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 *Amici Curiae* American Civil Liberties Union and ACLU of the District of Columbia in Support of Respondents

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INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with approximately two million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution of the United States. Since its founding in 1920, the ACLU has sought to protect individual liberties and to ensure that governmental power is limited as required by the Constitution. The ACLU recognizes that the separation of powers established by the Constitution, and the ability of different branches of government effectively to check and balance one another, helps to secure Americans' liberties. The ACLU of the District of Columbia is the ACLU's affiliate in Washington, DC.

The ACLU has participated directly or as *amicus curiae* in many of this Court's cases concerning immunity of public officials, including the President. In particular, the ACLU, participating as *amicus*, has urged the Court to reject claims that the President is entitled to immunity from civil lawsuits arising out of his unofficial conduct, and from compulsory process for evidence related to a criminal trial. *See, e.g.*, *Clinton v. Jones*, 520 U.S. 681 (1997); *United States v. Nixon*, 418 U.S. 683 (1974).[1]

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* certify that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than *amici* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties participating in this litigation have granted blanket consent for the filing of *amicus* briefs.

SUMMARY OF ARGUMENT

This Court has long recognized that Congress's authority to conduct investigations is deeply rooted in the American constitutional tradition. An unbroken history of legislative practice that predates the Republic itself leaves no doubt that Congress may initiate investigations and use compulsory process to inform its legislative agenda and appropriations decisions and to exercise oversight over the Executive, so long as it stays within certain well-established constraints. That authority includes the right to demand documents from or regarding the President and other members of the Executive Branch.

The President attempts to cast doubt on this authority, based in part on the paucity of case law resolving conflicts between Congress and the President over subpoenas.[2] But Presidents since George Washington have recognized Congress's investigative authority and have generally complied with its investigative demands, while reserving the right to withhold certain privileged information. The President's claim that his status entitles him to a sweeping, virtually unyielding immunity from congressional process has no support in precedent or history. In all events, he has articulated no specific need for such immunity over and above existing safeguards against congressional overreach, which already protect the legitimate interests of the

[2] The lead petitioner in this case is Donald J. Trump in his personal capacity, not in his official capacity. This brief nevertheless will refer to him as the President, following this Court's practice when William Jefferson Clinton petitioned in his personal capacity, *see Clinton v. Jones*, 520 U.S. 681 (1997).

Presidency. Nothing about this case—involving subpoenas to certain third parties for records concerning the President's unofficial conduct and relating to numerous subjects of potential legislative reform—comes close to demonstrating a need for the extreme limits on congressional investigative authority that President Trump demands.

The President invokes separation of powers, but those considerations only underscore the propriety of the subpoenas at issue here. Robust congressional oversight of the President is crucial to maintaining the checks and balances that protect the separation of powers and, by extension, Americans' liberties. Under separation-of-power principles, it is the President's unprecedented claim to special protection from congressional authority that requires a specific justification, not Congress's long-established authority to investigate. The President has offered no specific justification—let alone any persuasive one—to grant the President special protection, and erode congressional oversight, in the case before this Court.

The subpoenas at issue in this case are well within any reasonable definition of Congress's investigative authority. They seek evidence that would plainly inform legislative reform, appropriations decisions, and, more broadly, democratic accountability. The President's claim that the documents could not possibly inform any permissible legislation is both extravagant and unsupported. There is no basis for allowing the President to block these subpoenas. The President, just like the rest of us, is bound by law, and the law requires Respondents in this case to comply with congressional subpoenas.

ARGUMENT

I. Congress Has Broad Authority To Conduct Investigations, Including of the President.

This Court has repeatedly recognized that Congress has broad investigative authority. That authority is deeply rooted in American history and has always been understood to reach the Executive Branch, including the President. The unduly restrictive view of Congress's investigative authority advanced in President Trump's brief, along with the *amicus* brief filed by the Department of Justice, bears no resemblance to the practice of congressional investigation as it has existed for more than two centuries.

A. Congress's Investigative Authority is Broad and Well-Established.

Congress's authority to conduct investigations, including the power to issue subpoenas, is indispensable to the exercise of its legislative power under the Constitution. *See, e.g.*, *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 505 (1975) (investigative authority "is an integral part of the legislative process," and "[t]he issuance of a subpoena pursuant to an authorized investigation is similarly an indispensable ingredient of lawmaking" without which the ability to investigate "would be meaningless"). "Without the power to investigate . . . Congress could be seriously handicapped in its efforts to exercise its constitutional function wisely and effectively." *Quinn v. United States*, 349 U.S. 155, 160-61 (1955); *see also Watkins v. United States*, 354 U.S. 178, 197 (1957) ("[A]n investigation is part of

lawmaking."); *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927) ("[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function."). Congressional subpoenas are entitled to no less respect than subpoenas issued by the judicial branch. *See, e.g.*, *Watkins*, 354 U.S. at 187-88 (emphasizing the "duty of all citizens" to comply).

Congress's power to investigate, while not unlimited, is "necessarily broad," extending to any subject "on which legislation could be had." *Eastland*, 421 U.S. at 504 n.15 (citation omitted). Congress has the right and the duty to follow the facts as they develop, like any investigator, even if the search "takes the searchers up some 'blind alleys.'" *Id.* at 509. Congress has exercised this power "throughout our history," to inquire into a wide range of topics "concerning which Congress might legislate or decide upon due investigation not to legislate," as well as to determine "what to appropriate from the national purse, or whether to appropriate." *Barenblatt v. United States*, 360 U.S. 109, 111 (1959).

