Nos. 19-715 and 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 SEPARATION-OF-POWERS LAW PROFESSORS AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici are legal scholars who teach and write about constitutional law, including the separation of powers. Five of the *amici* have also served as legal advisors to the President and other Executive officers in the Office

[1] Pursuant to S. Ct. Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amici* and counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties have consented to the filing of this brief.

of Counsel to the President and the Office of Legal Counsel at the Department of Justice. *Amici* have an interest in the development of constitutional law and the maintenance of appropriate checks and balances among the branches of government.

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SUMMARY OF ARGUMENT

The subpoenas at issue here are constitutional because they are "pertinent," *McGrain* v. *Daugherty*, 273 U.S. 135, 176-177 (1927), to congressional investigations in "area[s] where legislation may be had," *Eastland* v. *U.S. Servicemen's Fund*, 421 U.S. 491, 506 (1975), and do not infringe on Executive privilege or otherwise violate the Constitution.

1. The investigations at issue are plainly designed to inform Congress, among other things, about whether the President has violated the law or is continuing to do so, cf. U.S. Const. Art. I, § 9, cl. 8, and most importantly, about whether he has continuing conflicts of interest arising from his undisclosed personal financial dealings that may impair his conduct in office. Knowledge of those underlying facts is critical for Congress to know whether or how to respond. Petitioners and the Solicitor General are wrong to suggest that an investigation can concern only the enactment of legislation or Executive oversight, as opposed to both, just as they are wrong to suggest that Congress's oversight objective is constitutionally suspect.

Congressional oversight of the government—including the President and other Executive officers—is an inherent and vitally important legislative function that Congress has "assiduously" performed "[f]rom the earliest times in its history." *Watkins* v. *United States*, 354 U.S. 178, 200 n.33 (1957). This Court has confirmed that it is an "indispensable" congressional power, one "not to be minimized." *United States* v. *Rumely*, 345 U.S. 41, 43 (1953).

Such oversight serves at least three critical functions. It provides the public with information about the conduct of Executive officers, including whether they are faithfully performing their duties on behalf of the Nation—indispensable information if the People are to be able to choose their agents wisely. It informs Congress itself about Executive abuses, thereby enabling it to respond by reforming laws, changing appropriations, censuring officials, or even initiating an impeachment

proceeding. And crucially, oversight acts as a powerful deterrent against Executive abuses in the first instance.

Oversight of the Executive branch is not impermissible "law enforcement." Congressional investigations such as these are not designed to deprive the investigated officials of liberty, fine them, or otherwise impose punishment. Nor does Congress's informing function involve mere "exposure for the sake of exposure." Rather, congressional oversight is a legislative means of maintaining constitutional checks and balances. As this Court has observed, it would be "danger[ous] to effective and honest conduct of the Government if the legislature's power to probe corruption in the executive branch were unduly hampered." *Watkins*, 354 U.S. at 194-195.

History and practical experience underscore the validity and importance of such legislative review of the conduct of Executive officials. Congress has engaged in countless Executive oversight investigations, including with respect to the Teapot Dome scandal, Watergate, Iran-Contra, Whitewater, and Benghazi. In so doing, Congress has often inquired into the conduct—and sometimes the personal financial dealings—of the President and his close family members in situations where legislative initiatives were possible but not the primary focus of the inquiries.

2. That does not mean, however, that any congressional subpoena relating to the President would be valid. Such a subpoena must be duly authorized and pertinent to an investigation "in an area where legislation may be had," *Eastland*, 421 U.S. at 506. Moreover, Article II of the Constitution may impose additional constraints insofar as one branch may not unduly

"impair another in the performance of its constitutional duties." *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1860 (2017) (quoting *Clinton* v. *Jones*, 520 U.S. 681, 701 (1997)). If the President makes a showing of actual impairment, then a court must balance that impairment against "the constitutional weight of the interest to be served" by the demand in question. *Nixon* v. *Fitzgerald*, 457 U.S. 731, 754 (1982).

There is no need for such balancing, however, where the challenging party fails in the first place to demonstrate any actual interference with the President's performance of his constitutional obligations. See *Clinton*, 520 U.S. at 701-705. And that is the case here. Neither petitioners nor the Solicitor General attempt to show that the subpoenas here would, in fact, impair the President's constitutional duties. The subpoenas are for non-privileged documents and are directed at third-party institutions, not the President; those institutions can comply without the President's involvement. And unlike in a case involving a claim of Executive privilege, *e.g.*, *United States* v. *Nixon*, 418 U.S. 683 (1974), disclosure of the personal financial records at issue has no bearing on the President's interest in obtaining candid advice from his advisors concerning the performance of his official functions. This Court should reject petitioners' proposal to flip the burden to require the Committees themselves to show a "demonstrated, specific need" for the information they have subpoenaed from third-party institutions.

Petitioners invoke hypothetical burdens that future subpoenas might impose. But this Court's Article II decisions look to the actual case at hand. In the unlikely event that one of petitioners' hypothetical cases were to

arise, the courts would be open to adjudicate a President's claim of actual burden, and the standards this Court has already articulated would provide a ready check against abuse or overreaching.

