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

BRIEF OF NISKANEN CENTER, REPUBLICAN WOMEN FOR PROGRESS, BILL WELD, ET AL. AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF OF NISKANEN CENTER, REPUBLICAN WOMEN FOR PROGRESS, BILL WELD, ET AL. AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

The Niskanen Center, Republican Women for Progress, Bill Weld, Emil Frankel, R.J. Lyman, Rina Shah, Vivek Paul, and Tanveer Kathawalla respectfully submit this amici curiae brief in support of respondents.[1]

INTEREST OF AMICI CURIAE

The Niskanen Center is a nonprofit, nonpartisan public policy think tank which advocates for the rule of law and free market solutions to promote growth and economic liberty. It is named for William A. Niskanen, who served on the Council of Economic Advisers to President Ronald Reagan and later became chairman of the Board of Directors of the CATO Institute.

Republican Women for Progress is a grassroots policy organization created to ensure the full spectrum of Republican women's voices are represented in the media, develop and support the pipeline of Republican women who want to lead and run for office, and refocus the GOP on proper governance and policy.

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[1] No counsel for any party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity, other than the amici curiae, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief. All parties have provided blanket consent for the filing of amici curiae briefs or filed letters of nonparticipation in this litigation.

Bill Weld is a Republican politician who served as the 68th Governor of Massachusetts from 1991 to 1997. A Harvard and Oxford graduate, Weld began his career as legal counsel to the United States House Committee on the Judiciary before becoming the United States Attorney for the District of Massachusetts and later, the United States Assistant Attorney General for the Criminal Division.

Emil Frankel was Assistant Secretary for Transportation Policy of the U.S. Department of Transportation from 2002 to 2005, during the George W. Bush administration.

R.J. Lyman is a lawyer and Senior Fellow at the Niskanen Center, and has served as a senior advisor to former Massachusetts Governor Bill Weld.

Rina Shah is a former senior staffer to two Republican Members of Congress, was a Delegate to the Republican National Convention in 2016, and is co-founder of the Women's Public Leadership Network.

Vivek Paul is an American businessman who was ranked among the top 30 most respected global CEOs by Barron's in 2005.

Tanveer Kathawalla is a venture capitalist who helped lead Republican Senator Marco Rubio's 2016 presidential campaign's millennial outreach effort.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners assert that the subpoenas issued in this case are "unprecedented." Pet. Br. 19. As President Reagan might have said, "There you go again."

Nearly twenty-five years ago, the United States Senate established a special committee to "investigate Whitewater Development Corporation and related matters." S. Rep. No. 104-280, at 1 (1996). "[T]he Special Committee deposed 274 witnesses and held 60 days of public hearings, during which 136 witnesses testified. The Committee also reviewed approximately 1 million pages of documents produced by the President and Mrs. Clinton, the White House, various federal agencies, and a number of individual witnesses." *Id.* This included evidence produced by Yoly Redden, President Clinton's personal accountant, in response to a subpoena regarding the President's personal finances and tax returns. *Id.* at 13.

Fifteen individuals were eventually convicted of 40 crimes uncovered by investigations into the Whitewater affair. At no point during its investigation did Congress announce that it was contemplating any specific legislation or considering impeachment related to the Whitewater events.

The fact that no one seriously questioned the Senate's authority to establish the special committee to investigate Whitewater or the committee's authority to subpoena evidence, including the financial records of a sitting president, is not surprising; it long has been established that the power to investigate is implied in Congress's power to enact legislation. *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927).

"[T]he power of inquiry—with power to enforce it—is an essential and appropriate auxiliary to the legislative function." *Id.*

This Court has recognized that Congress's power to investigate is broad, though not without reasonable limits. The subject of the investigation must be "one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit." *Id.* at 177. If it is, "the presumption should be indulged" that Congress's "object . . . was to aid it in legislating . . . ." *Id.* at 178.

Congress's essential ability to shine a light on executive corruption and mismanagement has been sacrosanct. And the courts are not obligated to constantly micromanage Congress's legislative process or subpoena power. There is no textual basis in the Constitution to create such an obligation, nor practical reason to do so now.