Indeed, because one cannot meaningfully legislate without first assessing the facts, legislative investigative authority is as deeply rooted in our history as the legislative power itself. *Quinn*, 349 U.S. at 160-61 (Congress's power to investigate is "deeply rooted in American and English institutions"). Even before the Republic was formed, colonial legislatures "very early assumed, usually without question, the right to investigate the conduct of the other departments of the government and also other matters of general concern brought to their attention." C.S. Potts, *Power of Legislative Bodies to*

Punish for Contempt, 74 U. Pa. L. Rev. 691, 708 (1926). The Continental Congress likewise exercised investigative power, and in at least one instance summoned an individual to appear. *See id.* at 716. Once the states were established, early state legislatures also asserted investigative authority, including the authority of compulsory process. *See id.* at 718.

The first Congresses used compulsory process to investigate "suspected corruption or mismanagement of government officials." *Watkins*, 354 U.S. at 192. Subsequent Congresses launched investigations into the effect of tariffs on domestic manufacturers, the raid on Harper's Ferry, and other topics of public interest, supported by compulsory process. *See id.* at 193 & nn.21-22; *McGrain*, 273 U.S. at 161-62; James M. Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 Harv. L. Rev. 153, 178 (1926).

Congress has continued to exercise this authority throughout American history, frequently examining past wrongdoing, including potential criminal conduct, to inform whether reform was warranted. High-profile recent examples include the investigation into the global financial crisis of 2007-2008 by the Financial Crisis Inquiry Commission—modeled after the Pecora Commission that investigated the causes of the Great Depression—and the investigations by multiple congressional committees into the collapse of Enron. Congress also has investigated, for example, "mob violence and organized crime," *In re the Application of U.S. Senate Permanent Subcomm. on Investigations*, 655 F.2d 1232, 1233 (D.C. Cir. 1981), and "human trafficking, particularly sex trafficking, on the Internet," *Senate*

Permanent Subcomm. v. Ferrer, 199 F. Supp. 3d 125, 128 (D.D.C. 2016), *vacated as moot*, 856 F.3d 1080 (D.C. Cir. 2017).

Contrary to the unsupported assertions of the Solicitor General, Congress's investigative arsenal includes not only the "wide net" but also the "harpoon." DOJ Br. 29. In investigating the financial crisis, for example, the Financial Crisis Inquiry Commission subpoenaed financial records from Goldman Sachs, including records related to specific Goldman transactions and customer names. *See* Sewell Chan & Gretchen Morgenson, *Financial Panel Issues a Subpoena to Goldman Sachs*, N.Y. Times, June 7, 2010. And in the Enron investigation, a Senate subcommittee issued 49 subpoenas to individuals. *Congress Steps Up Enron Probes*, CNN.com (Jan. 12, 2002, 9:17 AM), https://cnn.it/392F6sy.

B. Congress's Investigative Authority Has Long Been Understood To Apply to the Executive Branch, Including the President.

Since the first Congresses began investigating "suspected corruption or mismanagement of government officials," *Watkins*, 354 U.S. at 192, Congress has investigated the President and his administration. And since the Founding, Presidents have acknowledged Congress's authority to conduct such investigations, often working with Congress to accommodate its demands for information consistent with the President's legitimate prerogatives. The suggestion by President Trump and the Solicitor General that Congress lacks authority (or at most has an extremely circumscribed authority) to direct its

investigative authority at the President, *see* Pet. Br. 32-35, DOJ Br. 17-25, runs counter to American history and law.

As early as 1792, the House established a committee to investigate Major General Arthur St. Clair's failed expedition in the Northwest Territory and authorized the committee "to call for such persons, papers, and records, as may be necessary to assist their inquiries." 3 Annals of Cong. 493 (1792). When the committee sought records from President Washington, the President cooperated in full on the advice of his Cabinet ministers—including both Alexander Hamilton and Thomas Jefferson—who agreed that the House was authorized to make such inquiries through the committee. *See* William P. Marshall, *The Limits on Congress's Authority To Investigate the President*, 2004 U. Ill. L. Rev. 781, 786 (2004). In connection with a later investigation into the Jay Treaty, President Washington likewise acknowledged that production of papers "could be required of him by either House of Congress as a right." 5 Annals of Cong. 400-01, 759-60 (1796).

Although the Solicitor General points out that Thomas Jefferson later maintained, while he was President, that the President was immune from judicial process, *see* DOJ Br. 14 (citing *Nixon v. Fitzgerald*, 457 U.S. 731, 750 n.31 (1982)), it fails to mention that Chief Justice Marshall rejected Jefferson's position and squarely held that a subpoena *duces tecum* may be issued to the President. *See United States v. Burr*, 25 F. Cas. 30, 34-35 (C.C.D. Va. 1807). This Court has "unequivocally and emphatically endorsed Marshall's

position." *Clinton v. Jones*, 520 U.S. 681, 704 (1997); *see United States v. Nixon*, 418 U.S. 683, 706 (1974).

