well as within the domestic spheres of our allies.[20] This threat has grown increasingly grave as our adversaries have become more technologically and methodologically sophisti-

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[19] See, *e.g.*, U.S. Office of Government Ethics, *Form 450: Confidential Financial Disclosure Report*; U.S. Office of Government Ethics, *Form 278: Executive Branch Personnel*, Public Financial Disclosure Report; U.S. General Services Administration, *Standard Form 714: Financial Disclosure Report*.

[20] *Worldwide Threat Assessment of the U.S. Intelligence Community: Hearing Before the S. Select Comm. on Intelligence*, 116th Cong. 7 (2019) (statement of Daniel R. Coats, Dir., Nat'l Intelligence); see generally *id.* at 5-42; *Global Terrorism: Threats to the Homeland, Part II: Hearing Before the H. Comm. on Homeland Sec.*, 116th Cong. (2019) (statement of Christopher Wray, Dir., Fed. Bureau of Investigation); U.S. Dep't. of Justice, *Report of the Attorney General's Cyber Digital Task Force* (2018).

cated, as past successes have inspired more brazen interference, and as certain of these countries seek to restore or establish a position of prominence on the world stage.

The targets of these efforts are widespread, touching nearly every aspect of society. According to the U.S. intelligence community, adversaries are attempting—and in some cases are able—to deploy cyber capabilities and other means to enable attacks against a wide range of sensitive targets, including critical infrastructure, military facilities, the financial sector, national laboratories and academic institutions.[21] Foreign actors are attempting to influence public opinion and sow division by peddling propaganda through media outlets and social media.[22] And other nations continue to aggressively target U.S. election processes and infrastructure, as well as those of other democracies throughout the world.[23]

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[21] See *Worldwide Threat Assessment*, *supra* note 20; Ctr. for Strategic & Int'l Studies, *Significant Cyber Incidents Since 2006*; Nat'l Counterintelligence & Sec. Ctr., *National Counterintelligence Strategy of the United States of America: 2020-2022*.

[22] See *Oversight of the Federal Bureau of Investigation: Hearing Before the S. Comm. on the Judiciary* (2019) (statement of Christopher Wray, Dir., Fed. Bureau of Investigation); Christina Nemr & William Gangware, *Weapons of Mass Distraction: Foreign State-Sponsored Disinformation in the Digital Age* 14-25 (2019).

[23] S. Select Comm. on Intelligence, 116th Cong., 2 *Report on Russian Active Measures Campaigns and Interference in the 2016 U.S. Election* (Comm. Print 2019); see *Oversight of the Report on the Investigation into Russian Interference in the 2016 Presidential Election: Hearing Before the H. Comm. on the Judiciary and H. Permanent Select Comm. on Intelligence*, 116th Cong. (2019); *Significant Cyber Incidents Since 2006, supra* note 21; *Worldwide Threat Assessment of the U.S. Intelligence Community: Hearing Before S. Select Comm. on Intelligence*, 116th Cong.

An enduring target of these foreign influence operations is the U.S. government's national security decision-making apparatus. Foreign intelligence services seek influence over federal officials through a range of methods, from traditional spycraft to complex cyber operations. The U.S. intelligence community assesses that "threats to the United States posed by foreign intelligence entities are becoming more complex, diverse, and harmful,"[24] and include attempts to "influence and deceive key decision makers,"[25] procure "U.S. sensitive and classified information,"[26] and "exert leverage over the United States and weaken our alliances."[27] These foreign influence campaigns are only growing more aggressive and dangerous, "because, with ready access to advanced technology, they are threatening a broader range of targets at lower risk."[28] In the words of one expert, "Russia's growing reliance on influence operations * * * has led us into an era of dangerous strategic instability."[29]

One particularly virulent way in which foreign states seek to influence federal officials is through financial inducements. These can take various forms—

(2019) (statement of Christopher Wray, Dir., Fed. Bureau of Investigation); Press Release, FBI National Press Office, *Joint Statement from DOJ, DOD, DHS, DNI, FBI, NSA, and CISA on Ensuring Security of 2020 Elections* (Nov. 5, 2019).

[24] *National Counterintelligence Strategy*, *supra* note 21, at 2.

[25] *Id.* at 9.

[26] *Id.* at iii.

[27] *Id.* at 3; see, *e.g.*, Michael Carpenter, *Countering Russia's Malign Influence Operations*, Just Security (May 29, 2019); Carolyn Kenney et al., *Understanding and Combating Russian and Chinese Influence Operations*, Ctr. Am. Progress (Feb. 28, 2019).

[28] *National Counterintelligence Strategy*, *supra* note 21, at 2.

