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.

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Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SECOND AND DISTRICT OF COLUMBIA CIRCUITS

BRIEF FOR AMICI CURIAE CONGRESSIONAL SCHOLARS SUPPORTING RESPONDENTS

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BRIEF FOR AMICI CURIAE CONGRESSIONAL SCHOLARS SUPPORTING RESPONDENTS

INTERESTS OF AMICI CURIAE

Amici are scholars and historians of Congress who believe that flexible congressional investigations are necessary to gather facts for legislation, prevent and redress official misconduct, and preserve the separation of powers.*

* As required by Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than

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SUMMARY OF ARGUMENT

Although not advanced by petitioners or the United States, the dissent in *Mazars* would have adopted a categorical rule: "[A]llegations of illegal conduct against the

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amici and their counsel made a monetary contribution to its preparation or submission. All parties have provided blanket consent for the filing of amici curiae briefs or filed letters of nonparticipation in this litigation.

President cannot be investigated by Congress except through impeachment." Pet. App. 83a. Thus, maintains the dissent, "[w]hen Congress seeks information about the President's wrongdoing, it does not matter whether the investigation also has a legislative purpose." *Id.* at 77a. This proposed rule, moreover, would apply equally to impeachable officials other than the President, as the dissent appears to acknowledge. See Pet. App. 83a ("Impeachment provides the exclusive method for Congress to investigate accusations of illegal conduct by impeachable officials, particularly with the aid of compulsory process.").

This proposed rule is unprecedented—this Court has already explained that Congress's power to investigate is "co-extensive with [its] power to legislate." *Quinn* v. *United States*, 349 U.S. 155, 160 (1955). It contradicts the Constitution's text—the Impeachment Clause invokes "high crimes and misdemeanors," not each and every legal violation, no matter how minor. It would encourage premature impeachment inquiries—wasting congressional resources and putting more pressure on countless executive officials. And it would, paradoxically, mean that Congress has the least power to investigate legislation when needed to address the most serious harms—forcing legislative inquiries to "grind to a halt whenever responses to its inquiries might potentially be harmful to a witness in some distinct proceeding, or when crime or wrongdoing is disclosed." *Hutcheson* v. *United States*, 369 U.S. 599, 618 (1962) (quotation marks omitted).

To support this proposed approach, the *Mazars* dissent looks mostly to history. But history, from the Founding era onward, points in the opposite direction. For centuries, Congress has investigated serious misconduct by impeachable officials—and has subpoenaed documents and testimony from and about those officials—without in-

itiating formal impeachment proceedings. Legislative investigations have covered allegations of serious misconduct (including Teapot Dome, Iran-Contra, and Whitewater); and have reached Presidents (including Jackson, Buchanan, and Reagan), a Vice President, and Cabinet officials (including Treasury Secretary Alexander Hamilton). As detailed below, Congress has conducted these investigations without convening impeachment proceedings. And despite efforts to revise or reinterpret them, the nature and scope of these legislative investigations into serious misconduct by impeachable officials is documented by contemporaneous records.

The *Mazars* dissent does identify other examples in which information was withheld or in which Congress was otherwise rebuffed. But those involved specific privileges (like executive privilege); core individual liberties (like the Fifth Amendment protection against self-incrimination); objections to an underlying lack of legislative nexus or requests beyond the investigation's express scope; concerns about publicizing national-security secrets; or other intra- or inter-branch disputes over procedure.

None of those examples, however, document or reflect a limit on Congress's authority to investigate coextensively with its power to legislate. And nothing otherwise suggests that when confronted with possible misconduct, Congress should be forced to choose between impeachment proceedings or nothing at all.

ARGUMENT

I. Founding-era Congresses investigated impeachable officials without starting impeachment proceedings.

The rule proposed by the *Mazars* dissent is undermined by Congresses from the Founding era. Several

times, the Founding-era Congresses subpoenaed documents and testimony from and about impeachable officials without impeaching them.

A. After a bungled military expedition, Congress investigates George Washington's Secretary of War.

Soon after the Constitution was ratified, Congress began investigating the failure of a disastrous military campaign led by Major General Arthur St. Clair. 3 Annals of Cong. 493 (1792). Unaccompanied by impeachment proceedings, the investigation looked into possible misconduct of specific officials—including the Secretary of War.

The *Mazars* dissent claims that this investigation did not "single out" individuals. Pet. App. 88a. Instead, the dissent suggests that the inquiry sought "to study the problems of execution in the expedition as a whole," and argues that it "did not focus on General St. Clair." *Id.* at 102a. But from the start, "suspicions were entertained that blame lay somewhere." 3 Annals of Cong. 904 (1793). And Congress pointed fingers: The "principal parties" under investigation included General St. Clair and Secretary of War Henry Knox—a member of Washington's cabinet and an impeachable official. 1 *Congress Investigates: A Critical and Documentary History* 9 (Roger A. Bruns et al. eds., rev. ed. 2011) ("*Congress Investigates*").

This was not lost on President Washington, who shared with General St. Clair his "hope [that] an opportunity would thereby be afforded you, of explaining your conduct, in a manner satisfactory to the public and yourself." Letter from George Washington to Arthur St. Clair (April 4, 1792), *in* 10 *The Papers of George Washington* 218 (Robert F. Haggard & Mark A. Mastromarino eds., 2002). General St. Clair, in turn, thought that the committee intended to "discover some cause of complaint against [the Secretary of War,] General Knox." *Congress Investigates*, *supra*, at 10.