ARGUMENT

I. Congress May Investigate Whether The President And Other Executive Officers Have Complied With The Law And Whether They Have Conflicts of Interest

A. A Congressional Subpoena Is Constitutional If It Seeks Evidence Pertinent To The Subject Of An Investigation On Which Legislation Could Be Had And Does Not Violate Other Constitutional Restrictions

This Court has repeatedly held that "[t]he power of Congress to conduct investigations is inherent in the legislative process," *Watkins* v. *United States*, 354 U.S. 178, 187 (1957), and that the issuance of subpoenas is "a legitimate use by Congress of its power to investigate," *Eastland* v. *U.S. Servicemen's Fund*, 421 U.S. 491, 504 (1975).

In particular, "the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." *McGrain* v. *Daugherty*, 273 U.S. 135, 174 (1927). This Court therefore "has often noted that the power to investigate is inherent in the power to make laws." *Eastland*, 421 U.S. at 504; see *McGrain*, 273 U.S. at 175 ("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 because Congress's lawmaking power covers a wide range of

subjects, it follows that Congress's power to investigate is necessarily "broad." *Watkins*, 354 U.S. at 187.

Congress's lawmaking power is especially expansive with respect to the Executive branch—including the President—in light of Congress's authority to enact "all Laws which shall be necessary and proper for carrying into Execution" the statutorily created Executive agencies, U.S. Const. Art. I, § 8, cl. 18; its power to make necessary and appropriate laws to carry into execution the President's powers, *ibid.* ("all other Powers vested by this Constitution in … any … Officer [in the Government of the United States]"); and also its power of the purse, see *id.* Art. I § 8, cl. 1 and § 9, cl. 7, which allows Congress to substantially shape how the President and other officers perform their duties. This Court has affirmed Congress's power of inquiry "in determining what to appropriate from the national purse, or whether to appropriate." *Barenblatt* v. *United States*, 360 U.S. 109, 111 (1959). "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." *Ibid.*

This Court has never required Congress to demonstrate that an investigation's "actual" or "primary" purpose is to determine whether to enact legislation. To the contrary, the Court has consistently required only that the subject of the investigation be "one on which legislation *could be had*." *McGrain*, 273 U.S. at 177 (emphasis added); cf. *Quinn* v. *United States*, 349 U.S. 155, 161 (1955) (investigation's subject cannot be "an area in which Congress is forbidden to legislate"). Accordingly, as long as the investigation is "in an area where legislation may be had," *Eastland*, 421 U.S. at

506, compulsory process is permissible if the evidence sought is "pertinent to the matter under inquiry," *McGrain*, 273 U.S. at 176[2]—subject to the limitations that the subpoena cannot violate one of "the specific individual guarantees of the Bill of Rights," *Quinn*, 349 U.S. at 161, or, as discussed below, unduly interfere with the constitutional duties of another branch. See pp. 27-29, *infra*.

As respondents demonstrate (Br. 46-58), the subpoenas here are pertinent to the investigations in question, and those investigations are in "area[s] where legislation may be had," *Eastland*, 421 U.S. at 506. Indeed, they concern subjects as to which the House of Representatives has introduced, debated, and (in some cases) approved legislation. Nor is there any allegation that the subpoenas violate anyone's constitutional rights. Furthermore, as explained below, see pp. 29-30, *infra*, petitioners have failed to show that these subpoenas would unduly interfere with the President's performance of his constitutional duties, because they have not shown any actual interference at all.

The subpoenas are therefore constitutionally sound.

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[2] The Court has also referred to whether the evidence is "relevan[t]" to, *Watkins*, 354 U.S. at 211-212, or "concern[s]," the matter under inquiry, *Eastland*, 421 U.S. at 506. *Amici* understand those terms to be synonymous with "pertinent."

B. Congressional Oversight Of The Executive Branch Is A Well-Established, Legitimate, And Vital Legislative Function

Petitioners and the Solicitor General argue that the subpoenas are constitutionally suspect because the "real" or "primary" objects of the investigations are not to assess possible legislation, but instead to discover whether the President has complied with the law and whether he has conflicts of interest that could affect the conduct of his presidential functions. *E.g.*, Pet. Br. 21, 41-45; U.S. Br. 25-31. That is a false dichotomy. It presumes that an investigation can concern only the enactment of legislation or Executive oversight, and that the latter objective is invalid, or at least constitutionally suspect. Both premises are incorrect.

Congressional investigation of a sitting government official need not have a singular objective, either at its outset or as it continues. Congress may ultimately enact substantive legislation or alter appropriations in response to what it discovers regardless of whether it articulates that as a purpose of the investigation. See, *e.g.*, *McGrain*, 273 U.S. at 176-178 (upholding a congressional subpoena concerning alleged wrongdoing by an Executive official notwithstanding the absence of an articulated legislative aim). Congress may also contemplate other possible outcomes, ranging from informal criticism to formal censure or condemnation to impeachment in extraordinary cases. See U.S. Const. Art. I, § 2, cl. 5.

Furthermore, a central purpose of investigating Executive officials is basic oversight—an objective that is

not only well-established and constitutionally permissible, but also an essential component of the separation of powers.

For example, the Committees here seek to investigate, among other things, whether the President has complied with the law—including the Foreign Emoluments Clause, U.S. Const. Art. I, § 9, cl. 8—and whether he "has undisclosed conflicts of interest," particularly regarding Russia, "that may impair his ability to make impartial policy decisions." J.A. 285a n.63 (memorandum of House Oversight Chairman Cummings to Committee members explaining the need for a subpoena to Mazars); see Resps. Br. 25-26 (describing the Select Intelligence Committee's investigation of Russian interference with U.S. elections and whether, among other things, "any foreign actor has sought to compromise or holds leverage, financial or otherwise, over Donald Trump").