[29] Carpenter, *supra* note 27.

ranging from outright bribes to ostensibly private business transactions—that present substantial danger because they distort the decision-making of federal officials and compromise their single-minded focus on the national interest. Permitting private financial relationships with foreign states to go unmonitored creates a risk that national security decisions "consciously or otherwise, will be motivated by something other than the public's interest."[30] These relationships also can lead to the emergence of alternative, shadow pathways of influence that corrode U.S. national security decision-making. Left unaddressed, these tracks could confuse and fragment the channels by which decisions are made, undermining the durability and coherence of the United States' national security and foreign policy positions. For these reasons, the very existence of financial conflicts of interests implicate national security when those conflicts involve foreign states or officials.

II. Congress Plays an Indispensable Constitutional Role, Including Through Its Oversight and Investigative Authority, in Protecting the Nation From These Threats.

Amici collectively have given centuries of government service to the Executive Branch. Based on that experience, they reject Petitioners' claim that Congress' lawful monitoring of areas of security threat somehow falls outside the scope of any legitimate "legislative purpose." Our constitutional scheme vests in Congress expansive powers to provide for the security

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[30] Jack Maskell, Cong. Research Serv., R43365, *Financial Assets and Conflict of Interest Regulation in the Executive Branch* 1 (2014) (quoting The Association of the Bar of the City of New York, Special Committee on Congressional Ethics, *Congress and the Public Trust*, 38-39 (1970)).

and the welfare of the nation.[31] These powers have long been understood to give Congress broad authority to address matters of finance and banking;[32] dangerous activities foreign and domestic;[33] and the protection of our government from the corrupting influence of each[34]—precisely the areas of threat addressed by the subpoenas before this Court. And while not exclusive, this authority is far reaching, encompassing the creation and structuring of federal agencies and posts, the enactment and amendment of criminal and civil statutes, the authorization and appropriation of funds for agency functions, and—as here—the exercise of investigative and oversight powers.

[31] These powers include the authority to "provide for the common defence and general welfare of the United States", U.S. Const. art. 1, § 8, cl. 1, to "regulate Commerce with foreign nations, and among the United States," *id.* cl. 3, to "coin money, regulate the value thereof, and of foreign coin," *id.* cl. 5, to "provide for the Punishment of counterfeiting the Securities and current Coin of the United States," *id.* cl. 6, and to "make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof," *id.* cl. 18.

[32] See, *e.g., Norman* v. *B. & O. R.R.*, 294 U.S. 240, 303 (1935) (Congress vested with "broad and comprehensive national authority" over "subjects of revenue, finance and currency.").

[33] See, *e.g., United States* v. *Comstock*, 560 U.S. 126, 137 (2010) (Congress has "broad authority" to enact criminal statutes pursuant to its enumerated powers); *Ullman* v. *United States*, 350 U.S. 422, 436 (1956) (underscoring Congress's constitutional "authority in safeguarding national security").

[34] See, *e.g., Watkins* v. *United States*, 354 U.S. 178, 187 (1957) (Congress possesses "broad" power to "expose corruption, inefficiency or waste" in the executive branch).

This structure did not arise by accident. The framers of the Constitution were deeply anxious that foreign nations would use financial enticements and corrupt money to compromise the security of the nation. As Elbridge Gerry, a delegate to the Constitutional Convention, emphasized, "Foreign powers will intermeddle in our affairs, and spare no expence [sic] to influence them."[35] In *Federalist 75*, Alexander Hamilton pointedly addressed this concern, saying:

> An avaricious man might be tempted to betray the interests of the state to the acquisition of wealth. An ambitious man might make his own aggrandizement, by the aid of a foreign power, the price of his treachery to his constituents.[36]

Elsewhere, Hamilton warned that "[f]oreign powers also will not be idle spectators. They will interpose, the confusion will increase, and a dissolution of the Union ensue."[37]

Accordingly, the framers paid "provident and judicious attention" to "the desire in foreign powers to gain an improper ascendant in our councils."[38] They did so, in no small measure, by giving Congress a fundamental, structural role in curbing the excesses of

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[35] James Madison, *Notes of the Constitutional Convention* (Aug. 13, 1787).

[36] *The Federalist* No. 75, at 505 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

[37] Alexander Hamilton, *Speech at the Constitutional Convention*, James Madison's Notes of Debates in the Federal Convention (June 8, 1787).

[38] *The Federalist* No. 68, at 459 (Alexander Hamilton).

the Executive in matters of foreign affairs.[39] This role found expression in the general constitutional framework of checks and balances, as well as in specific instruments such as the Foreign Emoluments Clause. That Clause gave Congress a central role in a constitutional process intended to prohibit, in the words of Edmund Randolph, "any one in office from receiving or holding any emoluments from foreign states," specifically in order to "exclude corruption and foreign influence" from the American system of government.[40]

The framers understood that the President would be an especially prominent object of foreign influence. At the 1787 Federal Convention, Gouverneur Morris recognized that "[o]ur Executive * * * may be bribed by a greater interest to betray his trust; and no one

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[39] See, *e.g.*, *The Federalist* No. 75, at 505-506 (Alexander Hamilton) ("The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind as those which concern its intercourse with the rest of the world to the sole disposal of a magistrate, created and circumstanced, as would be a president of the United States."); *The Federalist* No. 48, at 332 (James Madison) (arguing the coordinate branches should be "so far connected and blended, as to give to each a constitutional controul over the others"); *The Federalist* No. 51, at 349 (James Madison) (arguing that in "a government which is to be administered by men over men," a system of checks and balances was "necessary to controul the abuses of government").