Congress was hardly subtle. From the beginning, Congress noted that the inquiry would likely discovery impeachable acts. See 3 Annals of Cong. 490 (1792) (statement of Rep. Vining) ("He was in favor of a full and complete investigation of the subject; and, if there has been any deficiency, let those who are to blame be impeached."); *id.* at 491 (statement of Rep. Steele) (similar). Yet even though Congress believed that the Secretary of War—along with other "officers who are immediately under the control of the Executive," *ibid.*— may have committed impeachable offenses, the committee never began impeachment proceedings nor invoked impeachment power. Instead, Congress commissioned an investigation, empowering a committee to "to call for such persons, papers, and records, as may be necessary to assist [its] inquiries." Pet. App. 90a (quoting 3 Annals of Cong. 493 (1792)).

During this investigation, the investigated parties—including the War Department led by Secretary Knox—produced documents to the committee. Disputes arose, but not over Congress's underlying investigative authority. Instead, President Washington objected to the scope of the requests, and vowed to direct the War Department to withhold documents that would "injure the public"; in response, the committee limited its request to documents that were "public." *Congress Investigates*, *supra*, at 10; *History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress*, 6 Op. O.L.C. 751, 752 (1982). In the end, "no records were withheld." *Congress Investigates*, *supra*, at 9.

After receiving these documents, Congress continued to investigate; again, it did so without instituting impeachment proceedings. Congress also heard testimony from General St. Clair and others involved in the incident, and then issued a report excoriating Secretary Knox. H.R.

Rep. No. 5, at 1 (1792) ("It appears from the correspondence * * * [to] the Secretary of War [that] repeated complaints were made of fatal mismanagements and neglects."); see also *Congress Investigates*, *supra*, at 10. Then, Secretary Knox asked to rebut the report, and the House reopened the investigation. *Id.* at 12. After investigating even more, Congress issued a new report, which was softer on Secretary Knox and which did not recommend action against any official. See *id.* at 13–14.

Had the Second Congress understood its investigative powers the same way that the *Mazars* dissent does now, the House would have bypassed its critical but more generalized inquiry into the disaster, and instead—due to unconfirmed and ultimately unsubstantiated suspicions that impeachable conduct had caused the expedition to fail—would have needlessly sparked the nation's first impeachment inquiry.

B. Congress investigates the Washington administration's negotiation of the Jay Treaty.

The 1796 investigation of the Washington administration's negotiation of the Jay Treaty does not reveal additional limits on congressional investigative authority. In that investigation, the House requested "documents and diplomatic correspondence related to the Jay Treaty and its ratification in order to determine whether to appropriate the funds necessary to implement the Treaty." Pet. App. 86a. Washington withheld the requested documents—but only after claiming that the requests lacked a legislative purpose. As "the assent of the House of Representatives is not necessary to the validity of a treaty," Washington wrote, the House's request could not be "relative to any [legislative] purpose under the cognizance of the House of Representatives." George Washington, Message to the House Regarding Documents Relative to the Jay Treaty (Mar. 30, 1796), *in* 19 *The Papers of George*

Washington 635–639 (David R. Hoth ed.) (2016). In any event, Washington's objection did not reflect a Founding-era consensus, and it appalled other Founders, including James Madison. See Letter from James Madison to James Monroe (April 18, 1796), *in* 2 *Letters and Other Writings of James Madison* 96–97 (1867).

Yet under the rule proposed by the *Mazars* dissent, this dispute over whether the House had a valid legislative purpose was academic; once the House suspected any wrongdoing or illegal act, it would lose its general power to investigate even with a legislative purpose. The debate between Washington and the House over the presence or absence of a legislative purpose undermines the dissent's theory.

C. Congress investigates Founding Father-turned-Treasury Secretary Alexander Hamilton.

The 1793 investigation into Treasury Secretary Alexander Hamilton further reinforces that Congress may investigate suspected wrongdoing by impeachable officials without first starting impeachment proceedings. Concerned about how the Treasury Department handled the national debt and certain foreign loans and suspecting Hamilton of wrongdoing, the House unanimously passed a resolution demanding that Hamilton produce Treasury documents and other detailed reports. See, *e.g.*, Peter Hoffer & N.E.H. Hull, *Impeachment in America, 1635–1805* (1984); 3 Annals of Cong. 870–872 (1793). Yet even though "an impeachment seemed in the offing," Hoffer & Hull, *supra*, at 143, the House never launched an impeachment inquiry.

Many House Members hoped that the requested documents would reveal Hamilton's misconduct; several specifically contemplated impeachment. See 3 Annals of Cong. 490 (1792) (statement of Rep. Vining) ("[L]et those who are to blame be impeached."); *id.* at 491 (statement of

Rep. Steele) ("[H]e had no great doubt that an inquiry would lead to an impeachment"). Hamilton, too, believed that the document requests "are of a nature, to excite attention, to beget alarm, to inspire doubts." 3 Annals of Cong. 1199 (1793). Yet Hamilton promptly produced "four comprehensive reports," in which he "defended his stewardship of the Treasury and rebutted each insinuation of maladministration [members of the House] had made against him." 25 *The Papers of Thomas Jefferson* 285 (John Catanzariti ed., 1992).