As amply demonstrated in the briefing by Respondents and supporting amici, the subject of the investigation at the heart of this case—much like Whitewater—is one on which legislation could certainly be had, whether to modify the financial system or rein in corruption. There is no doubt that the information sought by the subpoenas at issue—much like the subpoenas in Whitewater—would materially aid the committee in its investigation. Thus, if the Whitewater investigation and subpoenas were lawful, there can be little doubt that the present investigation and subpoenas are also lawful. And if the congressional investigation and subpoenas in this case are unlawful, then so too were they in Whitewater.

This controversy raises basic questions about Congress's authority that transcend political parties and alliances. Congress has the responsibility to enact laws and appropriate funds and cannot do so without the ability to investigate broadly and freely. While the political profile of Congress and the party that occupies the White House necessarily will change over time, the rules this Court establishes governing Congress's authority must not. The scope of Congress's investigative power should be constrained only upon a showing of manifest abuse and an absence of any valid legislative aim whatsoever, regardless of the political affiliation of either the investigators or the investigated.

Congress's Whitewater investigation was constitutional and important, just like Congress's investigation here. Congress's Whitewater subpoenas involving the President's finances were constitutional and important, just like Congress's subpoenas here. This Court should strongly affirm Congress's constitutional and important investigative powers and, with them, the decision below.

ARGUMENT

I. The history of Congress's Whitewater investigation

In 1992, the New York Times published a story describing a failed 1970s Arkansas real estate investment by then-Governor and Mrs. Clinton involving the Whitewater Development Corporation. Jeff Gerth, *Clintons Joined S.& L. Operator In an Ozark Real-Estate Venture*, N.Y. Times, Mar. 8, 1992, at A1 *available at* https://tinyurl.com/rp5msg3. Allegations, again in the New York Times, that documents

related to Whitewater were removed from the office of Associate White House Counsel Vince Foster immediately following his suicide in July 1993 prompted the Department of Justice to open an investigation. David Johnston, *Missing White House File Is Sought*, N.Y. Times, Dec. 19, 1993, at A28, *available at* https://tinyurl.com/vwr2ghy. Attorney General Janet Reno appointed a special prosecutor in January 1994. *Whitewater Special Counsel Announcement, Jan. 20, 1994 Clip*, C-Span, https://tinyurl.com/tahbcye (last modified Jun. 21, 2017).

Both branches of Congress began their own investigations almost immediately. The first hearing, held by the Republican-controlled Senate Committee on Banking, Housing, and Urban Affairs, took place in February 1994. Charles Krauthammer, *It's Time To Begin Congressional Hearings and Clear the Air on Whitewater*, Chicago Tribune, Mar. 14, 1994, *available at* https://tinyurl.com/wmge5ra. That Committee eventually established a special committee to investigate Whitewater, which would go on to oversee a majority of Congress's investigative efforts into the Whitewater affair, though the Democrat-controlled House Committee on Financial Services and House Banking Committee also conducted their own smaller investigations. S. Res. 120, 104th Cong. (1995); *see also* Michael Wines, *Senior Democrats Back Full Hearing Into Whitewater*, N.Y. Times, Mar. 22, 1994, at A1, *available at* https://tinyurl.com/tmdn9m8.

The resolution establishing the Senate's Whitewater Special Committee, chaired by New York Senator Alfonse D'Amato, was broad. It authorized "an investigation and public hearings into," among other matters:

- "the way in which White House officials handled documents in the office of White House Deputy Counsel Vincent Foster following his death"
- "whether any person has improperly handled confidential . . . information"
- "whether the White House has engaged in improper contacts" with various federal agencies
- "whether the Department of Justice has improperly handled . . . criminal referrals relating to . . . Whitewater"
- whether a government ethics report was "improperly released to White House officials"
- "all matters that have any tendency to reveal the full facts about":
    - "Whitewater"
    - "the policies and practices of . . . Federal banking agencies"
    - "the sources of funding and the lending practices of" a collection agency "and its supervision and regulation by the Small Business Administration, including any alleged diversion of funds to Whitewater Development Corporation"
    - "the lending activities of Perry County Bank, Perryville, Arkansas, in connection with the 1990 Arkansas gubernatorial election"

- other topics of interest related to the Whitewater affair.

S. Res. 120, 104th Cong., at § 1.

In terms of the special committee's purpose, the resolution authorized it "to make such recommendations, including recommendations for legislative, administrative, or other actions, as the special committee may determine to be necessary or desirable," and otherwise "to fulfill the constitutional oversight and informational functions of the Congress . . . ." *Id.* It said nothing more about legislation or other constitutional bases for its investigative powers.