In the centuries since, Congress has continued to investigate the conduct of the Executive Branch, including the President specifically. *See, e.g.*, H.R. Rep. No. 22-502 (1832) (authorizing inquiry into whether former Secretary of War John Eaton had fraudulently awarded a contract, and "whether the President of the United States had any knowledge of such attempted fraud, and whether he disapproved or approved of the same"). The long list of such investigations includes Watergate, Iran-Contra, Whitewater, and the Teapot Dome scandal.

The aftermath of many of these investigations illustrates the fallacy in President Trump's assertion that examining past wrongs is "law enforcement" rather than proper legislative inquiry. Pet. Br. 36-45. Facts uncovered in congressional investigations have informed, and in some cases prompted, many important legislative reforms. For example, after a congressional investigation exposed pervasive Executive Branch corruption in the Teapot Dome scandal, Congress enacted remedial legislation including the Revenue Act of 1924 and the Federal Corrupt Practices Act of 1925. After Watergate, Congress passed far-reaching reforms—including the Ethics in Government Act, the Congressional Budget and Impoundment Control Act of 1974, the War Powers Resolution, and the Foreign Intelligence Surveillance Act—to address problems identified in the Watergate investigation. Michael A. Fitts, *The Legalization of the Presidency: A Twenty-Five Year Watergate Retrospective*, 43 St. Louis Univ. Law J. 725, 726 (1999). Thus, investigations into past wrongdoing of the President and his associates,

initiated outside of any impeachment proceeding, have led to and informed substantial legislation that imposed rule-of-law principles on the Presidency. *See Nixon v. Administrator of General Services*, 433 U.S. 425, 453 (1977) (recognizing that Congress "need[ed] to understand how [American] political processes had in fact operated" during this period "in order to gauge the necessity for remedial legislation").

Presidents generally have continued to recognize Congress's legitimate investigative authority. While Presidents have negotiated with Congress to reach accommodations protecting their legitimate interests—and have, on occasion, gone to court to assert claims of executive privilege—they have never asserted anything like the sweeping blanket immunity that President Trump claims in this case.

Overall, then, the history of congressional investigations of Presidents since Washington strongly supports Congress's authority to demand information from the President and refutes his suggestions that Congress has little or no authority to issue such demands. Although the President characterizes this history as reflecting "congressional avoidance of the practice" of subpoenaing the President, Pet. Br. 31 (citation omitted), Presidents have long acquiesced to Congress's investigative demands even absent compulsory process. If the President were correct that he has—and that his office requires that he have—immunity from such demands by virtue of his status as President, it is inconceivable that such protection would be discovered only now, after more than two centuries of presidential accommodation of the congressional investigative and oversight process. By the same token, the historical record provides no reason to fear

an avalanche of illegitimate subpoenas motivated by partisan political considerations; no reason to fear that subpoenas will disrupt the function of the Executive Branch; and no reason to assume that Congress will be unwilling to accommodate legitimate concerns regarding privileged or sensitive information. If none of these abuses have come to pass in more than 200 years, there is no basis to believe that declining to block the subpoenas here will have that effect.

II. Congress's Authority to Investigate is Subject to Appropriate Constraints That Adequately Protect the Legitimate Interests of the President and Other Persons.

The authority of Congress to investigate, while broad, is subject to well-established legal limits. The relevant case law respects Congress's legitimate need for information while protecting individual liberties and privileges. When the individual at issue is the President, courts also respect and take into account the President's responsibilities and the legitimate interests of his office, including any claim of executive privilege. President Trump offers no reason why these traditional rules are not sufficient. Instead, he conjures hypothetical investigative demands not before the Court. The fact that he can point to no actual abuse, and has to rely instead on speculation is itself telling. But even as to his hypotheticals, the existing rules are sufficient to forestall abuse and to ensure that all legitimate interests are protected.

A. Congressional Investigations are Subject to Scope and Relevancy Limits, and May Be Required to Yield to Legitimate Privileges and Protected Interests.

All congressional investigations are subject to judicially enforceable constraints. First, no congressional inquiry may be maintained without a "valid legislative purpose." *Eastland*, 421 U.S. at 497. Congress may investigate only those subjects "on which legislation may be had," *id.* at 508, and may not supplant either of the other branches in their exclusive functions, *see Watkins*, 354 U.S. at 187; *Barenblatt*, 360 U.S. at 111-12; *see, e.g.*, *Kilbourn v. Thompson*, 103 U.S. 168, 194-95 (1880). Congress's power to investigate is "co-extensive with [its] power to legislate," and cannot be extended to an area in which legislation is forbidden. *Quinn*, 349 U.S. at 160-61.

Second, Congress may use compulsory process only insofar as it is "calculated to elicit" information that would be relevant to, and therefore would "materially aid[]," a legitimate investigation. *McGrain*, 273 U.S. at 177. For example, Congress may not, in the name of informing itself or the public, subpoena information if "the predominant result" of obtaining it "can only be an invasion of the private rights of individuals." *Watkins*, 354 U.S. at 200.

Third, Congress's investigative powers, like other forms of governmental action, are limited by the Bill of Rights and otherwise applicable privileges and rights. *See, e.g.*, *id.* at 198 (recognizing "the restraints of the Bill of Rights upon congressional investigations"). Courts have intervened to vindicate

the rights of subjects of congressional investigations under the First Amendment, *see, e.g.*, *United States v. Rumely*, 345 U.S. 41, 48 (1953), the Fourth Amendment, *see, e.g.*, *United States v. McSurely*, 473 F.2d 1178, 1193 (D.C. Cir. 1972), and the Fifth Amendment, *see, e.g.*, *Watkins*, 354 U.S. at 215; *Quinn*, 349 U.S. at 163-65.