Nevertheless, the dissent posits that this episode "confirms the Constitution's original meaning—investigations of unlawful actions by an impeachable official cannot proceed through the legislative power." Pet. App. 86a. To support this argument, the dissent points to House Members debating a resolution condemning Hamilton for conduct that was illegal and unsavory. Hoffer & Hull, *supra*, at 143–144; 3 Annals of Cong. 899–900 (1793). But that February 27 resolution was offered a week after Hamilton had completed his production of documents and information in response to Congress's demands. See Alexander Hamilton, *Report on the State of the Treasury at the Commencement of Each Quarter During the Years 1791 and 1792* (Feb. 19, 1793), *in* 14 *The Papers of Alexander Hamilton* 93–120 (Harold C. Syrett ed., 1969) (Feb. 20, 1793 final installment of Hamilton's responses to congressional documents demands).

The dissent maintains that Representative Smith "argued that an investigation of whether 'the Secretary violated a law' could not proceed under the guise of 'an investigation of theoretic principles of Government.'" Pet. App. 86a (quoting 3 Annals of Cong. 901 (1793)). But that ship had sailed. When Smith gave his speech, the House had already finished its unanimously approved investigation into Hamilton, and Hamilton had already produced the

documents demanded. Smith opposed the censure resolution because he felt that it was "trifling with the precious time of the House to lavish it on abstract propositions, when the object of the inquiry ought to be into the facts." 3 Annals of Cong. 901 (1793). Representative Murray added that Congress should not condemn Hamilton without hearing from him directly. *Id.* at 904.

Far from suggesting that an investigation predating an impeachment inquiry was improper, Representative Smith stressed the need to investigate more before censuring Hamilton: "[I]t was unquestionably proper *first to substantiate the facts*, and then establish the principles which were applicable to them." *Id.* at 901 (emphasis added). And "it was surely a reversal of order to spend much time in establishing principles, when it might happen that the charges themselves would be totally unsupported." *Ibid.*

Nor does the dissent's rule find support in Representative Smith's comments about "great public functionaries . . . accused of a breach of duty." Pet. App. 100a (quoting 3 Annals of Cong. 901 (1793)). This statement had nothing to do with the presence or absence of an impeachment inquiry; instead, Smith objected to the part of the Feb 27 censure resolution that would have transmitted the resolutions "to the President," apparently to "direct the President to remove the Secretary." 3 Annals of Cong. 902 (1793). Smith did not mean that Congress must commence an impeachment investigation if it wants to investigate; he meant that if Congress wanted Hamilton removed, it must remove him itself.

D. Investigation of Justice Chase.

The last major Founding-era example, the impeachment of Justice Samuel Chase, reinforces that Congress could and often should investigate before starting impeachment proceedings. According to the dissent, "[i]n

the high profile 1805 impeachment of Associate Justice Samuel Chase, the investigation into his misconduct proceeded unambiguously under the impeachment power." Pet. App. 101a (citations omitted). But as revealed by the House's debate on how to proceed with the 1804 (not 1805) impeachment of Justice Chase, Members did not believe that opening a formal impeachment inquiry would have expanded their investigative capacity.

Unsurprisingly, some Members preferred to gather more facts before inquiring about impeaching a Supreme Court justice. These Founding-era Members proposed that "the business be brought generally before the House, on the exhibition of certain facts," and after the House has undertaken this preliminary factual inquiry, "the public will be enabled to decide whether [the facts] warrant impeachment or even suspicion." 8 Annals of Cong. 810 (1804). To justify this approach, Representative Holland described three previous instances in which the House pursued investigations without impeachment proceedings, even though Congress contemplated impeachment as a possible, eventual outcome. See *id.* at 848.

II. Congress has continued to investigate impeachable officials without beginning impeachment proceedings.

After the Founding era, Congress continued to investigate flexibly. From Jackson to Buchanan to Reagan to Clinton, Congress has investigated potential misconduct by impeachable officials without launching impeachment inquiries.

A. Investigation into possible fraudulent contracting by the Secretary of War with the knowledge of President Jackson.

Without initiating an impeachment inquiry, Congress investigated whether the Secretary of War had—with the knowledge of President Andrew Jackson—committed

fraud in arranging for a contract to be awarded to former Representative Samuel Houston. This example further undermines the dissent's analysis.

1. In March 1832, Representative Stanberry spoke on the House floor about former Secretary of War John Henry Eaton and his attempt to award a certain government contract to former Representative Sam Houston. The next month, an irate Houston confronted Stanberry on the street and beat him with a "hickory bludgeon." 8 Reg. Deb. 2949–2950 (1832). The House soon held its own proceeding in which Houston was charged with "a violation of the rights and privileges of the House of Representatives, in having offered personal violence to one of its members for words spoken in debate."

After that proceeding concluded, the House turned to the allegedly fraudulent contracting scheme. It established a select committee "to inquire whether an attempt was made by the late Secretary of War, John H. Eaton, fraudulently to give to Samuel Houston * * * a contract for supplying rations to such Indians as might emigrate." *Ibid.* In addition to describing the allegedly fraudulent conduct of Sam Houston and Secretary Eaton, the resolution authorized the committee to investigate "whether the President of the United States had any knowledge of such attempted fraud, and whether he disapproved or approved of the same." *Ibid.*

Attempting to downplay that investigation's significance, the dissent claims that "[f]ar from an investigation of the President's wrongdoing, this inquiry was part of a broader investigation of Houston's assault on a member of Congress for statements made on the floor." Pet. App. 105a n.8. Not so; the House waited until the assault investigation was finished. When, in the middle of the assault trial, Polk moved to investigate the Houston-Eaton-Jack-

son affair, the House demurred—insisting that the assault inquiry should conclude before the House investigated the question of fraudulent contracting. See 8 Reg. Deb. 2595 (1832). In short, the House viewed the two inquiries as sequential and separate.