[40] 3 *Records of the Federal Convention of 1787*, at 327 (Max Farrand ed., 1911). Randolph explained that even an appearance of corruption could pose a threat to the nation's security. In what is widely considered a reference to a snuff box gifted by the King of France to U.S. Ambassador Benjamin Franklin, Randolph stated that if, at the moment "[a] box was presented to our ambassador by the king of our allies * * *, we had supposed that he was corrupting our ambassador, it might have disturbed that confidence, and diminished that mutual friendship, which contributed to carry us through the [Revolutionary] war." *Ibid.*

would say that we ought to expose ourselves to the danger of seeing the first Magistrate in for[e]ign pay without being able to guard ag[ain]st[] it."[41] Echoing other delegates' fear of foreign interference with the presidency through financial misdeeds, Morris cautioned that "[o]ne would think the King of England well secured ag[ain]st bribery. He has as it were a fee simple in the whole Kingdom. Yet Charles II was bribed by Louis XIV."[42] And Charles Pinckney argued that the President would be more vulnerable to "foreign bribery and corruption" than a monarch because the President's "office is not to be permanent, but temporary; and he might receive a bribe which would enable him to live in greater splendor in another country than his own."[43]

In the years that followed, Congress acted time and again, in the areas of financial misconduct and foreign influence, to safeguard the security of the nation and the integrity of its government. Among the earliest laws of the Republic were those in which Congress regulated bribery of officials and the falsification of securities or currency.[44] Following controversies arising out of the Mexican War of 1846 and the

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[41] Governeur Morris, *Speech at the Constitutional Convention*, James Madison's Notes of Debates in the Federal Convention (July 20, 1787).

[42] Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia*, 1787 (J.B. Lippincott & Co. 1861) (quoting *Debates in the Federal Convention*, July 20, 1787).

[43] Charles Pinckney, *Debate at the South Carolina Legislature* (Jan. 16, 1788).

[44] See, *e.g.*, An Act to Regulate the Collection of the Duties Imposed by Law on the Tonnage of Ships or Vessels, and on Goods, Wares and Merchandises Imported into the United States, § 35,

Civil War, Congress enacted the nation's first conflict of interest laws, in part to check perceived disloyalty of government officials in defending those arrested for their disloyalty to the Union.[45]

The early twentieth century saw Congress pass a series of laws aimed specifically at reducing foreign influence over the national security apparatus. The Espionage Act of 1917 made it illegal to share information "related to the national defence."[46] The Foreign Agents Registration Act (FARA) of 1938 required the registration of individuals "attempting to influence U.S. public opinion, policy and laws" on behalf of foreign entities.[47] Other statutes enacted in this period allowed the U.S. government to prosecute clandestine behavior by entities tied to foreign governments that endangers national security.[48] During World War II, Congress created the Office of Production Administration to expedite defense mobilization,

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1 Stat. 29, 46 (1789) (criminal penalties for "any officer of the customs [who] shall, directly or indirectly, take or receive any bribe, reward or recompense for conniving * * * at a false entry of any ship or vessel"); An Act for the Punishment of Certain Crimes Against the United States, § 21, 1 Stat. 112, 117 (1790) (criminal penalties for "any person [who] shall * * * give any sum or sums of money, or any other bribe, present or reward * * * to obtain or procure the opinion, judgment or decree of any judge or judges of the United States"); *Id.* § 14 (death penalty for "any person or person [who] shall falsely make, alter, forge or counterfeit * * * any certificate, indent or other public security with intention to defraud any person").

[45] See Robert N. Roberts, *White House Ethics: The History of the Politics of Conflict of Interest Regulation*, 9-14 (1988).

[46] Act of June 15, 1917, ch. 30, 40 Stat. 217.

[47] H.R. Rep No. 1381, 75th Cong., 1st Sess. 1-2 (1937).

[48] See, *e.g.*, Crime and Criminal Procedure Act, ch. 645, § 951, 62 Stat. 743 (1948) (codified as 18 U.S.C. § 951).

which included an extensive clearance and nomination process to guard against national security risks.[49] FARA was amended in 1966 to focus on the integrity of the government's decision-making process from agents representing foreign political and economic interests, including by making it illegal for such an agent to make political contributions and expenditures in elections.[50]

Congress updated its conflict of interest laws in 1962[51] and added further restrictions on outside employment and compensation following the Watergate scandal in 1978.[52] After a number of additional amendments, the U.S. Code now prohibits Executive Branch officials from engaging in a wide range of acts that could lead to illicit financial entanglements or foreign influence, among them participating in mat-

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[49] Roberts, *supra* note 45, at 29.