That investigatory function does not diminish the constitutionality of the subpoenas. An oversight investigation of the Executive branch or the President seeking records that may reveal corruption, self-dealing, or undue foreign influence involves "a subject on which legislation 'could be had.'" *Eastland*, 421 U.S. at 506 (quoting *McGrain*, 273 U.S. at 177). For instance, upon uncovering wrongdoing, Congress could pass legislation expanding disclosure requirements or could condition appropriations for Executive branch functions on disclosure or divestment.

As respondents explain (Br. 49-54), that is all the Constitution requires. This Court's precedents do not empower, much less compel, the judiciary to go further and assess what the "real object," "primary purpose,"

or "gravamen" of the investigation might be. "The courts should not go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province." *Eastland*, 421 U.S. at 506 (quoting *Tenney* v. *Brandhove*, 341 U.S. 367, 378 (1951)); *id.* at 508 ("[I]n determining the legitimacy of a congressional act we do not look to the motives alleged to have prompted it.").

Nor is there any sound basis for suggesting, as petitioners do, that the Committees' oversight objectives are constitutionally suspect and therefore undermine the legality of the subpoenas. Because congressional oversight of the government—including of the President and other Executive officers—is itself an inherent and vitally important function, it is a "legitimate task of the Congress," and therefore an investigation in "furtherance" of that objective is constitutional. *Watkins*, 354 U.S. at 187. This Court has long recognized that Congress has the power to investigate such governmental actors in order to inform itself and the public about (1) whether those officials are complying with the law and their official duties and (2) whether they might be compromised in a way that threatens their ability to faithfully execute the law in the interests of the Nation.[3]

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[3] Because the investigations here serve an oversight function in areas where legislation could be had, this case provides no basis for addressing whether oversight of Executive conduct, standing alone, could justify a subpoena even if no valid legislation could result. It is difficult to imagine such a situation ever arising.

1. Informing Congress and the public about the conduct and possible conflicts of interest of Executive officials is a legislative function that serves crucial purposes

As this Court has recognized, "[f]rom the earliest times in its history, the Congress has assiduously performed" the oversight, or "informing," function described by Woodrow Wilson in 1885 with respect to the government's operations. *Watkins*, 354 U.S. at 200 n.33 (citing James M. Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 Harv. L. Rev. 153, 168-194 (1926) (Landis)).

Wilson famously wrote:

> It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct. The informing function of Congress should be preferred even to its legislative function. The argument is not only that discussed and interrogated administration is the only pure and efficient administration, but, more than that, that the only

> really self-governing people is that people which discusses and interrogates its administration.

Woodrow Wilson, *Congressional Government* 303-304 (1885) (Wilson).

The Court has confirmed that this "informing function" is an "indispensable" congressional power—one "not to be minimized," *United States* v. *Rumely*, 345 U.S. 41, 43 (1953). "The public is, of course, entitled to be informed concerning the workings of its government." *Watkins*, 354 U.S. at 200; see C.S. Potts, *Power of Legislative Bodies to Punish for Contempt (Continued)*, 74 U. Pa. L. Rev. 780, 826 (1925-1926) (Potts) ("[I]t is too well settled to be questioned that either branch of the legislature has a right to investigate the administration of the various departments of the government.").

The informing, or oversight, function of a legislature has deep roots. As Montesquieu explained, a representative body should not only "enact[] laws" but also "see whether the laws in being are duly executed"—a "thing suited to their abilities, and which *none indeed but themselves can properly perform*." 1 *The Complete Works of M. de Montesquieu: The Spirit of Laws*, Book XI, Ch. 6, at 203 (1777 ed.) (emphasis added). Mill agreed: "[T]he proper office of a representative assembly," he wrote, "is to watch and control the government; to throw the light of publicity on its acts; to compel a full exposition and justification of all of them which any one considers questionable." John Stuart Mill, *Considerations on Representative Government* 104 (1861). Shortly after the Founding, James Wilson likewise described the House of Representatives, in particular,

as "the grand inquest of the state." James Wilson, *Lectures on Law*, Pt. II, Ch. I (1790), *reprinted in* 2 *The Works of the Honourable James Wilson* 146 (1804) ("They will diligently inquire into grievances, arising both from men and things.").

Congressional oversight of Executive officers, and the related function of informing itself and the public of what it has uncovered, serves at least three crucial functions.

First, it provides the public with information about whether government officials are faithfully performing their duties on behalf of the Nation—indispensable information for the People to be able to choose their agents wisely (and decide whether to retain them in office). In Woodrow Wilson's words, "[u]nless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government," the country would "remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct." Wilson 303 (quoted in *Rumely*, 345 U.S. at 43); see Felix Frankfurter, *Hands Off the Investigations*, 38 New Republic 329, 330 (1924) (supporting congressional investigations as "an effective instrument for ventilating issues for the information of Congress and of the public"), *reprinted in* 65 Cong. Rec. 9080-9082 (May 21, 1924).[4]

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[4] This important governmental interest is a basis for familiar legislation, as well as oversight investigations. For example, the disclosure provisions of the Ethics in Government Act, 5 U.S.C. app. 4 101(a), (f)(1), 102 (requiring the President to file periodic financial disclosures), and the Foreign Gifts and Decorations Act, 5 U.S.C.