2. The dissent also disputes whether the House investigated President Jackson at all, noting that "[t]he Committee Report never mentions the President, nor does it indicate the Committee took any steps to investigate the President." Pet. App. 91a n.8. Similarly, petitioners' brief states that "attempts to identify any congressional subpoena for presidential records—let alone a subpoena for President Jackson's personal papers—come up empty." Pet. Br. 29. These assertions are incorrect: In addition to investigating whether President Jackson knew about any fraudulent contracting process, it subpoenaed and obtained records that would reflect President Jackson's knowledge of the allegedly fraudulent contracting process. See H.R. Rep. No. 502, at 66 (1832). The subpoena even asked for letters written and received by President Jackson himself. *Ibid.*

After obtaining certain evidence during the inquiry into whether the President directly participated in the contracting process, the select committee passed a motion "to cause a subpoena to be issued to William B. Lewis, esq. requiring his attendance forthwith before the committee; and that, he bring with him such correspondence within his power or possession, as may have passed between Major Eaton and the President in the United States, upon the subject of supplying emigrating Indians with rations." *Id.* at 64. Lewis, an auditor at the Treasury Department and President Jackson's close friend, testified before the committee with the requested documents in hand. *Id.* at 66. Those documents, which Lewis gave to the committee, included letters—written to and by the President—

demonstrating that the President personally authorized the allegedly fraudulent contract. *Id.* at 64–65.

The select committee also sought and received, from the Secretary of War, additional presidential correspondence about the contract. *Id.* at 52. And it subpoenaed several witnesses who testified about personally discussing the contract with President Jackson. See *id.* at 24, 58.

Although the select committee's report ultimately found no conclusive evidence of wrongdoing by any party, the minority report concluded that President Jackson had known about the fraudulent contracting scheme. *Id.* at 1–2. Yet another Representative wrote separately to describe his own conclusion (that the President approved the contract, but the evidence did not establish that he had known that it was fraudulent). See *id.* at 3.

This detailed history confirms that in 1832, the House did in fact investigate alleged wrongdoing by the President and Secretary of War, without ever invoking its impeachment power.

B. The Covode Committee's investigation of corruption in the administration of President Buchanan.

A few decades later, Congress investigated impeachable officials even more intensively. After learning that hundreds of bonds held in trust for Indian tribes had disappeared from the Department of the Interior, Congress appointed a select committee. See generally H.R. Rep. No. 36-78 (1861). Soon, it became clear that one of the culprits was the Secretary of War, John B. Floyd, who appeared to have participated in a fraudulent scheme. See James Buchanan, *Mr. Buchanan's Administration on the Eve of Rebellion* 185–186 (1866). Without convening an impeachment inquiry, the committee adduced a tale of "fraud and folly" through documentary evidence and testimony from Secretary Floyd and others. See H.R. Rep.

No. 36-78, at 20 (1861). The Covode Committee's investigation is hence especially instructive. The investigation was broad and covered possible wrongdoing by the President, the Secretary of War, and other impeachable officials, but it did not arise from an impeachment proceeding. Instead, the investigation was designed to help Congress draft legislation to address presidential patronage abuse.

1. Congress created the select committee "to inquire into the extent of Executive patronage, the circumstances which have contributed to its great increase of late, the expediency and practicability of reducing the same, and the means of such reduction." H.R. Rep. No. 648, at 4 (1860). The committee was authorized "to investigate the conduct of the President of the United States or any other officer of the government." *Id.* at 6.

Although President Buchanan wrote to the House and protested the investigation, the committee dismissed his objections to its inquiry into his potential malfeasance. As the committee explained, in a report responding to President Buchanan's protest: The "gravamen of his complaint" is that "the accusations are of such a nature, if true, would subject him to an impeachment," and "the House has proceeded to pass upon them or is moving to pass upon them, through a form of proceedings not authorized by the Constitution." H.R. Rep. No. 394, at 4 (1860). But this was a "fallacy." *Ibid.*

The committee explained that it was not launching a full-blown impeachment proceeding; it was "a mere inquiry that is proposed." *Id.* at 3. That a preliminary investigation "may lead to the conclusion that the party against whom it is brought to bear is guilty of nefarious practices, cannot affect the right; it is preliminary to accusation, trial, and judgment." *Id.* at 4. Of course, "[i]f it shall be found, in executing the command of these resolutions, that

the President is open to a direct charge of high crimes or misdemeanors, it will but prove the wisdom of the proceeding." *Id.* at 5. No matter: "Then, and not till then, may the party sought to be implicated demand the full hearing secured to him by the Constitution." *Ibid.* In other words, the House refused to convene the very impeachment inquiry that the *Mazars* dissent believes is necessary under those circumstances.

Then, the House passed a formal resolution "dissent[ing] from the doctrines of the special message of the President of the United States of March 28, 1860." See 2 *Hinds' Precedents of the House of Representatives of the United States* 1042 (1907). The resolution affirmed that the House investigation into President Buchanan was sanctioned by "judicial determinations, the opinions of former Presidents, and uniform usage," and that abandoning investigations like this would "lead to a concentration of power in the hands of the President, dangerous to the rights of a free people." *Ibid.* After describing the long line of congressional precedent recognizing the House's power to investigate presidential misconduct outside of the impeachment process, the committee concluded: "With these precedents before them, your committee have felt at liberty to investigate the conduct of the President of the United States or any other officer of the government." H.R. Rep. No. 648, at 3–6 (1960).