[50] Act of July 4, 1966, Pub. L. No. 89-486, 80 Stat. 244 (codified as amended at 22 U.S.C. § 611 et seq. (1976)); see U.S. Attorneys' Manual, Criminal Resource Manual § 2062; Cong. Res. Serv., *Foreign Agents Registration Act, An Overview*, Mar. 7, 2019. In 1976, Congress added a ban on political contributions and expenditures by foreign nationals. See Amendments to Federal Election Campaign Act of 1971, Pub. L. No. 94-283, 90 Stat. 475 (codified as 52 U.S.C. § 30121).

[51] An Act to Strengthen the Criminal Laws Relating to Bribery, Graft, and Conflicts of Interest, and for Other Purposes of 1962, Pub. L. No. 87-849, 76 Stat. 1119 (codified as amended in scattered sections of 18 U.S.C. § 201).

[52] Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824.

ters that would affect their private financial interests,[53] acting as agents of a foreign government,[54] giving[55] and taking[56] bribes, or representing or assisting a foreign government in the year after leaving office.[57] As former Executive Branch officials, amici have complied with all such legal requirements.

Finally, in response to emergent security threats in the last half century, Congress has undertaken a wide range of efforts to combat money laundering and foreign influence. As global financial crimes surfaced as an urgent national security concern, Congress enacted a series of statutes to develop a coherent federal response, which today form a comprehensive set of criminal prohibitions and civil requirements to combat illicit finance.[58] Following the terrorist attacks on

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[53] 18 U.S.C. § 208 (2018).

[54] *Id.* § 219.

[55] *Id.* §§ 201, 210.

[56] *Id.* §§ 203, 211.

[57] *Id.* § 207(f); 22 U.S.C. § 612. Congress amended 18 U.S.C. §§ 203, 205, 207, 208, and 209 in 1989 to exclude the president, vice president, members of congress, and federal judges, see Pub. L. No. 101-194, 103 Stat. 1747 § 401 (1989), codified in 18 U.S. Code § 202, but other statutes continue to require the President to disclose finances and gifts, 5 U.S.C. app. 4 §§ 101(a), (d), (f)(1), 5 U.S.C. § 7342(a)(1)(E) & (b), and Congress is considering further such requirements, see, *e.g.,* For the People Act, H.R. 1, 116th Cong. (2019). See generally Samantha Block, *It Is All About The Money: Presidential Conflicts of Interest*, Harv. J. Leg. Online.

[58] See, *e.g.*, Bank Secrecy Act of 1970, 12 U.S.C. §§ 1951 *et seq.*; Money Laundering Control Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-18; Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207; Annunzio-Wylie Anti-Money Laundering Act of 1992, Pub. L. No. 102-550, 106 Stat. 4044; Money Laundering Suppression Act of 1994, Pub. L. No. 103-325, 108 Stat. 2160; Money Laundering and Financial Crimes Strategy Act of 1998,

September 11, 2001, Congress took steps to address the illicit financing of terrorist organizations.[59] And in response to Russia's recent well-publicized influence campaigns, Congress imposed new economic sanctions, funded efforts to improve the security of presidential elections, and directed the Executive Branch to stand up interagency groups to address Russian interference and disinformation and report back to Congress on their progress.[60]

Pub. L. No. 105-310, 112 Stat. 2941; Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107–56, 115 Stat. 272; Intelligence Reform & Terrorism Prevention Act of 2004, Pub. L. No. 118 Stat. 3638. These statutes, *inter alia*, required financial institutions to assist the federal government in detecting and investigating financial crimes and established money laundering as a federal crime. Several additional bipartisan bills are currently pending in Congress on these topics. See, *e.g.*, Coordinating Oversight, Upgrading and Innovating Technology, and Examiner Reform Act (Counter Act), H.R. 2514, 116th Cong. (2019); Corporate Transparency Act of 2019, H.R. 2513, 116th Cong. (2020); Improving Laundering Laws and Increasing Comprehensive Information Tracking of Criminal Activity in Shell Holdings (ILLICIT CASH) Act, S. 2563, 116th Cong. (2019); Combating Money Laundering, Terrorist Financing, and Counterfeiting Act, S. 1883, 116th Cong. (2019).

[59] USA PATRIOT Act, *supra* note 58.