Second, congressional oversight of Executive officers' conduct is a central component of the checks and balances by which the "ambition" of each branch can "counteract ambition" in the other and thereby "keep … each other in their proper places." The Federalist No. 51 (Madison). If such oversight reveals Executive abuses, for example, Congress can respond with new legislation or changes in allocations of appropriations.[5] In other instances, Congress may rebuke, condemn, or reprimand Executive officials, including the President, for wrongdoing or maladministration.[6] In extreme

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7342(a)(1)(E) and (c)(3) (requiring the President to report foreign gifts), inform Congress and the public of possible risks of undue influence on the President's exercise of his constitutional functions. See *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 452-453 (1977) (upholding a law requiring the President to preserve official records in part because it served the "substantial interest" of protecting "the American people's ability to reconstruct and come to terms with their history").

[5] In *Hutchinson* v. *Proxmire*, 443 U.S. 111 (1979), the Court excluded from the informing function an individual legislator's decision to issue press releases about his own conduct. *Id.* at 132-133. Contrary to the Solicitor General's assertion (Br. 11-12), *Hutchinson* did not limit and instead reaffirmed the classic informing function. See 443 U.S. at 132-133 (noting the line of cases "holding that congressional efforts to inform itself through committee hearings are part of the legislative function").

[6] *E.g.*, Jane Hudiburg & Christopher Davis, Congressional Research Service, *Resolutions to Censure the President: Procedure and History* 5-6 (updated Nov. 20, 2019) (describing Senate resolution finding President Jackson "in derogation" of the Constitution and laws for removing the Treasury Secretary, as well as a House resolution stating that President Buchanan deserved "reproof" for awarding self-serving government contracts); *Impeachment of William Jefferson Clinton, President of the United States*, H.R. Rep.

cases, an inquiry may reveal evidence of impeachable conduct—something that the House ordinarily cannot assess at the outset. Cf. *Nixon* v. *Fitzgerald*, 457 U.S. 731, 757 (1982) (noting that Congress's power to oversee the President "make[s] credible the threat of impeachment"); see Landis 221 (a rule that Congress "must announce a precise choice [on impeachment] before adducing evidence necessary for a proper judgment, is to insist upon leaping before looking, to require of senators that they shall be seers").

Third, and just as critically, congressional oversight acts as a potent deterrent to Executive abuses in the first instance. See *Fitzgerald*, 457 U.S. at 757 ("Vigilant oversight by Congress also may serve to deter Presidential abuses of office."); cf. *Buckley* v. *Valeo*, 424 U.S. 1, 67 (1976) (per curiam) ("[S]unlight is … the best of disinfectants.") (quoting Louis D. Brandeis, *Other People's Money* 62 (1933)). As one of the *amici* has written, "[w]ithout some outside check on the Executive Branch, there would be little to discourage unscrupulous officials from acting in their own, and not in the nation's, best interests." William Marshall, *The Limits on Congress's Authority to Investigate the President*, 2004 U. Ill. L. Rev. 781, 799 (Marshall). "Certainly, the Executive Branch could not be trusted to correct itself." *Id.* at 798; see Wilson 303 ("[D]iscussed and interrogated administration is the only pure and efficient administration."). The very prospect of congressional oversight may stop Executive officials, including the

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No. 105-830, at 271 (1998) (House expressing disapproval of President Clinton for allegedly using official resources for personal legal matters).

President, from engaging in corruption or misconduct. As the *amici* who have worked in the Executive branch can attest, the possibility of having to explain one's decisions to Congress has a significant tempering impact on how one performs one's work. It checks impulses to overstep, cut corners, or disregard norms designed to protect the public interest. Conversely, if Congress's power of oversight were seriously circumscribed, no independent body could step in to fill the void.

Congressional oversight thus plays a critical role in constitutional checks and balances. Indeed, it would be "danger[ous] to effective and honest conduct of the Government if the legislature's power to probe corruption in the executive branch were unduly hampered." *Watkins*, 354 U.S. at 194-195.

2. Congressional oversight of sitting Executive officials is not impermissible "law enforcement" or exposure of wrongdoing "for the sake of exposure"

Petitioners and the Solicitor General argue that the congressional inquiries at issue here—particularly to the extent they investigate whether the President has complied with the law—may be invalid because they involve "exposure for the sake of exposure" or are exercises of "law enforcement" functions properly performed by the Executive branch. *E.g.*, Pet. Br. 37-41; U.S. Br. 12-13, 19, 26-27. Those descriptions, however, fundamentally mischaracterize Congress's oversight of the Executive branch.

First, petitioners and the Solicitor General suggest that the Committees might be pursuing "the impermissible object of exposing illegality for its own sake." U.S.