2. After rebutting President Buchanan's objections, the Covode Committee described its investigation. The committee had investigated specific acts of wrongdoing by specific impeachable individuals. For instance, the Naval Contracts Committee "specifically charge[d] that certain officers in the Navy Department, in awarding contracts for the construction of vessels of war of the United States, have been guilty of partiality, and of violation of law and their public duty." H.R. Rep. No. 184, at 1 (1859).

When it investigated those officials and their acts, the committee wielded its "power to send for persons and papers"—by subpoenaing numerous Cabinet for information about presidential misconduct. Contrary to the dissent's claim that the House "asserted its power to investigate generally, issued no subpoena seeking evidence of unlawful conduct by the President," Pet. App. 108a, the House issued numerous subpoenas seeking exactly that evidence. President Buchanan even complained about this to Congress: "Different persons in official and confidential relations with myself, and with whom it was supposed I might have held conversations, the revelation of which would do me injury, were examined. Even members of the Senate and members of my own Cabinet, both my constitutional advisers, were called upon to testify, for the purpose of discovering something, if possible, to my discredit." President James Buchanan, *Addendum to March 28 Message to Congress* (June 22, 1960), https://perma.cc/3U83-6TW3.

In sum, the Covode Committee's investigation featured nearly every type of activity that the *Mazars* dissent claims is unprecedented and unconstitutional. If the dissent were correct, this rigorous legislative investigation never could have occurred.

C. Investigation of Vice President Colfax.

A similar sequence of events—investigation before any impeachment inquiry—took place in the 1872 investigation of Vice President Schuyler Colfax. In that year, rumors emerged that some Members of Congress were taking stock in a company associated with a Transcontinental Railroad government contractor. *Congress Investigates*, *supra*, at 342–346. The controversy centered around Representative Oakes Ames of Massachusetts, who was alleged to have bribed other House members with company

stock. See *id.* at 346. Congress convened a special committee to investigate, *id.* at 347, and the investigation implicated Vice President Schuyler Colfax, see *id.* at 350; H.R. Rep. No. 42-77 (1873).

Colfax testified voluntarily but falsely; the committee learned that Representative Ames paid Vice President Colfax a $1,200 dividend on the stock, so it "probed deeper into Colfax's bank transactions." *Congress Investigates*, *supra*, at 351. The committee then called the cashier of First National Bank of Washington to testify and produce Vice President Colfax's bank records. See *ibid*; H.R. Rep. No. 42-77, at 341–342 (1873). And the bank records helped confirm the committee's suspicion about his misconduct. See *Congress Investigates*, *supra*, at 351.

It was not, however, until the committee investigated the Vice President and received and reviewed his bank records that the House considered impeaching him (though it ultimately declined to do so). 3 *Hinds' Precedents of the House of Representatives of the United States* 1016–1019 (1907). Under the dissent's theory, this sequence of events would have exceeded Congress's power under Article I.

D. Investigation into Interior Secretary Fall's role in Teapot Dome scandal.

This same approach continued in signature investigations throughout the twentieth century. During the Harding administration, a Senate committee led by Montana Senator Thomas Walsh investigated the infamous Teapot Dome scandal. That investigation targeted Secretary of the Interior Albert Fall for corrupt leasing of oil fields in Wyoming. See *Congress Investigates*, *supra*, at 460–474. The committee deemed the transactions to be corrupt and illegal, and it believed that Secretary Fall acted lawlessly and abused his power. *Id.* at 468, 473. And the offshoot Wheeler Committee investigation into the Department of

Justice, which targeted Attorney General Daugherty for misfeasance, was another example of a legislative investigation charging "illegality, graft, and influence-peddling" by high officials. *Id.* at 471.

The resulting Walsh report led to "indictments and guilty verdicts * * * for conspiracy, bribery, and illegal transferal of the oil lands." *Id.* at 474. But Congress investigated this Cabinet-level wrongdoing without starting impeachment proceedings. Its inductive approach epitomized that, in the words of then-Professor Felix Frankfurter, "[t]he power of investigation should be left untrammeled, and the methods and forms of each investigation should be left for the determination of Congress and its committees, as each situation arises." *Ibid.* (quoting Felix Frankfurter, *Hands Off the Investigations*, 38 New Republic 329, 331 (1924)).

E. Iran-Contra investigation of President Reagan.

Congress again exercised that power when investigating the Iran-Contra Affair; it examined the conduct of high-ranking Reagan administration officials up to and including the President. Contrary to the *Mazars* dissent, Pet. App. 117a, individual officials were in fact targeted. Indeed, in its final report, the Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition asks, "Who Was Responsible for the Iran-Contra Affair"? H.R. Rep. No. 100-433, at 20–22 (1987). That report describes the conduct of the Attorney General and the Vice President, and then poses "the central remaining question": "the role of the President in the Iran-Contra Affair." *Ibid.*

Although the independent counsel sought to investigate and prosecute any violations of criminal law, determining culpability was "part of [the committee's] mandate"—"to reaffirm that those who serve the Government are accountable for their actions." *Id.* at 20. To this end,

the investigation pursued "the full facts about any activity of * * * [any] department, agency, or entity of the United States Government or of *any officer* or employee thereof." S. Res. 23, 100th Cong. (1987) (emphasis added). And in response, President Reagan "cooperated with the investigation." H.R. Rep. No. 100-433, at xvi (1987). His cooperation was full: "He did not assert executive privilege; he instructed all relevant agencies to produce their documents and witnesses; and he made extracts available from his personal diaries." *Ibid.*