[60] See, *e.g.*, Countering America's Adversaries Through Sanctions Act, H.R. 3364, 115th Cong. (2017) (authorizing new sanctions in response to cyber intrusions); National Defense Authorization Act, S.2943, 115th Cong. §1287 (2017) (establishing a new Global Engagement Center within the Department of State to counter foreign interference, propaganda and disinformation); John S. McCain National Defense Authorization Act, H.R. 5515, 116th Cong. §§ 1043, 1085 (2019) (imposing additional registration requirements on foreign media outlets); National Defense Authorization Act, S.1790, 116th Cong. §§ 6501-08 (2020) (requiring greater scrutiny and reporting on identified threats, and

Across this history, Congress has complemented its exercise of the legislative function in the areas of national security relevant here with extensive use of its investigative and oversight powers. As this Court has held, these powers are necessarily "broad," because a "legislative body cannot legislate wisely or effectively in the absence of information respecting the condition which the legislation itself is intended to affect or change."[61] Where "the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it."[62]

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establishing a Social Media Data and Threat Analysis Center at the Directorate of National Intelligence); Cybersecurity and Infrastructure Security Agency Act, H.R. 3359, 115th Cong. (2017) (creating the Cybersecurity and Infrastructure Security Agency to counter cyber attacks); Consolidated Appropriations Act, H.R. 1158, 116th Cong. Title V (appropriating $425 million for election security improvements).

Other legislation on these matters is currently pending in one or both Houses of Congress, including bipartisan legislation requiring the Director of National Intelligence to determine whether there was foreign interference in federal elections and impose sanctions on any nations found to interfere. Defending Elections from Threats by Establishing Redlines Act, S.1060, 116th Cong. (2019). The House of Representatives has also passed three bills that would create additional election security appropriations, regulations, and oversight. See, *e.g.*, For the People Act, H.R. 1, 116th Cong. §298 (2019); SHIELD Act, H.R. 4617, 116th Cong. (2019); SAFE Act, H.R. 2722, 116th Cong. (2019).

[61] *McGrain* v. *Daugherty*, 273 U.S. 135, 186 (1927).

[62] *Id.* at 174. The Court further explained that "the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." *Ibid.*; see also *United States* v. *Clarridge*, 811 F. Supp. 697 (D.D.C. 1992) (affirming Congress' broad investigatory powers in context of Iran-Contra affair).

The first Congressional investigation in the history of the United States involved a controversy arising out of foreign attempts to interfere in the security of the young Republic. In March 1792, the House created a special committee to inquire into the defeat of roughly 1,500 U.S. soldiers at the hands of Miami and Shawnee Indians who, "at the instigation and with the support of the British, had refused to make peace with the infant United States government."[63] The House of Representatives appointed a Select Committee "to call for such persons, papers and records as may be necessary to assist in the inquiries."[64] President Washington responded by directing the Secretary of War to turn over all of the records requested by the committee.[65]

In the early 1800s, Congress conducted several investigations into Senator John Smith and General James Wilkinson in connection with allegations of foreign interference: that then-Vice President Burr had conspired with the British government to offer it Western territory that belonged to the United States.[66] Other investigations in this era involved a mix of financial misdeeds and national security. In 1832, the House created a committee to investigate

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[63] Telford Taylor, *Grand Inquest: The Story of Congressional Investigations* 17 (1996).

[64] *Id.* at 22 (citing 3 Annals of Cong. 490-94 (1792)).

[65] *Id.* at 24.

[66] The Senate authorized a committee to investigate Senator John Smith, of Ohio, "as an alleged associate of Aaron Burr," and vested that committee with the authority "to send for persons, papers, and records." S. Journal, 10th Cong., 1st Sess. 198 (1807); see S. Misc. Doc. No. 52-66, at 718-32 (1893). The House also introduced several resolutions to investigate General Wilkinson in connection with the Burr conspiracy. See, *e.g.*, 10 Annals of Cong. 1391 (1808); H.R. Journal, 10th Cong., 1st Sess., 306 (1810).

whether the former Secretary of War John H. Eaton had provided a fraudulent government contract to former Congressman Sam Houston, as well as whether President Andrew Jackson had known about or approved the fraud.[67] The Committee issued subpoenas as part of its investigation.[68]

The decades following the Civil War saw a growing number of investigations into financial misconduct, often with national security implications.[69] During the 1920s Teapot Dome scandal, Congress exercised its subpoena authority to investigate the Secretary of the Interior's acceptance of a bribe from private oil companies in exchange for leasing them land that had been set aside as a critical national security oil reserve for the U.S. Navy. When the investigating Senate Committee issued a subpoena to oil magnate Harry F. Sinclair to testify, he refused, and was convicted and sentenced. This Court upheld the conviction, ruling that the scandal was clearly a proper matter for Congressional inquiry.[70] The investigations led

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[67] 22 Reg. Deb. 3022-23 (1832).