These constraints protect the liberties and constitutional interests of all citizens, including the President, and prevent abuses of authority by congressional investigators. President Trump suggests that unless this Court grants him the extraordinary protection from congressional investigation that he demands, Congress could subpoena his "high school transcripts in service of an investigation into K-12 education," or "his medical records as part of an investigation into public health." Pet. Br. 51-52 (quoting Pet. App. 43a); *see also* DOJ Br. 20. But in fact, under this Court's precedent it is difficult to imagine a circumstance under which Congress could permissibly subpoena *any* individual's high school transcripts or medical records for such purposes. Absent a particularized showing, such evidence would not be relevant, and such a subpoena would not be "calculated to" "materially aid[]" a congressional investigation of those topics. *McGrain*, 273 U.S. at 177. Congress cannot enforce a subpoena if the effect of such enforcement "can only be" to invade the private rights of individuals. *Watkins*, 354 U.S. at 200. That the President has to strain for such fanciful hypotheticals only underscores that while Congress's investigative authority is as old as Congress itself, it has never pressed such outlandish investigative demands on any President. And the D.C. Circuit, whose judgment the President seeks

here to overturn, indicated that it would *reject* such subpoenas on relevancy grounds. Pet. App. 43a.

B. The President and Other Executive Branch Officials Are Appropriately Protected by These Doctrines.

All the protections discussed above apply when the President is the subject of a congressional investigation or subpoena. Moreover, just as courts managing civil litigation involving the President must conduct the proceedings—including the timing and scope of discovery—in light of "[t]he high respect that is owed to the office of the Chief Executive," *Clinton*, 520 U.S. at 707, Congress must also respect the legitimate interests of the Presidency, and courts are available to ensure that it does. The long history of negotiations between Congress and the President regarding the timing and scope of disclosures by the Executive strongly suggests that congressional investigative demands generally do not impose an inordinate burden on those interests, particularly relative to Congress's own considerable interests. *See Anderson v. Dunn*, 19 U.S. 204, 226 (1821) ("[I]f there is one maxim which necessarily rides over all others, in the practical application of government, it is, that the public functionaries must be left at liberty to exercise the powers which the people have intrusted to them."); Neal Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal—Do Nothing*, 48 Admin. L. Rev. 109, 116 (1996) (discussing long history of executive cooperation with congressional demands for information).

Furthermore, the President has the right to object to particular subpoenas or to argue that they should be narrowed on the basis of any particular burdens

they impose on his conduct of his office. Courts recognize that the President has legitimate interests, for example, in avoiding time-consuming compliance burdens that distract from his public duties, *see, e.g.*, *Clinton*, 520 U.S. at 697-99, and in protecting certain Executive Branch confidentiality interests, *see, e.g.*, *Nixon*, 418 U.S. at 705. In appropriate circumstances, the President is entitled to consideration of these interests even without raising a claim of executive privilege. *See Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 389 (2004). But of course the President also may invoke that privilege where appropriate, providing an additional safeguard for the legitimate interests he holds in his office.

In this case, executive privilege obviously cannot be invoked because the information Congress seeks (which largely predates the Trump presidency) does not implicate it. Indeed, President Trump makes no specific showing that the subpoenas at issue would impinge in any way on the legitimate interests of his office. To the contrary, he all but concedes that his concern is not the subpoenas that are actually at issue in this case but rather "*potential additional [subpoenas] that an affirmance of the Court of Appeals judgment might spawn*." Pet. Br. 64 (emphasis and alterations in Petitioners' brief). But the mere fact that "the power of inquiry . . . may be abusively and oppressively exerted . . . 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." *McGrain*, 273 U.S. at 175-76.

The President argues broadly that the protections applicable to every other citizen "will not do when Congress seeks the President's records," and that the status of his office *ipso facto* requires Congress to make a greater showing to subpoena his records, if Congress can subpoena them at all. Pet. Br. 53. No authority supports this argument. Nor does any authority support the President's claim that the showing Congress must make to *overcome* a claim of executive privilege—a "demonstrated, specific need"—is somehow also required when the President asserts no privileged communications whatsoever. *Id.* (citation omitted); *see also* DOJ Br. 8.

In short, the President has offered no persuasive reason why this Court's existing safeguards are not adequate to protect the President's legitimate public and private interests, especially in the circumstances of this case. This Court should adhere to the principles it has developed over the course of our nation's history, which sufficiently protect the legitimate interests of the President and other persons subject to Congress's investigatory powers, while simultaneously recognizing the legitimate authority of a coequal branch to conduct its business informed by appropriate fact-finding.

III. The President's Argument for Sweeping Immunity Lacks Any Justification and Would Endanger the Separation of Powers.

Under this Court's separation of powers jurisprudence it is the President's immunity claim, not Congress's exercise of investigative power, that requires special justification. President Trump offers none. Moreover, the immunity he seeks would pose

substantial danger to the separation of powers, which requires appropriate oversight of the President. Indeed, this Court has deemed other mechanisms of presidential oversight unnecessary precisely in light of the congressional investigatory tools that the President's claim of immunity would substantially weaken.