Br. 13; see Pet. Br. 20, 37. No sound basis exists, however, for concluding that the Committees seek to expose wrongdoing merely "for the sake of exposure," *Watkins*, 354 U.S. at 200, rather than to fulfill the traditional, legitimate function of congressional oversight of Executive officials. To be sure, in its McCarthy-era decision in *Watkins*, this Court recognized that "[t]here is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress." *Id.* at 187. But *Watkins* expressly contrasted that sort of excess with Congress's traditional oversight of public officers: "The public is, of course, entitled to be informed concerning the workings of its government." *Id.* at 200. Citing Wilson's canonical description of the informing function, *Watkins* specifically reaffirmed "the power of the Congress to inquire into and publicize corruption, maladministration or inefficiency in agencies of the Government." *Id.* at 200 n.33.

Second, the Solicitor General argues (Br. 26) that some of the rationales Oversight Chairman Cummings himself invoked for the subpoenas—in particular, to investigate "whether the President may have engaged in illegal conduct before and during his tenure in office," J.A. 285a n.63—"betray a law-enforcement purpose, which is flatly impermissible." Petitioners likewise assert (Br. 37) that because the investigations are designed in part to examine an individual's possible wrongdoing, the Committees have "affirmatively and definitely avowed" that the subpoenas have a law enforcement purpose.

That is incorrect. Both criminal prosecutions and congressional oversight investigations may involve factual inquiries into wrongdoing by a federal official—but that does not mean the oversight investigation is an exercise of "enforcing" the law or has a prosecutorial purpose. The Committees would not purport to charge the official, put him or her on trial (absent an impeachment, which the Constitution expressly authorizes), or impose punishment. They are instead overseeing the conduct of Executive officials, among other things, in order to inform the public and enable a possible statutory or appropriations response. See, *e.g.*, *Watkins*, 354 U.S. at 200 & n.33; *McGrain*, 273 U.S. at 179-180 ("Nor do we think it a valid objection to the investigation that it might possibly disclose crime or wrongdoing on [the Attorney General's] part.").

The "law enforcement" objection is particularly misplaced here because the ongoing House investigations are not solely concerned with the backwards-looking question of whether President Trump engaged in past wrongdoing. More importantly, they are also designed to discover, among other things, whether the President is *currently* subject to conflicts of interest or foreign influence that affect his conduct as President and his ability or willingness to comply with his constitutional duty to act in the Nation's best interests (rather than his own private interests) going forward. *E.g.*, J.A. 285a n.63 (investigating "whether he has undisclosed conflicts of interest that may impair his ability to make impartial policy decisions").

Finally, petitioners overstate the applicability (Br. 25-27, 41, 43) of the only case in which this Court has held that a congressional inquiry exceeded the bounds

of Article I, *Kilbourn* v. *Thompson*, 103 U.S. 168 (1880). The Court in *Kilbourn* explicitly did not "pass[] upon the existence or non-existence of [Congress's investigatory] power." *Id.* at 189; see *McGrain*, 273 U.S. at 171 (noting that *Kilbourn* did not limit this power). The opinion has also been subjected to "weighty criticism." *Rumely*, 345 U.S. at 46; see Landis 164-165 n.48, 214-221. And it is now, "[a]t most," authority "for the proposition that Congress cannot constitutionally inquire 'into the private affairs of individuals who hold no office under the government' when the investigation 'could result in no valid legislation on the subject to which the inquiry referred.'" *Hutcheson* v. *United States*, 369 U.S. 599, 613 n.16 (1962) (Harlan, J.) (plurality opinion) (quoting *Kilbourn*, 103 U.S. at 195); see *Watkins*, 354 U.S. at 198 (similar); *In re Chapman*, 166 U.S. 661, 668 (1897) (noting that *Kilbourn* dealt with "a mere matter of private concern"). This is not such a case, because the investigations here involve, among other things, oversight of an individual who *does* hold federal office, and the information sought is pertinent to those investigations.

C. History And Practice Confirm Congress's Power To Inquire Into Corruption, Conflicts Of Interest, And Other Improprieties Involving Executive Officials

1. "In separation-of-powers cases this Court has often 'put significant weight upon historical practice.'" *Zivotofsky ex rel. Zivotofsky* v. *Kerry*, 135 S. Ct. 2076, 2091 (2015) (quoting *NLRB* v. *Noel Canning*, 573 U.S. 513, 524 (2014)). And here, for more than 200 years, Congress has undertaken countless investigations grounded primarily in the need to engage in oversight

of possible Executive corruption, conflicts of interest, and maladministration. It is "abundantly proven by the records and debates" that Congress "from the very beginning claimed and exercised the power to inquire into all affairs of the government, *whether any immediate action was contemplated or not*." Potts 813-814 (emphasis added). Many of those investigations involved the President. And although there was invariably a prospect of legislative enactments, that was rarely a focus or "primary purpose."

Oversight investigations began at the dawn of the Republic. In 1792, Congress directed a subpoena to the Secretary of War in connection with a military defeat. See Resps. Br. 4-5. President Washington's response was telling: He did not claim that inquiring into the causes of the defeat—a venture under the President's ultimate command—was beyond Congress's Article I authority or improperly interfered with his Article II functions. Instead, he objected that the request should have been directed at him rather than his subordinate. See *ibid.*

Congressional oversight of Executive officials has continued unabated since the eighteenth century. For example, the Teapot Dome scandal in the 1920s involved "an unholy mixture of oil and politics," Marshall 791 (quoting Robert Grant & Joseph Katz, *The Great Trials of the Twenties* 195 (1998)), related to suspect leases for oil-bearing lands owned by the government. *Id.* at 791-793. Congress responded with a series of investigations, including of whether Attorney General Harry Daugherty's personal financial interests contributed to his failure to initiate certain prosecutions. In *McGrain*, this Court upheld the validity of a special committee's

subpoena issued to the Attorney General's brother, which demanded bank records to shed light on the relationship between Daugherty's private interests and his public conduct. See 273 U.S. at 150-152.