[68] *Ibid.* (resolution instructing committee "to send for persons and papers"); Charles E. Schamel et al., *Guide to the Records of the United States House of Representatives at the National Archives* 294 (1989) (The "[r]ecords of that committee [to investigate Samuel Houston] include * * * subpoenas (including one for Houston).").

[69] Taylor, *supra* note 63, at 51-65.

[70] *Sinclair* v. *United States*, 279 U.S. 263 (1929). See generally Taylor, *supra* note 63, at 56. In 1912, skeptical of a proposal to create a money trust, Congress issued subpoenas to high-profile Wall Street bankers and conducting six days of hearings. The inquiry uncovered extensive financial abuse and ethics violations, including unauthorized lending of large sums of government funds and "virtual[] gambling." In the aftermath of the investigation, Congress created the Federal Reserve and enacted the

to the enactment of the Revenue Act of 1924 and the Federal Corrupt Practices Act of 1925.[71]

In 1970, the House and Senate Committees on Banking and Currency heard testimony that uncovered "a wide variety of" foreign financial abuses, including money laundering, tax evasion, and securities manipulation.[72] Noting that, *inter alia*, secret foreign bank accounts were being used for money laundering into narcotics and gambling, as well as foreign corporate takeovers,[73] Congress used the investigation to evaluate a proposed legislative response to the crimes.[74] Just two months after the Senate Banking Committee hearings, Congress enacted the Bank Secrecy Act, the foundation of the modern statutory scheme to combat the modern threat of financial crimes.[75]

Today, Congress routinely exercises its investigative and oversight authority on matters of money laundering, foreign influence, and the integrity and healthy functioning of the U.S. government.[76] As senior national security officials, amici themselves have

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Clayton Act and Federal Trade Commission Act. See Richard N. Sheldon, *The Pujo Committee: 1912, in* Congress Investigates: 1792-1974, at 172-175, 180, 187, 192 (Arthur M. Schlesinger, Jr. & Roger Bruns eds., 1975).

[71] Federal Corrupt Practices Act of 1925, ch. 368, § 301, 43 Stat. 1070 (1925); Revenue Act of 1924, ch. 234, 43 Stat. 253 (1924).

[72] S. Rep. No. 91-1139 (1970); see also H. Rep. No. 91-975 (1970).

[73] See S. Rep. No. 91-1139, at 3-4 (1970).

[74] See *id.* at 14-17; H. Rep. No. 91-975, at 15-25 (1970).

[75] See Charles W. Blau et al., *Investigation and Prosecution of Illegal Money Laundering: A Guide to the Bank Secrecy Act* 6-7 (1983).

[76] See, *e.g.*, *supra* notes 14, 20, 23.

been subject to regular, and at times intensive, Congressional oversight on these and countless other security issues. Amici interacted daily and weekly with Congress—in formal hearings and informal meetings—regarding matters within the scope of their responsibilities. Although it was not always easy, amici willingly submitted themselves to this inquiry because they understood it to be necessary to the functioning of checks and balances, to informing Congress' legislation on matters of security, and to maintaining the actual and perceived integrity of the national security components of the Executive Branch.

The Executive Branch's accountability to Congress is especially crucial in matters of national security, where the public is unable to monitor sensitive and often classified issues. The Executive Branch cannot self-regulate in these matters in the absence of Congress, and Congress cannot responsibly regulate without exercising its oversight, including by subpoena when necessary.

III. The Creation of a New Exception to This Longstanding Congressional Authority, for Subpoenas Relating to the President, Would Leave the Nation Vulnerable to Harm.

Facing this centuries-old tradition of Congressional action on the very matters addressed by the subpoena, Petitioners maintain that the Committees in the present case should be compelled to make "a greater showing of need than mere relevance" because the subpoenas involve the President's private records.[77] The Solicitor General, for his part, argues for an expansive set of "immunities" from subpoena with respect to the personal activities of the President and

[77] Pet. Br. 52-53.

affiliated persons.[78] These proposals would throw up unprecedented obstacles in the path of traditional Congressional oversight, including—as in this case—in areas of core security concern. From the perspective of national security, creating a novel judicial exception to Congress's longstanding oversight and investigative role would leave the nation exposed to undue harm.

Nothing in our constitutional history, national security practice, or executive precedent requires such judicial creativity. The framers well understood the danger that the presidency would be vulnerable to foreign operators, or that the President might abuse or misuse national security authority.[79] Amici's experience has taught them that these concerns are not hypothetical. Foreign adversaries have made efforts to influence the presidency throughout history.[80] U.S. intelligence agencies assess that they continue to do so

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[78] U.S. Br. 13-17.

[79] See *supra* notes 35-43 and accompanying text; see also, *e.g.*, Letter to Jefferson, May 13, 1798, in 2 Letters and Other Writings of James Madison 140-41 (1865) ("[T]he management of foreign relations appears to be the most susceptible of abuse of all trusts committed to a Government.").