As to evidence, the special committee was authorized to "require by subpoena or order the attendance, as a witness before the special committee or at a deposition, of any person who may have knowledge or information concerning any of the matters that the special committee is authorized to investigate and study." *Id.* § 5

Relevantly, it was also expressly authorized to "inspect and receive . . . any tax return or tax return information, held by the Secretary of the Treasury, if access to the particular tax-related information sought is necessary to the ability of the special committee to carry out" its mission. *Id.* Information discovered was required to be kept confidential. *Id.* § 6.

Over the subsequent 13 months, the special committee held 300 hours of hearings over 60 sessions, generating more than 10,000 pages of congressional transcripts. David Maraniss, *The Hearings End Much as They Began*, Wash. Post, June 19, 1996, at A1, *available at* https://tinyurl.com/qwzofzp. It also

accepted into the record more than 35,000 pages of deposition testimony from nearly 250 witnesses. *Id*.

The special committee issued nearly 50 subpoenas for documents, notes, and records from individuals and federal agencies in the course of its investigation. One subpoena recipient was Yoly Redden, President and Mrs. Clinton's personal financial and tax advisor. *Panel to Issue 49 Subpoenas in Whitewater Probe*, Associated Press, Oct. 26, 1995, *available at* https://tinyurl.com/r39l7rw. Redden agreed to testify about the Clintons' choices regarding the tax treatment of their Whitewater investment. S. Rep. No. 104-280, at 29-30. The Clintons did not interfere with her doing so.

The only Senate subpoena President Clinton opposed to the point that the special committee authorized a lawsuit was directed to associate White House Counsel William Kennedy III. S. Res. 199, 104th Cong. (1995). That subpoena sought Kennedy's notes of a meeting with the President's personal lawyers, and the objection was based on attorney-client and executive privileges. Michael K. Forde, *The White House Counsel and Whitewater: Government Lawyers and the Scope of Privileged Communications*, 16 Yale L. & Pol'y Rev. 109, 114 (1997). Before any lawsuit could proceed, however, President Clinton agreed to disclose the notes to Congress. *Id*. at 114-15.

Eventually, the special committee issued a nearly 700-page report. S. Rep. No. 104-280. The report made no legislative recommendations.

During the same period of time, a series of independent counsel, appointed pursuant to statutes that have since lapsed, conducted their own independent

investigations into the Clintons' affairs concerning Whitewater and related matters. Ultimately, those investigations led to President Clinton's impeachment, as well as the indictment and conviction of 14 individuals, including the sitting Governor of Arkansas, for various crimes. *Caught in the Whitewater Net*, CBSNews.com (May 19, 1998, 5:27 PM), https://tinyurl.com/v6srw3v.

II. This Court has consistently and correctly upheld the type of broad investigative authority Congress exercised during Whitewater and is exercising today

This Court has not wavered from the view that Congress must be able to gather the information it needs to perform its duties. "A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and 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." *McGrain*, 273 U.S. at 175; *Watkins v. United States*, 354 U.S. 178, 187 (1957) ("The power of the Congress to conduct investigations is inherent in the legislative process."); *Quinn v. United States*, 349 U.S. 155, 160 (1955) ("There can be no doubt as to the power of Congress, by itself or through its committees, to investigate matters and conditions relating to contemplated legislation.").

"The power of the Congress to conduct investigations . . . is broad." *Watkins*, 354 U.S. at 187. It must be, because the responsibilities of Congress are far-ranging. Congress's authority to investigate

"encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste." *Id.*

The Court has recognized that in order to gather the information it requires, Congress forms committees and invests those committees with the authority to conduct investigations and issue subpoenas. "The theory of a committee inquiry is that the committee members are serving as the representatives of the parent assembly in collecting information for a legislative purpose. Their function is to act as the eyes and ears of the Congress in obtaining facts upon which the full legislature can act." *Id.* at 200.

"The scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution." *Barenblatt v. United States*, 360 U.S. 109, 111 (1959).