Notably, Congress did not "avow" that the purpose of the investigation was "in aid of legislation." *Id.* at 177. To the contrary, the committee's mandate was "to inquire into, investigate and report to the Senate the activities of the said Harry M. Daugherty, Attorney General, and any of his assistants in the Department of Justice *which would in any manner tend to impair their efficiency or influence as representatives of the government of the United States*." *Id.* at 152 (emphasis added). The district court found that "[t]he extreme personal cast of the original resolutions; the spirit of hostility towards the then Attorney General which they breathe; [and the fact] that it was not avowed that legislative action was had in view until after the action of the Senate had been challenged" together "create[d] the impression that the idea of legislative action being in contemplation was an afterthought." *Id.* at 176. This Court nonetheless upheld the inquiry as being in service of a valid Article I function: The administration of the Department of Justice was a subject "on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit." *Id.* at 177.

Other more recent examples abound, including major oversight investigations involving almost every modern presidency. For example, the Watergate scandal prompted a congressional investigation into President Nixon's conduct, during which no one disputed Congress's Article I power to engage in oversight. Pet.

App. 19a-20a.[7] Another committee investigated President Nixon's tax returns (as well as those of family members), which he had not voluntarily provided. See Resps. Br. 9. In the 1980s, Congress investigated the Iran-Contra Affair and received excerpts from President Reagan's personal diaries that he voluntarily produced. See *id.* at 10-11. Again, Congress's authority to seek this information was unquestioned.

Congress also undertook a multiyear investigation into the personal business and financial affairs of President Clinton and his family (in particular, Hillary Clinton) based on their involvement in the Whitewater land deal and related transactions before President Clinton was in office. The Clintons' personal accountant even testified. See *id.* at 11-12. And although the Clintons resisted a subpoena, they did not contend that subpoena was beyond the scope of Congress's Article I authority; they argued simply that it demanded privileged materials. See Louis Fisher, Congressional Research Service, *Congressional Investigations: Subpoenas and Contempt Power*, at CRS-16 to -18 (Apr. 2, 2003).[8]

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[7] The D.C. Circuit rejected an effort by the Senate Watergate Committee to subpoena certain of President Nixon's records because those records (unlike those here) were subject to an Executive privilege claim and another committee had already obtained them, thereby "substantially undermin[ing]" the Watergate Committee's need for them. *Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, 498 F.2d 725, 732 (1974). The court expressed no doubts about the constitutionality of the investigation itself.

[8] Subpoenas to third-party record holders, such as telephone records from Bell Atlantic, went unchallenged. See *Final Report of the*

More recently, a House select committee engaged in a lengthy oversight investigation into the conduct of Secretary of State Hillary Clinton regarding the 2012 attacks on U.S. facilities in Benghazi, Libya. The investigation involved subpoenas to the State Department, the Defense Department, and Secretary Clinton, as well as document requests to the White House. See *Final Report of the Select Committee on the Events Surrounding the 2012 Terrorist Attack in Benghazi*, H.R. Rep. No. 114-848, at 361 (2016). Although the committee cited "its legislative responsibility to set policy and appropriate funds," Staff of H.R. Comm. on Oversight and Government Reform, 113th Cong., *Legislative and Oversight Accomplishments of the House Committee on Oversight and Government Reform* 146 (2014) (Oversight Staff Report), the prospect of legislation was barely discussed during the protracted proceedings. Instead, a principal function of the proceedings was plainly to bring public attention to possible failures by Executive officials. See *id.* at 146-152.

The long line of investigations throughout the Nation's history illustrates Congress's power to engage in oversight of Executive officials' conduct, even when the prospect of statutory enactments is remote. As Judge Livingston noted below, Presidents, like other Executive officials, "are routinely the subjects of congressional investigation while in office—as they must be, and for appropriate reasons." J.A. 341 n.13.

Special Committee to Investigate Whitewater Development Corporation and Related Matters, S. Rep. No. 104-280, at 47 n.11 (1996).

2. Congress's committee structure reflects the importance of oversight as a distinct and critical legislative function. In response to the enormous expansion of the Executive branch in the early twentieth century, Congress enacted the Legislative Reorganization of Act of 1946, 60 Stat. 812. See Aaron Ford, *The Legislative Reorganization Act of 1946*, 32 A.B.A. J. 741, 741 (1946). The Act directed the standing committees to "exercise continuous watchfulness" over the Executive branch. Legislative Reorganization Act § 136, 60 Stat. at 832; see George Galloway, *The Operation of the Legislative Reorganization Act of 1946*, 45 Am. Pol. Sci. Rev. 41, 59 (1951).

As its name suggests, the House Committee on Oversight and Reform is the "government's chief watchdog." Oversight Staff Report 11; see *id.* at 15 (describing the Committee as an "investigative and oversight body"). In one form or another, such a committee has investigated the conduct of officials in the Executive branch since 1792—even when an investigation may "embarrass the President." *Id.* at 12-13. The current Committee has express authorization to "review and study on a continuing basis the operation of Government activities at all levels, including the Executive Office of the President." House Rules, 116th Cong., Rule X, cl. 3(i).