A. Under This Court's Jurisprudence, the President's Assertion of Immunity Requires a Justification He Has Not Provided.

As a general matter, the law disfavors immunities for government officials—due in part to "the undeniable tension between official immunities and the ideal of the rule of law"—and so places the burden on the party seeking an immunity to justify its need. *Forrester v. White*, 484 U.S. 219, 223 (1988). Any presidential immunity, like that of other officials, "must be related closely to the immunity's justifying purposes." *See Fitzgerald*, 457 U.S. at 755. Thus, for example, contrary to the Solicitor General's characterization, *see* DOJ Br. 14, *Fitzgerald* did not recognize broad presidential immunity from the actions of coordinate branches. Rather, *Fitzgerald* "merely precludes a particular private remedy," namely damages, and only for the President's official actions. 457 U.S. at 758.

That remedy, of course, is not implicated here, nor are the President's official actions. The Court has never even "suggested that the President, or any other official, has an immunity that extends beyond the scope of any action taken in an official capacity." *Clinton*, 520 U.S. at 694. Even where the Court has recognized a presidential immunity for official acts, it

has been careful to grant only such immunity as was necessary based on "the nature of the function performed, not the identity of the actor who performed it." *Id.* at 694-95 (citation omitted). Additionally, where one branch claims a right to exemption from the other branch's procedures, the Court's analysis must take into account the legitimate needs of both branches. *Nixon*, 418 U.S. at 707.

This principle is so important that this Court has construed as limited even those official privileges and immunities that the constitutional text expressly provides. *See, e.g.*, *Hutchinson v. Proxmire*, 443 U.S. 111, 127 (1979); *Gravel v. United States*, 408 U.S. 606, 626-27 (1972) (holding that Speech or Debate Clause provides only a limited immunity that did not excuse U.S. Senator's aide from testifying before grand jury regarding Senator's alleged arrangement for private publication of classified documents). In *Proxmire*, the Court reasoned that the immunity provided by the Speech or Debate Clause was intended to protect legislative independence, not supremacy, and any attempt to claim immunity that goes beyond what is needed to preserve that independence is an abuse of the law. 443 U.S. at 126-27.

The President's assertion of immunity in this case transgresses these principles. Here, as in *Clinton*, the President's official conduct is not the subject of the information sought. "The litigation of questions that relate entirely to the unofficial conduct of the individual who happens to be the President poses no perceptible risk of misallocation of either judicial power or executive power," and this Court has never recognized an immunity in any such context.

Clinton, 520 U.S. at 694, 701. The President's assertion of immunity is even more extreme here because he claims the right even to bar third parties from disclosing his information to Congress. If such a claim of implied immunity could be justified, it would require a justification closely related to a specific presidential function, and its value would have to be weighed against Congress's investigative interest. *See id.* at 694-95; *Nixon*, 418 U.S. at 707. Instead, the President has offered only abstract, hypothetical, generalized interests tied to his identity as the President rather than any particular function of his office. This cannot suffice.

B. The President's Asserted Immunity Would Directly Undermine the Separation of Powers.

The President's claimed immunity also should be rejected because it would substantially interfere with Congress's constitutional authority—and indeed, responsibility—to carry out appropriate oversight of the Executive Branch.

The separation of powers does not contemplate branches that are hermetically sealed off from one another. *See, e.g.*, *Loving v. United States*, 517 U.S. 748, 756 (1996). As James Madison explained, "separation of powers does not mean that the branches 'ought to have no *partial agency* in, or no *controul* over the acts of each other.'" *Clinton*, 520 U.S. at 703 (quoting The Federalist No. 47 (James Madison)). To the contrary, the Constitution depends upon the branches of government acting upon one another in appropriate ways. *See, e.g.*, *Mistretta v. United States*, 488 U.S. 361, 381 (1989) (the Constitution "imposes upon the Branches a degree of

overlapping responsibility, a duty of interdependence as well as independence"). The President's hyperbolic claims that any congressional action to require disclosure by the President would impermissibly "exercise dominion and control over the Office of the President" and "alter the basic structure of the Federal government," Pet. Br. 47, thus misunderstand the structure of our government. *See, e.g.*, *Fitzgerald*, 457 U.S. at 753-54 ("It is settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States.").

Furthermore, maintaining the separation of powers envisioned by the Constitution requires adherence to the fundamental principle that the President must be subject to continuing scrutiny. Contrary to the Solicitor General's suggestion, DOJ Br. 17-18, the Framers (who had fought a war to free themselves of rule by a King) expressed deep concern about the risk of an imperial Executive—and the President's authority has only grown over time. *See generally* Martin S. Flaherty, *The Most Dangerous Branch*, 105 Yale L.J. 1725 (1996). As this Court noted in *Clinton v. Jones*, James Wilson argued at the Constitutional Convention that although the President is "placed [on] high," the danger of his position was minimized by the fact that "not a single privilege is annexed to his character; far from being above the laws, he is amenable to them in his private character as a citizen, and in his public character by impeachment." 520 U.S. at 696 (quoting 2 J. Elliot, *Debates on the Federal Constitution* 480 (2d ed. 1863)). The special exemption from the ordinary operation of the laws that the President seeks here in his private character as a citizen would contravene that principle and directly imperil Congress's ability to engage in

oversight of the President's ability to carry out his public office.