F. Whitewater investigation of President Clinton.

Finally, the *Mazars* dissent fails to accurately describe the congressional investigations of President Clinton's role in the Whitewater Development Corporation. According to the dissent, "Congressional involvement began several years after a United States Attorney forwarded a criminal investigation of the failure of Madison Guaranty Savings and Loan Association to the Department of Justice and, ultimately, an independent counsel." Pet. App. 117a. But these investigations and Congress's investigation were not mutually exclusive. The congressional Special Committee was authorized to investigate "whether the White House improperly handled confidential Resolution Trust Corporation information about Madison Guaranty Savings & Loan Association and Whitewater." S. Res. 120, 104th Cong., at 2 (1995). And it could "issue subpoenas for the production of documents." *Ibid.*

Nor, as suggested by the *Mazars* dissent, did the Whitewater investigation lead directly to President Clinton's eventual impeachment. See Pet. App. 117–118a. Neither of the relevant impeachment reports, H.R. Rep. No. 105-795 (1998), and H.R. Res. 581, 105th Cong. (1998), mention Whitewater. For good reason: The House impeached President Clinton after the independent counsel

referred allegations that President Clinton perjured himself and obstructed justice during a sexual-harassment lawsuit brought by a former Arkansas state employee and an investigation into his sexual relationship with a White House intern. See H.R. Rep. No. 105-830, at 2 (1998).

III. The dissent's remaining examples involve objections or immunities distinct from to the presence or absence of an impeachment inquiry.

Although the *Mazars* dissent invoked several other past investigations to support its theory of rigid limits on congressional power, none embraced the dissent's hard line between legislation and impeachable conduct. Rather, they involved other objections, immunities, or disputes—including executive privilege, the Fifth Amendment, and the illegal appointment of private lawyers to committee staff.

A. Assertions of other privileges or special circumstances.

1. Objections to public disclosure of certain information (President Polk).

The impeachment inquiry into Daniel Webster, President Polk's former Secretary of State, does not reflect limits on investigation of wrongdoing by impeachable officials outside of the impeachment process. After the committee requested documents for that impeachment inquiry, President Polk refused to produce certain records publicly—a refusal that the dissent states was due to "President Polk and the House agree[ing] that the House may call for documents seeking evidence of a public officer's wrongdoing only pursuant to an impeachment investigation." Pet. App. 107a. This is inaccurate, for two reasons.

First, there was no question that the House instituted the Webster inquiry with the aim of impeachment (although some were uncertain whether Webster, who had become a Senator and no longer an impeachable official, could still be impeached). Cong. Globe, 29th Cong., 1st Sess., at 638–641 (1846). Because the House had started an impeachment inquiry, President Polk necessarily was not objecting to the scope of Congress's powers outside of the impeachment process.

Second, Polk's refusal to produce certain records publicly reflected concerns about confidentiality, not the extent of congressional investigative power. The relevant information concerning Webster's tenure at the State Department was privately disclosed to the committee through witness testimony; once the committee was familiar with the information, it agreed with Polk's recommendation to "adopt all wise precautions to prevent the unnecessary exposure of matters the publication of which might injuriously affect the public interest." H.R. Rep. No. 684, at 4 (1846). Public disclosure might have been required if the House had actually voted to impeach— "to furnish the proof necessary to attain the great ends of public justice"—but since the committee did not believe that impeachment was warranted, "the reasons which induced the President to decline to make these facts public * * * return[ed] in their full force against their disclosure." *Ibid.*

2. Invocation of Fifth Amendment right to avoid self-incrimination (President Grant and Consul Seward).

Other officials invoked classic procedural rights, such as the Fifth Amendment right to avoid self-incrimination. Their refusal to comply with investigative demands reflected their own individual liberties, not structural limits on Congress's authority to investigate.

During the Grant administration, the House asked for details about "President Grant's whereabouts while performing executive functions[,] to determine whether the President was in violation of the Act of 16 July 1790, which established the District of Columbia as the seat of government." Pet. App. 109a–110a. Grant objected on the ground that the resolution requesting production "does not necessarily belong to the province of legislation" and "does not profess to be asked for that object." 4 Cong. Rec. 2999–3000 (1876). And because Grant believed that the request lacked an apparent legislative nexus, he thought it might be assumed that the House had invoked its impeachment power—in which case, he objected to the request on the ground that it would require him to incriminate himself in violation of the Fifth Amendment. See *ibid.* (if the request was part of an impeachment proceeding, "it [was] asked in derogation of an inherent natural right," which "protects every citizen, the President as well as the humblest in the land, from being made a witness against himself").

President Grant was not, as the dissent suggests, objecting to the request because it was a legislative investigation. Quite the opposite: He feared that the request arose from Congress's impeachment powers and objected to it on that basis. In any event, President Grant went on to respond in writing to the House inquiries, and therefore "[t]he House took no further action." Pet. App. 110a.

The 1879 investigation of Consult George Seward provoked a similar objection. Seward believed that the proceedings "were instituted and have been conducted in the exercise and execution of the power of impeachment"—"for the purpose of ascertaining and determining whether the respondent has been guilty of high crimes and misdemeanors justifying his impeachment." 8 Cong. Rec. 2139–2140 (1879). Like President Grant, Seward wanted to

avoid incriminating himself: "[T]he object of such subpoena was to compel him to be a witness against himself upon the charges under investigation by the committee" and hence "was inoperative and void under the provisions of the fifth amendment of the Constitution of the United States." *Ibid.*

3. Assertion of executive privilege (President Nixon).

President Nixon's objections to a Senate committee's Watergate-related documents requests turned on yet another basis: executive privilege. Invoking that privilege says nothing about limits on the underlying investigative authority.