The House Permanent Select Committee on Intelligence (HPSCI) similarly plays a vital role in overseeing the operations of the Executive branch. It is tasked with "review[ing] and study[ing] on a continuing basis laws, programs, and activities of the intelligence community," including its sources and methods. *Id.* cl. 3(m). Its jurisdiction includes the Central Intelligence Agency, as well as the "[i]ntelligence and intelligence-

related activities of all other departments and agencies," and appropriations for such activities. *Id.* cl. 11(b)(1)(B) and (D). Although much of its work is classified, HPSCI engages in constant, close oversight of the intelligence community, including with respect to decisions of the President. Cf. 50 U.S.C. 3091-3093 (requiring, among other things, the President to report intelligence activities to the congressional intelligence committees, and to keep them "fully and currently informed"). HPSCI and its Senate counterpart (the Senate Select Committee on Intelligence) in turn use their extensive, continual oversight to inform themselves of the Executive's conduct, respond in their annual intelligence authorization bills, and to help prevent abuses in areas otherwise largely shielded from scrutiny.

The Committees' structure and functions further underscore the validity of the subpoenas here. For instance, HPSCI demanded from a third-party institution specified financial records, including those that would tend to reveal foreign influence. See J.A. 129a-136a. Such an inquiry falls well within Congress's investigatory authority, including its oversight function (as well as HPSCI's special role in evaluating threats to national security). There is a clear link between the documents sought and a valid congressional oversight purpose. There is also a clear reason for demanding the records of the President in particular: The Committee is investigating the possibility of foreign influence *on the President himself* (see Resps. Br. 25-29) because, as Judge Tatel observed, the President has unusually complex, undisclosed finances and extensive business operations abroad, and he has not divested or established ethical walls to insulate his official conduct from those private

interests. See Pet. App. 61a; see also J.A. 285a n.63 (memorandum of House Oversight Chairman Cummings explaining the need for a subpoena to Mazars in order to investigate possible misconduct by the President).

* * * * *

Longstanding practice thus belies petitioners' view of Article I investigative authority as limited to inquiries primarily designed to produce legislation. Instead, historical practice amply supports this Court's recognition of a "basic premise[] on which there is general agreement"—namely, that Congress's constitutional investigative power "comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste." *Watkins*, 354 U.S. at 187. And that is so for the President as well as other Executive branch actors.

II. Congress May Not Unduly Impair The President's Performance Of His Article II Duties, But Petitioners Have Not Shown Any Actual Impairment

A. A Separation-Of-Powers Challenge Requires Showing Actual Impairment

In addition to the requirements that a subpoena concerning a President be duly authorized,[9] pertinent to an

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[9] *Amici* agree that, in order to ensure political accountability for the choice to issue a subpoena directed at the records of a sitting President, the House must authorize that compulsory process. See Marshall 821. But as respondents explain (Br. 67-72), the full House did authorize the subpoenas here. The Committees had authority in advance to issue them, and the passage of House Resolution 507 on July 24, 2019 (see Resps. Br. 35-36) makes crystal clear which

investigation "in an area where legislation may be had," *Eastland*, 421 U.S. at 506, and consistent with the "specific individual guarantees of the Bill of Rights," *Quinn*, 349 U.S. at 161, Article II may impose additional constraints. In this as in analogous contexts, one branch may not unduly "impair another in the performance of its constitutional duties." *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1860 (2017) (quoting *Clinton* v. *Jones*, 520 U.S. 681, 701 (1997)); see *Cheney* v. *United States District Court for the District of Columbia*, 542 U.S. 367, 384 (2004) (same); *Nixon* v. *Administrator*, 433 U.S. at 443 (similar); see also *Noel Canning*, 573 U.S. at 555 (avoiding an inquiry that "would risk undue judicial interference with the functioning of the Legislative Branch"); *Free Enterprise Fund* v. *Public Company Accounting Oversight Board*, 561 U.S. 477, 484 (2010). If a showing of actual impairment is made, then a court must balance such impairment against "the constitutional weight of the interest to be served" by the demand in question. *Fitzgerald*, 457 U.S. at 753-754; see *United States* v. *Nixon*, 418 U.S. 683, 711-712 (1974) (*Nixon*) (prescribing such a balancing test); *Clinton*, 520 U.S. at 690, 702, 707-708 (emphasizing the need for balance and "respectful and deliberate consideration" of the interests of different branches of government, and noting that "even quite burdensome" interactions may be constitutional).

A court need not engage in such balancing, however, absent a showing of actual interference with the President's ability to perform his constitutional obligations.

House members stand behind these subpoenas, so that voters can hold their representatives accountable as they see fit.

See *Clinton*, 520 U.S. at 701-705 (analyzing whether "burdens will be placed on the President that will hamper the performance of his official duties," and concluding that the mere ancillary effect "on the President's time and energy" of compliance with civil discovery was not sufficient to justify postponement of proceedings, even though he might be required to testify); *Nixon* v. *Administrator*, 433 U.S. at 443, 451-452 (evaluating the extent of actual disruption caused by compliance with the Presidential Recordings and Materials Preservation Act, 44 U.S.C. 2107). Quite simply, when an otherwise valid congressional subpoena does not actually impair the President's performance of his constitutional duties, the subpoena is in keeping with the separation of powers.