Indeed, a core premise of the President's and the Solicitor General's argument—that Congress should have *less* authority to investigate the President than to investigate the affairs of private citizens—gets it exactly backward. When it comes to scrutiny of their activities, elected officials generally have fewer privileges than ordinary citizens. *See, e.g.*, *New York Times v. Sullivan*, 376 U.S. 254, 279-83 (1964); *see also Nixon v. Administrator*, 433 U.S. at 465 (citing President Nixon's "status as a public figure" against his constitutional challenge to the Presidential Records Act on privacy grounds). That is because the public has a right, grounded in the First Amendment and the very structure of representative democracy, to know about the workings of its government. The First Amendment was grounded in the struggle "to establish and preserve the right of the English people to full information in respect of the doings or misdoings of their government." *Grosjean v. American Press Company*, 297 U.S. 233, 247 (1936); *see also Sullivan*, 376 U.S. at 297 (Black, J., concurring) ("[A] representative democracy ceases to exist the moment that the public functionaries are by any means absolved from their responsibility to their constituents." (citation omitted)).

The Framers of our Constitution, and American leaders throughout our history, have emphasized that our democracy and ultimately our liberty depend on a citizenry that is well-informed about the activities of its officers. As James Madison explained:

> Should it happen, as the Constitution supposes it may happen, that either of [the political] branches of the government may not have duly

> discharged its trust, it is natural and proper, that, according to the cause and degree of their faults, they should be brought into contempt or disrepute, and incur the hatred of the people. . . . Whether it has, in any case, happened that the proceedings of either or all of those branches evince such a violation of duty as to justify a contempt, a disrepute, or hatred among the people, can only be determined by a free examination thereof, and a free communication among the people thereon.

James Madison, *Report on the Virginia Resolutions* (1799-1800). *See also, e.g.*, 3 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 169-70 (1881) (Patrick Henry: "The liberties of a people never were, nor ever will be, secure, when the transactions of their rulers may be concealed from them."); Letter from Thomas Jefferson to Charles Yancey (Jan. 6, 1816), in 11 *Works of Thomas Jefferson* 497 (Ford ed. 1905) ("If a nation expects to be ignorant and free, in a state of civilization, it expects what never was and never will be."); Woodrow Wilson, *Congressional Government: A Study in American Politics* 303 (1885) (emphasizing the importance of Congress's investigative power and informing function because "the only really self-governing people is that people which discusses and interrogates its administration").

Thus, the fact that the President is the President *supports* congressional and public scrutiny of his activities. *See, e.g.*, *Kilbourn*, 103 U.S. at 195 (where Congress has no ability to affect the subject of an investigation by legislation, the House does not have authority to investigate "the private affairs of

individuals *who hold no office under the government*" (emphasis added)). The Solicitor General emphasizes the President's "vast and vital public responsibilities," DOJ Br. 13-14; but the scope and importance of those responsibilities is all the more reason to ensure that the public's representatives in Congress have the necessary authority to carry out effective oversight. *See, e.g.*, *Pennekamp v. Florida*, 328 U.S. 331, 355 (1946) (Frankfurter, J., concurring) ("Power in a democracy implies responsibility in its exercise."). That is especially true where, as here, there is no reason to believe, and the President makes no meaningful argument, that the particular exercise of congressional oversight at issue would interfere with his responsibilities in any way.

Congress has a constitutionally prescribed role and duty to engage in legislative action, aided by its investigative authority. Congress's capacity for vigorous independent exercise of its constitutional powers—including its powers to enact legislation, appropriate (or deny) funds, authorize various Executive Branch activities, and impeach—is essential to checking the powers vested in the President. Congress cannot effectively carry out this crucial oversight role if it cannot inform itself, and in appropriate circumstances the public, of facts that may bear on the President's performance of his duties. That is why this Court has described Congress's "informing function" as "indispensable" and "not to be minimized." *Rumely*, 345 U.S. at 43; *see also Watkins*, 354 U.S. at 200 n.33 (Congress may "inquire into and publicize," *inter alia*, "corruption, maladministration or inefficiency in agencies of the Government"); Brett M. Kavanaugh, *The President and the Independent Counsel*, 86 Geo. L.J. 2133, 2144 n.40 (1998) ("Congressional investigations

historically have been the primary manner in which the public learns whether executive branch officials have committed malfeasance in office.").

Scholars likewise have emphasized the importance of this function. *See, e.g.*, Marshall, *supra*, at 799 ("Congress's power to investigate plays a critical role in the checks and balances of U.S. democracy" by serving to deter "officials from acting in their own, and not in the nation's, best interests"); Arthur M. Schlesinger, Jr., *Introduction* to *Congress Investigates: 1792-1974*, at xi, xii (Arthur M. Schlesinger, Jr. & Roger Bruns eds., 1975) ("The investigative power may indeed be the sharpest legislative weapon against Executive aggrandizement."); Bernard Schwartz, *Executive Privilege and Congressional Investigatory Power*, 47 Cal. L. Rev. 3, 47 (1959) ("It is no overstatement to say that vigorous employment by the Congress of its investigatory power is essential to the preservation of our representative democracy.").