This particular dispute arose after the Senate Select Committee, acting through its legislative power, subpoenaed documents from the President. The D.C. Circuit later affirmed the district court's refusal to enforce the subpoena. See *Senate Select Comm. on Presidential Campaign Activities* v. *Nixon*, 498 F.2d 725, 733 (D.C. Cir. 1974) (en banc). But the D.C. Circuit's decision did not embrace the rule proposed by the *Mazars* dissent. Rather, the court of appeals upheld a decision sustaining President Nixon's claim of executive privilege. See *id.* at 733–734. Because the House Judiciary Committee already had copies of the tapes subpoenaed by the Senate Select Committee, the latter's interest in "having these particular [audio recordings] scrutinized simultaneously by two committees" did not override the claim of executive privilege. *Id.* at 732.

The *Mazars* dissent adds that while the legal case was pending, the House Judiciary Committee concluded that the gathered evidence "had shifted the focus so heavily toward allegations of wrongdoing by President Nixon that a formal impeachment investigation was necessary to proceed any further" and that "[o]nly after the House passed

a resolution explicitly invoking its authority under the impeachment power did the Judiciary Committee subpoena the President." Pet. App. 115a–116a. By focusing only on whether and when subpoenas were issued to the President himself, the dissent overlooks that the Senate Committee already had subpoena authority under its general investigative authority.

Indeed, before the House authorized the Judiciary Committee to begin impeachment proceedings, that committee had already "been conducting an investigation into the charges of impeachment against President Nixon under its general investigatory authority, granted by the House on Feb. 28, 1973 (H. Res. 74) . . . and had authorized the chairman to issue subpenas [sic] in relation to the inquiry on Oct. 30, 1973." 3 *Deschler's Precedents of the House of Representatives* 507–508 (1994). This earlier investigation arose from impeachment resolutions introduced on October 23, 1973, see *id.* at 621–623, three days after the dismissal of Special Prosecutor Archibald Cox and resignation of Attorney General Elliott Richardson and Deputy Attorney General William Ruckelshaus, see Carroll Kilpatrick, *Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit*, Wash. Post, Oct. 21, 1973, at A1.

In addition, the dissent claims that the "House Judiciary Committee took responsibility for commencing an impeachment investigation and thereafter accorded robust procedural protections to ensure that documents obtained in the course of that process remained confidential" and that "[t]he Committee also determined that the President must comply *only* with subpoenas issued 'relative to the impeachment inquiry.'" Pet. App. 116a (emphasis added) (quoting 3 *Deschler's Precedents*, *supra*, at 507–508). The quoted source says no such thing. It does clarify that an official can be impeached for failing to comply with a con-

gressional subpoena issued in an impeachment proceeding—given past efforts by government officials to resist impeachment-related subpoenas by invoking the Fifth Amendment. See *id.* at 508. But the committee did not address the question of subpoenas outside of an impeachment inquiry. See *id.* at 507–508. For good reason: The Committee had just recommended impeaching President Nixon "for failing without lawful cause or excuse to comply with subpenas [sic] issued by the committee for things and papers relative to the impeachment inquiry." *Id.* at 507. In other words, the Judiciary Committee was demanding compliance with subpoenas from impeachment inquiries, not excusing compliance with subpoenas from legislative investigations.

B. Disputes over procedure or tactics.

Another set of cases cited by the *Mazars* dissent involved procedural disputes or objections, not wholesale objections to non-impeachment-oriented investigations.

1. Disputes over investigative scope.

In discussing the 1818 investigation of Judge Van Ness's role in embezzling federal court funds, the dissent claims that it "illustrates the line between general investigation and impeachment particularly well." Pet. App. 87a. According to the dissent, after initially authorizing an investigation into "the disposition of funds from the district court," "[t]he Judiciary Committee thought it improper to proceed under the existing resolution and sought specific authority from the House to transfer from a legislative investigation to an investigation of the judge's official conduct." *Id.* at 87a–88a (quoting 32 Annals of Cong. 1715 (1818)).

The Judiciary Committee's concern, however, was different. An earlier referral had authorized the committee to investigate the disposition of district court funds, and the committee learned that a court clerk had "nefariously

purloined" them. 32 Annals of Cong. 1715 (1818). As a result, the committee—whose Members "considered themselves restricted by the [original] resolution to the conduct of the clerk only"—requested a new, broader resolution that would enable the committee to investigate the role of Judge Van Ness, who had appointed the purloining clerk. *Ibid.* Even the latter inquiry was not an impeachment proceeding; upon introducing the resolution, Representative Smith stressed that "it was not intended by him to communicate the idea, that the Judiciary Committee thought there was evidence of criminality in Judge Van Ness, before the committee; such an idea would have been inconsistent with the sentiments expressed by the committee." *Id.* at 1716.

2. Solitary objections by former President John Quincy Adams.

The dissent also maintains that "Representative John Quincy Adams defeated a resolution seeking to conduct a legislative investigation into charges of public misconduct against a federal land commissioner." Pet. App. 104a. But the resolution was not defeated; the House passed it and the House Judiciary Committee investigated the land commissioner without starting impeachment proceedings. See H.R. Rep. No. 1055 (1832). More generally, his position on certain investigations did not reflect congressional consensus.