Petitioners do not even attempt (nor does the Solicitor General) to make the predicate showing that the subpoenas would actually impair the performance of the President's constitutional duties. That is not surprising. The third-party institutions' compliance with the subpoenas here would not require the President himself to do anything. The demanded documents are personal financial records, not records of the President's communications in office, so their disclosure would not implicate the President's interest in obtaining "candid, objective, and even blunt or harsh opinions" from his advisors. *Nixon*, 418 U.S. at 708. Indeed, the subpoenas demand non-privileged business records from third-party institutions, so those documents do not "fall within a protected zone of privacy" for purposes of discovery via other forms of legal process. *United States* v. *Miller*, 425 U.S. 435, 440 (1976). And petitioners do not even try to demonstrate that the

President's duties will otherwise be impaired by the recipients' compliance with the subpoenas, even if, as a practical matter, it may prompt some attention by the President himself. Presidents "face a variety of demands on their time." *Clinton*, 520 U.S. at 705 n.40. "While such distractions may be vexing to those subjected to them, they do not ordinarily implicate constitutional separation-of-powers concerns." *Ibid.* And even if there were some impact on the President's time, it would be indirect, attenuated, and easily outweighed by Congress's powerful interest in determining whether the sitting President's official conduct is compromised by his undisclosed personal financial ties.

Petitioners speculate (Br. 63-65) about a "flood" of hypothetical future subpoenas from unspecified committees to future Presidents. It is, they say, "not at all difficult to conceive" that hypothetical future subpoenas would be burdensome. *Id.* at 63 (quotation omitted). But reflecting the sensitivity of separation-of-powers claims, this Court's precedents indicate that each case must be evaluated on its own facts, looking not at hypotheticals but instead at what burden, if any, the President has demonstrated in the "case at hand." *Clinton*, 520 U.S. at 702; see *Nixon* v. *Administrator*, 433 U.S. at 444-445 (discounting "future possibilities for constitutional conflict" and instead considering the facts of the case). In the unlikely event that a future congressional committee were to issue a subpoena or subpoenas that alone or together create a real, practical impediment to the effective fulfillment of the President's duties, the courts will be open at that time to hear the President's objections and to provide "respectful and deliberate consideration" to them. *Clinton*, 520 U.S. at 689-690.

B. Petitioners' And The Solicitor General's Proposals To Further Limit Congress's Authority Lack Merit And Would Hamper Important Congressional Functions

Petitioners argue that this Court should flip the burden to require the *Committees* to show a "demonstrated, specific need" for the information subpoenaed from third-party institutions. Br. 53 (quoting *Nixon*, 418 U.S. at 713); see U.S. Br. 15 (same); *id.* at 23-24 (proposing that the Committees be required to show that the information is "demonstrably critical" to an "asserted" legislative purpose).

That is incorrect. This Court applied a "demonstrated, specific need" standard in the *Nixon* tapes case because the President had asserted Executive privilege regarding a subpoena to disclose the President's communications in office with his close advisors. See 418 U.S. at 708, 712-713; see also Pet. Br. 30 (conceding that requests for official records involve "different issues"). This Court recognized that disclosure of such communications interfered with the President's interest—which this Court deemed crucial to the exercise of his Article II duties—in obtaining "candid, objective, and even blunt or harsh opinions" from his advisors. *Nixon*, 418 U.S. at 708.

Nixon's justifications for imposing a heightened standard are absent here. The President has not even claimed Executive privilege over the personal, non-official records at issue, and their disclosure would not impact the President's ability to obtain candid advice from his official advisors. Indeed, extending the *Nixon* standard to this context would conflict with

Nixon's very distinction between official and non-official matters. See *ibid.* (grounding the Executive privilege in the need to communicate with advisors "in the process of shaping policies and making decisions"); *Clinton*, 520 U.S. at 694 ("[W]e have never suggested that the President, or any other official, has an immunity that extends beyond the scope of any action taken in an official capacity.").

Petitioners (Br. 51-52) raise the specter of abusive subpoenas, such as a demand for the private health records of the President (or his or her family) for the ostensible purpose of considering potential general healthcare reform legislation, or for the President's high school transcripts. See Pet. App. 43a (Rao, J., dissenting). The existing standards for assessing the validity of congressional subpoenas, see pp. 6-8, *supra*, already fully address such hypotheticals. The President's private health records would plainly not be pertinent to an inquiry into general healthcare reform because there would be no basis for singling out the President, of all people, for the demand. Likewise, it is hard to imagine the possible relevance of the President's high school grades to any legitimate congressional objective.

Here, by contrast, there is an obvious connection between the President's undisclosed financial records—records that he alone, unlike all other recent Presidents, has refused to publicly disclose—and the possibility that he has conflicts of interest that could impair his official conduct and interfere with his constitutional duties. See pp. 26-27, *supra*; Resps. Br. 17-35, 46-58.

Upon a similar showing of relevance, financial records such as those here would be subject to ordinary civil discovery in a case brought by a private plaintiff

against a sitting President. Cf. *Clinton*, 520 U.S. at 690-692. Surely, private litigants should not have greater access than the House of Representatives itself.

CONCLUSION

The judgments of the courts of appeals should be affirmed.

Respectfully submitted.

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