In the same vein, this Court has emphasized Congress's ability to provide vigorous oversight in holding that *other* potential checks on the President were not necessary to maintaining the separation of powers. In *Fitzgerald*, for example, the Court explained that granting the President absolute immunity from civil damages for actions taken in his official capacity would not leave the nation unprotected from presidential misconduct in part because among the "checks" to which the President is subject to a *greater* degree than "other executive officials" is "[v]igilant oversight by Congress," which "may serve to deter Presidential abuses of office, as well as to make credible the threat of impeachment." 457 U.S. at 757. And before joining the Court,

Justice Kavanaugh noted that under the Constitution, "Congress alone is directly responsible for overseeing the conduct of the President of the United States" and that "[t]he Constitution itself seems to dictate . . . that congressional investigation must take place in lieu of criminal investigation when the President is the subject of investigation." Kavanaugh, *supra*, at 2158, 2178; *see also* Brett M. Kavanaugh, *First Let Congress Do Its Job*, Wash. Post, Feb. 26, 1999 (arguing that Congress should let the independent counsel statute lapse in part because the statute allowed Congress "to avoid its own investigative and oversight responsibilities and thereby avoid (or at least defer) responsibility for unpopular or politically divisive investigations"). If the Court were to hold now that the President has broad immunity from congressional investigations, it would leave the President dangerously unconstrained.

IV. The Subpoenas at Issue in This Case Are Well Within the Investigative Authority of the House of Representatives.

For all the reasons addressed above, the Court should reject President Trump's effort to deny Congress its traditional investigatory power and should reaffirm existing standards for evaluating congressional investigatory demands. Under any reasonable view of Congress's investigative authority, the subpoenas at issue here are valid.

First, the information sought by the subpoenas is relevant to multiple subjects "on which legislation may be had," *Eastland*, 421 U.S. at 508, without exceeding Congress's "potential power to enact and appropriate under the Constitution," *Barenblatt*, 360

U.S. at 111. Based on its review of the materials subpoenaed, Congress may determine, for example, whether any changes are needed to financial disclosure laws that apply to the President, and whether any reforms—including potential changes in funding through the appropriations process—are needed to the Office of Government Ethics. The House already has passed legislation to make changes along these lines, and other such bills are pending. Pet. App. 30a-31a. Congress also has a legitimate interest in investigating the risk of the President or his associates being compromised by any foreign actor in order to determine whether any reforms are needed to address such threats, including in the form of new or amended legislation or changes through the appropriations process.

The President resists this conclusion by contesting Congress's constitutional authority to pass any relevant legislation that might apply to him, even if it merely required disclosure. *See* Pet. Br. 45-51. But that extraordinary argument would sweep aside a vast range of federal legislation, including the existing presidential disclosure provisions of the Ethics in Government Act. It also would invalidate, or seriously threaten, the Presidential Records Act, which this Court has upheld with specific reference to Congress's investigative power. *See Nixon v. Administrator*, 433 U.S. at 452-53. The President's argument, by its terms, also appears to threaten virtually any legislative regulation of the President's exercise of his authorities under the Constitution, such as his power to authorize covert actions or command the military. But Congress extensively regulates and oversees the President's superintendence of the intelligence community and has long regulated the military as well. The Court

should decline the President's invitation to reach out and invalidate broad swaths of both existing law and potential legislation.

President Trump also contends that this Court should presume, and then find, that Congress's stated purposes for issuing the subpoenas at issue here are pretextual and that the real reasons are illegitimate. *See* Pet. Br. 44-45. That approach would offend the separation of powers and is contrary to this Court's precedent. The Court "generally take[s] at face value the Senate's own report of its actions," *NLRB v. Noel Canning*, 573 U.S. 513, 551 (2014), and the same is true of the House. *See, e.g.*, *Marshall Field & Co. v. Clark*, 143 U.S. 649, 672 (1892); *United States v. Ballin*, 144 U.S. 1, 4 (1892). In particular, the Court generally has deferred to congressional investigators regarding the purpose of their investigations, presuming that Congress investigates legitimately and in good faith regardless of the fact that—as is often the case—investigations have the potential to uncover wrongdoing, even of a criminal nature. *See, e.g.*, *Eastland*, 421 U.S. at 508; *Wilkinson v. United States*, 365 U.S. 399, 412 (1961); *Barenblatt*, 360 U.S. at 132; *McGrain*, 273 U.S. at 179-80.

This deferential approach not only safeguards Congress's role in the separation of powers but also respects important limits on the Court's role by avoiding, as much as possible, both a necessarily subjective assessment of the motives of a multi-member body, and the issuance of preemptive advisory opinions declaring illegitimate wide swaths of potential congressional legislation, without any specific law before the Court. An overly expansive view of courts' authority to second-guess Congress's

motives in facially legitimate exercises of investigative authority would risk creating "a self-operating restraint on congressional inquiry." *Hutcheson v. United States*, 369 U.S. 599, 613 n.16 (1962) (plurality opinion); *see also Nashville, Chattanooga & St. Louis Railway v. Wallace*, 288 U.S. 249, 262 (1933) (courts may not make "abstract determination[s] . . . of the validity of a statute" or issue "decision[s] advising what the law would be on an uncertain or hypothetical state of facts"). To determine that Congress is acting without any legitimate basis, the Court would have to assess—and reject—an almost limitless range of potential legislation as beyond Congress's constitutional authority, in the absence of any specific law to assess.