Thus, this Court repeatedly has upheld the authority of Congress to investigate "in aid of its own constitutional power" irrespective of political party or controversy. *Sinclair v. United States*, 279 U.S. 263, 295 (1929), overruled on other grounds in *United States v. Gaudin*, 515 U.S. 506, 519-22 (1995). It upheld Congress's authority to investigate the Teapot Dome scandal, *id.*, "un-American activities" during the 1950s, *Barenblatt*, 360 U.S. at 117-18, *Watkins*, 354 U.S. at 187-88, *Quinn*, 349 U.S. at 160-61, and labor and management disputes in the 1960s, *Hutcheson v. United States*, 369 U.S. 599, 600-01 (1962).

This Court was not called upon to judge the wisdom of those investigations but only the broad power of Congress to engage in them. "The propriety of" Congress's choice to make a person or entity "a subject of [an] investigation and subpoena is a subject on which the scope of [this Court's] inquiry is narrow." *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 506 (1975). Each case recognized "the indispensable function, in the exercise of that power, of congressional investigations." *Watkins*, 354 U.S. at 215.

Congress's investigative powers have remained steady since, across Watergate in the 1970s, Iran-Contra in the 1980s, Benghazi in the 2010s—and of course, Whitewater in the 1990s. In the process, Congress has routinely shined a light on corruption and mismanagement in the executive branch, including potential malfeasance by presidents. It has passed new laws where appropriate. Like democracy itself, Congress's investigations have sometimes been messy. They have worked to the benefit and detriment of both political parties. But the authority of Congress to conduct such investigations cannot be questioned.

The need for this Court to confirm Congress's consistently broad investigative power is even more critical today, with the expiration of the last independent counsel statute in 1999. While there is little question that statute created as many problems as it solved and waded into murky constitutional waters, there is no doubt it was an effective tool for investigating executive corruption and wrongdoing. *See* Donald C. Smaltz, *The Independent Counsel: A View from Inside*, 86 Geo. L.J. 2307, 2323-24 (Jul. 1998); *Starr: Independent Counsel Act Should Not Be Renewed*, CNN

(April 14, 1999, 6:07 PM), https://tinyurl.com/wezyegv.

With no independent counsel statute in place today, and other Justice Department prosecutors ultimately controlled by a presidential appointee, Congress's independent investigative authority is the sole method by which *any* fully independent governmental investigation of the executive branch can occur. Whether to provide information for needed but yet-unrecognized legislative changes or merely to expose the behavior of the executive to disinfecting sunlight, Congress's ability to investigate broadly and freely is one of the key weights on its corner of the constitutional scale that maintains the pristine balance of our coordinate branches of government.

III. Petitioners' arguments would have precluded Congress's Whitewater investigation

Petitioners contend the subpoenas are unconstitutional because Congress is engaged in an impermissible law enforcement action. Petitioners further argue that no legislation involving the president's personal finances would be constitutional anyway.

Both contentions are without serious legal or constitutional merit and are effectively dispatched by Respondents' brief. But if they were not, the same contentions would have rendered the Whitewater investigation equally unconstitutional. The entire Whitewater investigation effectively hinged on the President's past financial investments in real estate and his personal tax treatment of those losses decades earlier. There is no cogent way to distinguish

Congress's power to conduct one investigation from the other.

Petitioners also assert that House rules governing the investigation here do not give the relevant committees power to issue subpoenas. But the relevant House rules are manifestly similar to those in the resolution authorizing the Senate's investigation of Whitewater. Here, the Committee on Oversight and Reform's enabling resolution charges it "with 'review[ing] and study[ing] on a continuing basis the operation of Government activities at all levels' " and permits it "to 'conduct investigations' 'at any time ... of any matter . . . .' " *Trump v. Mazars USA, LLP*, 940 F.3d 710, 714 (D.C. Cir. 2019) (alteration in original). To perform these duties, "the Oversight Committee may 'require, by subpoena or otherwise ... the production of such ... documents as it considers necessary.' " *Id.*

Likewise, the Senate resolution that established the Whitewater Special Committee authorized it to "investigate Whitewater Development Corporation and Related Matters" and "issue subpoenas . . . to the full extent permitted by law." S. Res. 120, 104th Cong.; *see supra*, at 6-8.

Thus, if the House's investigation and subpoenas here are invalid for the absence of some magic words petitioners would require in a congressional authorizing resolution, then so too was the Senate's Whitewater investigation and subpoenas, which arose from similar language and powers.

IV. The theoretical possibility of abuse does not justify unduly restricting the authority of Congress to issue subpoenas

Petitioners express concern that the "standing committee[] exercising the authority to issue third-party subpoenas in aid of legislation might significantly burden presidents with myriad inquiries into their business, personal, and family affairs." Pet. Br. 18, 63 (quoting Pet. App. 341a (Livingston, J.)).