[80] See, *e.g.*, Jordan E. Taylor, *The Founding Fathers knew first-hand that foreign interference in U.S. elections was dangerous*, Wash. Post (Oct. 7, 2019) (describing interference by the French in presidential politics in the early years of the Republic, leading George Washington to warn, as he left office, of "the insidious wiles of foreign influence"); David Stout, *How Nazis Tried to Steer U.S. Politics*, N.Y. Times (July 23, 1997) (describing how "a German envoy in Mexico City wired Berlin on July 8, 1940 that 'about $160,000' had been funneled to the Pennsylvania Democratic Party for 'buying the approximately 40 Pennsylvania delegates to vote against Roosevelt' at the Chicago convention"); Joseph C. Goulden, *When Antagonists of Old Interfered*, Wash. Times (Feb. 19, 2019) (describing how the Soviet Union made a

today, principally through ongoing efforts to influence the upcoming presidential elections.[81]

The subpoenas at issue here seek financial documents concerning the President and his companies, financing provided to those entities, and claimed associations between those entities and foreign governments or corrupt entities. Amici take no position on the public reports of ties between the President's business entities and foreign nations and criminal organizations.[82] But if true, those claims would pose a risk to national security, for the many reasons discussed

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direct offer of financial support to presidential candidate Hubert Humphrey for his campaign, which Humphrey declined).

[81] See *supra* note 20.

[82] See, *e.g.*, Adam Davidson, *Trump's Business of Corruption*, New Yorker (Aug. 14, 2017) (describing a 2011 Trump Tower Batumi business deal that "intertwined [Trump's] company with Kazakh oligarchs," including Timur Kulibayev and Nursultan Nazarbayev, "a close ally of Putin" and "involved unorthodox financial practices" considered by experts to be "'red flags' for bank fraud and money laundering"); Oren Dorell, *Trump's Business Network Reached Alleged Russian Mobsters*, USA Today (Mar. 28, 2017) (describing how "the President and his companies have been linked to at least 10 wealthy former Soviet businessmen with alleged ties to criminal organizations or money laundering"); Craig Unger, *Trump's Businesses Are Full of Dirty Russia Money. The Scandal Is That It's Legal*, Wash. Post (Mar. 29, 2019) (claiming that "for more than three decades, at least 13 people with known or alleged links to the Russian Mafia held the deeds to, lived in or ran criminal operations out of Trump Tower in New York or other Trump properties," using "Trump-branded real estate to launder vast amounts of money"); Adam Davidson, *Donald Trump's Worst Deal*, New Yorker (Mar. 6, 2017) (reporting that the President helped to build a hotel in Azerbaijan in partnership with foreign officials and a money laundering syndicate).

above.[83] It would be not only appropriate but necessary for Congress to seek information, and take action in response.

The Solicitor General protests that Congressional subpoenas could be abused in a manner that would "harass[]" or "distract[]" the President from his constitutional duties.[84] But through the lens of national security, the dangers of uncurbed foreign or financial influence loom far greater than the perils of occasional distraction. To mobilize and respond to these dangers, Congress needs information. In amici's experience, these national security areas cannot tolerate significant blind spots.

Petitioners argue even more broadly that the subpoenas are invalid because "[n]one of [them] cover a subject upon which legislation could be had."[85] They claim, without legal basis, that the Oversight Committee's interest in conflict of interest and disclosure laws is unhelpful because those laws cannot constitutionally be applied to the President. They further assert, with minimal elaboration, that the Financial Services and Intelligence Committees "lack a valid statutory outlet for the banks investigation."[86] But even assuming *arguendo* that Congress is somehow unable to enact laws within the scope of the subpoenas that are targeted at the President, two critical national security points would remain.

First, if it came to light that the President had been compromised by interactions or relations with a foreign state or private criminal elements, no one can

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[83] See *supra* Part I.

[84] U.S. Br. 10.

[85] Pet. Br. 45 (quotations omitted).

[86] Pet. Br. 51.

deny it would be entirely appropriate for Congress to respond with legislation that *targets the malign actors.* Such measures might take the form of economic sanctions, stronger tools for combating illicit finance, or restrictions on foreign aid, to name a few. Likewise, it would be entirely appropriate for Congress to take action to *shield the rest of government*, and its national security components in particular, from the downstream effects of the compromising of the President. These responses might include amending foreign agent and related requirements, funding stronger election security, or passing laws to narrow executive authority in areas that might be tainted by foreign influence. Congress already has taken several of these steps in response to recent events; others are reflected in pending legislation; and Respondents have identified still others as areas of ongoing focus.[87] The precise contours of the legislative response will turn, of course, on the nature of the threat exposed by the investigation. But Congress plainly has ample justification to enact legislation targeted not just at the President, but at the external threat or the internal vulnerability exposed.