The deferential approach also avoids requiring courts to engage in the impossible line-drawing task that the President's asserted distinction between legislative investigation and "law enforcement" would entail.[3] As the Court has recognized, because lawmaking requires understanding where problems exist, and where existing legal strictures are inadequate, pursuing investigations in aid of legislation does often require looking into past and present wrongdoing. *See, e.g.*, *Watkins*, 354 U.S. at 187 (Congress's "broad" investigative power encompasses, *inter alia*, "surveys of defects in our social, economic or political system for the purpose of

[3] To be sure, were Congress to engage in an investigation purely for the purpose of obtaining information to pass on to a prosecutor, its actions would be illegitimate. But because virtually any potentially illegal conduct can give rise to *both* law enforcement by the Executive Branch and oversight and statutory reform by Congress, the President's invitation to treat these as mutually exclusive makes no sense.

enabling the Congress to remedy them," and "probes into departments of the Federal Government to expose corruption, inefficiency or waste."). Additionally, the deferential approach affords to a coequal branch of government the approach the Court has adopted for the President in generally taking at face value his stated reason for his actions. *See, e.g.*, *Trump v. Hawaii*, 138 S. Ct. 2392, 2419 (2018).[4]

Considering the functional analysis this Court has employed in analyzing presidential immunity claims, *see, e.g.*, *Fitzgerald*, 457 U.S. at 749, it is important that the President can assert no specific privilege and identify no specific harm to the functioning of the Executive Branch that would result from the disclosure to Congress of the materials sought here. The documents sought do not implicate the President's confidential communications with his advisors. Because discovery is sought from third parties, the President does not personally have to do

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[4] The Solicitor General likewise argues that the Court should do otherwise in this case, relying on *Kilbourn*. But in that case, the Court repeatedly emphasized that "no suggestion ha[d] been made" of what legislation Congress might conceivably enact based on the investigation at issue. 103 U.S. at 194-95. Absent such suggestion, the Court held that Congress has no authority "to enter upon this investigation into the private affairs of individuals *who hold no office under the government*." *Id.* at 195 (emphasis added); *see also Hutcheson*, 369 U.S. at 613 n.16 (Brennan, J., concurring) (observing that *Kilbourn* "[a]t most" stands 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'"). Here, by contrast, a wide range of potential legislation (and legislation already under consideration by Congress) is readily identifiable, and Congress is exercising oversight of the President, not a wholly private person.

anything to comply with the subpoenas, so there is no reason to fear distraction from the duties of the office. And the interest in protecting the Presidency is further attenuated in light of the fact that all of the information sought concerns his conduct outside of office, and that much of it predates President Trump's time in office altogether. *See Clinton*, 520 U.S. at 692-95.

By contrast, the intrusion into legitimate presidential interests involved in *Clinton v. Jones* was far greater. In that case, President Clinton argued that allowing Paula Jones's civil suit to go forward while he was in office would interfere with his ability to carry out his public responsibilities. *See Clinton*, 520 U.S. at 697-98. In unanimously holding nevertheless that the case would not be stayed while the President was in office, the Court noted that in other cases Presidents had responded to written interrogatories, given depositions, and provided videotaped trial testimony. *See id.* at 704-05. Here, by contrast, President Trump need take no action at all in response to the subpoenas.

Because, as in *Clinton v. Jones*, the President's unofficial conduct is at issue, the interest in protecting the confidentiality of official communications is not a factor. Notably, however, during the Clinton administration, courts refused to recognize a protective-function privilege for Secret Service agents assigned to the President, *see In re Sealed Case*, 148 F.3d 1073, 1079 (D.C. Cir.), *cert. denied*, 119 S. Ct. 461 (1998), and rejected an asserted privilege for certain Executive Office communications by Deputy White House Counsel Bruce Lindsey, *see In re Lindsey*, 158 F.3d 1263, 1282-83 (D.C. Cir.), *cert. denied*, 525 U.S. 996 (1998).

In those cases, unlike here, the President's interest in confidential official communications *was* at issue—and the disruption to the President's office was far greater than that posed by the third-party compliance sought here. At the same time, the public interest in the *congressional* investigation at issue here surely is no less weighty than that at stake in the *private* civil suit against President Clinton.

Finally, the fact that the House has the sole power of impeachment strengthens its authority to investigate presidential misconduct—and does not, as the President suggests, create an impeachment-inquiry precondition to Congress's use of its investigative power. The House must be able to investigate to inform its exercise or non-exercise of all its powers. *See, e.g.*, *Barenblatt*, 360 U.S. at 111. To require the House to open an impeachment inquiry in order to conduct oversight over the President that may well lead only to legislation or appropriations responses would serve only to encourage (if not necessitate) the use of such inquiries, which would diminish the Presidency, cheapen the impeachment power, and confuse the public.

* * *

In 1973, during hearings of the Senate Select Committee on Presidential Campaign Activities, Senator Howard Baker asked one of the most famous questions in American history: "What did the President know, and when did he know it?" Congress's effort to find the answer to that question ultimately led not only to the commencement of impeachment proceedings the following year but also to a raft of new reform legislation intended to protect Congress and the public from excessive executive power. Now, the President—in his personal

capacity—comes before the Court asking it to roll back its precedents from that era and since; to declare that post-Watergate legislation unlawful as applied to him; and to declare that at the time Senator Baker asked his famous question, Congress had no right to know the answer. That result would be contrary to American values, history, and law. This Court should reject it.

CONCLUSION

For the foregoing reasons, the judgments of the courts of appeals below should be affirmed.

March 4, 2020

Respectfully submitted,

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