This concern might have made sense in the midst of the Whitewater investigation, in which President Clinton was called upon to produce nearly one million pages of documents to the Senate. But here, the President is not being requested to do anything at all; the subpoenas are to Deutsche Bank and Mazars, and only they will need to spend time or effort responding to them.

Perhaps recognizing this defect in their argument, petitioners assert that some congressional subpoenas, "may impose an unacceptable burden" on the President. Pet. Br. 64. This speculative possibility that future imagined subpoenas might distract some president does not justify stripping congressional committees of their traditional subpoena powers or inserting the courts unduly into what has mostly been a back-and-forth between the executive and legislative branches.

As this Court has previously recognized, the solution, if one proves to be needed to deter some future abuse, is for the courts to carefully consider specific challenges to individual subpoenas for clearly expressed reasons to ensure they have a potential legislative purpose and are not so oppressive that they

would convert the entire West Wing into a document production factory. While, theoretically, the subpoena "power may be abused, [that] is no ground for denying its existence." *McGrain*, 273 U.S. at 166.

McGrain confronted and dismissed the contention that the power of inquiry "may be abusively and oppressively exerted," observing: "If this be so, it affords no ground for denying the power. The same contention might be directed against the power to legislate, and of course would be unavailing. We must assume, for present purposes, that neither houses will be disposed to exert the power beyond its proper bounds, or without due regard to the rights of witnesses." *Id.* at 175-76.

Nor does history suggest a risk of a slippery slope. Congressional subpoenas for the records of sitting presidents did not increase in frequency or invasiveness following the Whitewater investigation nearly a quarter of a century ago. During the George W. Bush administration, Congress investigated the leaking of the identity of CIA operative Valerie Plame, the death of Army Ranger Pat Tillman, and administration deals with private contractors operating in Iraq without rendering the presidency inoperative. *See* Josephine Hearn & Jim Vendehei, *The Oversight Congress: Trouble for Bush*, Politico (May 27, 2007, 6:00 PM), https://tinyurl.com/sbk95ab. During the Barack Obama administration, Congress investigated the Benghazi consulate attack, the Fast & Furious gun-sale program, and political bias at the IRS without grinding executive function to a halt. *See* Philip Bump, *The Many Investigations Into The Administration of Barack Obama*, Wash. Post (Feb. 7, 2019, 1:47 PM), https://tinyurl.com/y5x7j3yu. In the modern

era, congressional investigations have always been part-and-parcel of divided government. Amelia Thomson-DeVeaux, *Trump Is Wrong. When The Opposition Party Runs The House, The President Gets Investigated.*, FiveThirtyEight (Feb. 7, 2019, 4:52 PM), https://tinyurl.com/y7cprerh.

Since the judgments below merely apply long-existing precedent, there is no plausible reason to think that affirming creates any risk of a newly expansive congressional subpoena power that threatens functioning government.

V. The people, rather than the courts, have the primary responsibility to curb perceived abuses of congressional subpoenas

Whether a congressional investigation appears to be well intentioned often depends on the point of view of the observer. This Court has recognized the judiciary's need to remain above the fray and rely largely on the political process to curb perceived abuses of congressional investigations. "Investigations, whether by standing or special committees, are an established part of representative government. Legislative committees have been charged with losing sight of their duty of disinterestedness. In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies." *Tenney v. Brandhove*, 341 U.S. 367, 377-78 (1951) (footnotes omitted).

Should such legislative abuses occur, it is up to the voters to impose their will on their elected representatives: "Self-discipline and the voters must be the

ultimate reliance for discouraging or correcting such abuses." *Id.* at p. 378. While a truly unmoored and unprecedented congressional subpoena with no conceivable legislative purpose might be open to judicial limitation, by and large the remedy for such abuses lies "in the people, upon whom . . . reliance must be placed for the correction of abuses committed in the exercise of a lawful power." *Barenblatt*, 360 U.S. at 133.

CONCLUSION

The power of Congress to issue subpoenas to gather evidence to perform its legislative functions is a crucial part of our constitutional democracy and its balance of powers. Amici curiae urge this Court to protect that balance as it has long existed and affirm the judgments below.

Respectfully submitted,

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