Second, even if the Committees were hypothetically disabled from taking any legislative action against the President himself, national security concerns would make it even more important that Congress have *some* visibility into his actions. Without such visibility, Congress would be handcuffed and blindfolded as to the presidency, and fatally barred from securing the information it would need to respond within the proper bounds of its constitutional

[87] Resp. Br. 17-18, 24-25, 28-29, 34-35.

authority.[88] That outcome would have been unimaginable to the framers, who were deeply apprehensive about precisely the sorts of external threats—to the nation, and its presidency—that these subpoenas aim to meet.

The antidote to such threats, the framers understood, was informed Congressional action. But Petitioners and the Solicitor General would disrupt this delicate constitutional balance, even as foreign threats gather. This Court should reject the invitation of Petitioners and the Solicitor General to fashion a novel judicial exception that would require Congress to respond to such threats through guesswork.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to affirm the judgments of the U.S. Courts of Appeals of the Second Circuit and D.C. Circuit.

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[88] *Nixon* v. *Fitzgerald*, 457 U.S. 731, 757 (1982) ("Vigilant oversight by Congress also may serve to deter Presidential abuses of office, as well as to make credible the threat of impeachment.").

APPENDIX

APPENDIX

List of *Amici Curiae*

1. Daniel Benjamin served as Ambassador-at-Large for Counterterrorism at the U.S. Department of State from 2009 to 2012.

2. John O. Brennan served as Director of the Central Intelligence Agency from 2013 to 2017. He previously served as Deputy National Security Advisor for Homeland Security and Counterterrorism and Assistant to the President from 2009 to 2013.

3. Michael Carpenter served as Deputy Assistant Secretary of Defense for Russia, Ukraine, and Eurasia from 2015 to 2017. He previously served as a foreign policy advisor to Vice President Joe Biden and as Director for Russia at the National Security Council.

4. James Clapper served as U.S. Director of National Intelligence from 2010 to 2017.

5. Bathsheba N. Crocker served as Assistant Secretary of State for International Organization Affairs from 2014 to 2017.

6. Jonathan Finer served as Chief of Staff to the Secretary of State from 2015 to 2017, and Director of the Policy Planning Staff at the U.S. Department of State from 2016 to 2017.

7. Josh Geltzer served as Senior Director for Counterterrorism at the National Security Council from 2015 to 2017. Previously, he served as Deputy Legal Advisor to the National Security Council and as Counsel to the Assistant Attorney General for National Security at the Department of Justice.

8. Suzy George served as Deputy Assistant to the President and Chief of Staff and Executive Secretary to the National Security Council from 2014 to 2017.

9. General (ret.) Michael V. Hayden, USAF, served as Director of the Central Intelligence Agency from 2006 to 2009. From 1995 to 2005, he served as Director of the National Security Agency.

10. Prem Kumar served as Senior Director for the Middle East and North Africa at the National Security Council from 2013 to 2015.

11. Michael J. Morell served as Acting Director of the Central Intelligence Agency in 2011 and from 2012 to 2013, as Deputy Director of the Central Intelligence Agency from 2010 to 2013, and as a career official from 1980 onward. His duties included briefing Presidents George W. Bush and Barack Obama.

12. James C. O'Brien served as Special Presidential Envoy for Hostage Affairs from 2015 to 2017. He served in the U.S. Department of State from 1989 to 2001, including as Principal Deputy Director of Policy Planning and as Special Presidential Envoy for the Balkans.

13. Matthew G. Olsen served as Director of the National Counterterrorism Center from 2011 to 2014.

14. Jeffrey Prescott served as Deputy National Security Advisor to the Vice President from 2013 to 2015, and as Special Assistant to the President and Senior Director for Iran, Iraq, Syria and the Gulf States from 2015 to 2017.

15. Eric P. Schwartz served as Assistant Secretary of State for Population, Refugees, and Migration from 2009 to 2011. From 1993 to 2001, he was responsible for refugee and humanitarian issues at the National Security Council, ultimately serving as Special Assistant to the President for National Security Affairs and Senior Director for Multilateral and Humanitarian Affairs.

16. Stephen Sestanovich served from 1997 to 2001 as Ambassador-at-Large and Special Adviser to the Secretary of State for the new independent states of the former Soviet Union (including Russia). Previously, he served as Senior Director for Policy Development (from 1985 to 1987) and as Director of Political-Military Affairs (from 1984 to 1985) at the National Security Council.

17. Wendy R. Sherman served as Under Secretary of State for Political Affairs from 2011 to 2015.

18. James B. Steinberg served as Deputy National Security Adviser from 1996 to 2000 and as Deputy Secretary of State from 2009 to 2011.

19. Jake Sullivan served as National Security Advisor to the Vice President from 2013 to 2014. He previously served as Director of Policy Planning at the U.S. Department of State from 2011 to 2013.

20. Strobe Talbott served as Deputy Secretary of State from 1994 to 2001.