The original resolution would have referred the investigation to the Public Lands Committee, but possible conflicts of interest required the House to send the investigation elsewhere. See 8 Reg. Deb. 2197–2199 (1832). Suggested alternatives included the Private Lands Committee, the Judiciary Committee, or a select committee. *Id.* at 2199. Adams opposed assigning the investigation to Private Lands or Judiciary; and because Congress would be

investigating allegations of misconduct by a public officers, Adams believed that "[a] select committee would * * * be most proper in this case." *Ibid.* But the House of Representatives disagreed and referred it to Judiciary. *Id.* at 2199–2200. Adams had not prevailed.

The same year, an investigation into the Second Bank of the United States reinforced that Congress has never embraced the dissent's categorical rule. The House convened a select committee to investigate whether officials managing the Bank had caused it to violate its charter. See *Congress Investigates*, *supra*, at 64–78. The committee examined not only the Bank's general operations, but also alleged misconduct by Bank president Nicholas Biddle. See *id.* at 72; 8 Reg. Deb. 2670 (1832) (statement of Rep. Johnson) ("In the investigation of the concerns of the bank, we were involved in the difficulty of looking into some charges or imputations which came to the committee respecting the conduct of the president of the bank."). Again, objections from Adams "did not strike a responsive chord with Congress or the public." *Congress Investigates*, *supra*, at 78.

3. Demand for more specific accusations (President Jackson).

Yet another reason explains President Jackson's refusal to answer charges of corruption. See Pet. App. 104a; 3 *Hinds' Precedents of the House of Representatives* 102–103 (1907). The underlying resolution baldly accused officers, including the President, of "corrupt violation" of the laws. 3 *Hinds' Precedents*, *supra*, at 102–103. President Jackson objected because, he stressed, the House needed to identify the precise topics being investigated. He added that "after all the severe accusations contained in the various speeches of yourself and your associates, you are unwilling of your own accord to bring specific charges." H.R. Rep. No. 19, at 31 (1837). Lamenting the

lack of specific allegations, he "hope[d] * * * we shall at last have your charges, and that you will proceed to investigate them, not like an inquisitor, but in the accustomed mode"—the accustomed mode in which the misconduct allegations were more precise. See *ibid.*

4. Intra-party debates over investigative speed (investigation of President Andrew Johnson).

Nor does the impeachment of Andrew Johnson support the *Mazar* dissent's theory. See Pet. App. 109a. On the contrary, that investigation was hindered by an intra-party dispute over how fast to move.

Initially, some of the Radical Republicans announced that they wished to propose impeachment; in response, the Republican leadership warned caucus members against "bringing impeachment resolutions to the floor without first getting caucus approval." Michael Les Benedict, *A New Look at the Impeachment of Andrew Johnson*, 88 Pol. Sci. Q. 349, 352 (1973). When some Radical Republicans proposed impeachment resolutions anyway, the Republican majority referred them to various committees, and the House Judiciary Committee "began slowly to investigate the president's conduct." *Ibid.* Eventually, those Radical Republicans again became frustrated by the slow pace of the inquiry and "tried to bypass it and win caucus approval for impeachment." *Ibid.*

In sum, the Republicans' disagreement was tactical, not constitutional. If anything, the initial approach of Republican leadership reinforces that the House may investigate presidential wrongdoing long before it begins impeachment proceedings.

5. Objection to appointment of private lawyer and lack of legislative nexus (Treasury Secretary Mellon).

Finally, the dissent maintains that during the 1925 congressional investigation of Treasury Secretary Andrew Mellon, President Coolidge "refused to hand over Mellon's tax returns to a Senate committee tasked with a legislative investigation of the Bureau of Internal Revenue, noting that 'the attack which is being made on the Treasury Department goes beyond any . . . legitimate requirements.'" Pet. App. 112a (quoting 65 Cong. Rec. 6087–6088 (1924)). This too is incorrect.

Mellon initially produced responsive documents, arranging for the committee to receive the tax returns of the companies in which he had current or prior financial interest. See George K. Yin, *James Couzens, Andrew Mellon, the "Greatest Tax Suit in the History of the World," and Creation of the Joint Committee on Taxation and Its Staff*, 66 Tax. L. Rev. 787, 824 (2013). He stopped cooperating only after his political rival illegally appointed a private lawyer to the investigating committee. See *id.* at 824–825. That led Coolidge to likewise question the investigators' motives and the legality of appointing the lawyer. *See id.* at 825–826; 65 Cong. Rec. 6190 (1924).

With respect to the 1929 Senate Judiciary Committee investigation into Secretary Mellon's alleged conflicts of interest, the Committee did not state or suggest, as the dissent claims, that "it did not have the power to issue compulsory process." Pet. App. 113a. Rather, some Members "question[ed] the jurisdiction of the committee to proceed in this inquiry beyond an interpretation of the statute in question," S. Rep. No. 71-7, at 3 (1929), especially since "there [was] no legislation pending or pro-

posed which would bring the investigation within the lawful power of the Senate or of the Committee on the Judiciary." *Ibid.*

Again, this objection was to a lack of legislative nexus, and did not propose a rigid new limit on congressional power. The latter would both defy history—including the investigations conducted by the Congresses of the Founders—and too often prevent Congress from gathering facts to meet official misconduct with remedial laws.

CONCLUSION

The judgments of the United States Courts of Appeals for the Second and District of Columbia Circuits should be affirmed.

Respectfully submitted.

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