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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

The Committees' brief dispels any doubt about the breadth of the powers they are asserting. In their view, nothing can prevent Congress from using its implied power to issue subpoenas in aid of legislation for a nearly unlimited array of the President's private papers. The lack of any historical precedent is no bar. The 140-year-old prohibition on congressional law enforcement is easily evaded. The Committees need not show any valid legislative outlet for their efforts. And separation of powers requires no greater showing of necessity—or even just a clear statement from the House of Representatives—before its committees are unleashed to rifle through the President's personal financial history.

The Committees' expansive view of their own power finds no support in text, structure, history, or precedent. The Constitution—and the separation of powers it creates—is not a mere "parchment barrier." The Federalist No. 48, at 308 (Clinton Rossiter ed. 1961) (J. Madison). To keep it from becoming one, the Court interprets implied powers narrowly and views with skepticism novel assertions of authority. Those principles override the Committees' request for broad deference. Whatever may be the case in other settings, Congress does not get the benefit of the doubt when it issues an unprecedented subpoena for the President's private papers on the assertion that might be useful in considering legislation. To the contrary, the Court should harbor serious doubts

that the subpoenas are within the Committees' power to issue.

The subpoenas are plainly illegitimate absent total deference to Congress. The Committees concede that the subpoenas are meant to uncover and expose whether the President has engaged in wrongdoing. Their argument that such an avowed law-enforcement purpose is legitimate so long as they also proclaim a generalized interest in examining the adequacy of existing laws is meritless. Unless the primary purpose of the subpoenas controls, the Committees have carte blanche to engage in law enforcement. And there is no doubt that the primary purpose of these subpoenas is law enforcement.

The Committees' effort to identify a legitimate statutory outlet for these investigations also misses the mark. They make no real effort to explain how any legislation they might enact could constitutionally force disclosure of or otherwise restrict the President's finances. Nor do they try to explain how the banking subpoenas legitimately advance any legislative agenda concerning presidential finances. In their view, that the Committees might discuss doing so is sufficient to obtain (and then publicize) every detail of the personal financial history of the sitting President. That simply cannot be right.

The Committees likewise resist application of this Court's precedent requiring a greater showing of need when subpoenas seek the President's records. Their resistance is understandable. Any requirement

that the Committees demonstrate a need for all these documents exposes these subpoenas for what they are. The notion that Congress cannot adequately consider or pass legislation without volumes upon volumes of the President's financial records is unsustainable. The Committees no doubt want these documents. But they clearly do not need them.

The Committees also urge the Court to discard its precedent requiring the Committees' authority to be narrowly construed to avoid serious constitutional issues. Here too, the Committees cannot locate any precedent to support their position. Indeed, it is hard to imagine a more appropriate circumstance in which to invoke the clear-statement rule and the canon of constitutional avoidance. If the Committees are intent on pushing their implied authority to the brink, it is appropriate for the Court to ensure that the House of Representatives has empowered them to do so before passing on constitutional questions of this magnitude. The significant precedent this case will set warrants a prudent approach.

Congress is granted many great powers in our founding document, but its authority to legislate is not accompanied by a blank check for a single committee to demand the President's private papers whenever it deems useful. Endorsing the Committees' expansive conception of Article I "undermine[s] the structure of government established by the Constitution." *NFIB v. Sebelius*, 567 U.S. 519, 559 (2012). The Court should reject the Committees' unbridled view of their powers and reverse the judgments below.

ARGUMENT

I. Congress lacks historical support for its use of implied authority to subpoena the President's private papers.

A. The Committees' request for broad deference to Congress conflicts with governing precedent.

For two reasons, the Court should have serious doubts whether Congress has constitutionally used its lawmaking power to issue these subpoenas. First, any authority that Congress possesses is implied. Second, there is no history of congressional committees using any implied power they possess in this provocative fashion. Brief for Petitioner ("Pet. Br.") 24-35; Amicus Brief of the United States ("U.S.") 10-11. Nothing in the Committees' response alters the understanding that they are pressing the outer limits of their power under Article I.

To begin, the Committees concede (at 43) that Congress lacks "textually explicit" power to subpoena the President's private papers. They instead contend that it should be irrelevant. But this Court's decisions hold otherwise. Regardless of the precise source of the implied subpoena power, the Constitution is "hostile to the exercise of implied powers" and, as a result, they may be exercised in only an "auxiliary and subordinate" way. *Anderson v. Dunn*, 19 U.S. 204, 225-26 (1821). The Committees offer no response to *Anderson* or the other cases

reaching this conclusion. Pet. Br. 32-35 (collecting cases); U.S. 11. And for good reason. The Court has been emphatic that implied authority is limited to "*the least possible power adequate to the end proposed*." *Anderson*, 19 U.S. at 230-31.

The Committees' suggestion (at 43) that the Court's treatment of sovereign immunity and judicial review proves otherwise is mistaken. Unlike here, *see infra* 9-13, there is strong historical support for the way in which these doctrines have been implemented. *See Franchise Tax Bd. of Calif. v. Hyatt*, 139 S. Ct. 1485, 1498-99 (2019); *Marbury v. Madison*, 5 U.S. 137, 175-78 (1803). Even still, the Court has been cautious in defining judicial review, limiting it to disputes that would have been heard "in the period immediately before and after the framing of the Constitution." *Vt. Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 776 (2000); *see Coleman v. Miller*, 307 U.S. 433, 460 (1939) (opinion of Frankfurter, J.). The Court has been similarly cautious in defining the scope of sovereign immunity. *See Northern Ins. Co. of N.Y. v. Chatham County, Ga.*, 547 U.S. 189, 193-94 (2006). The Committees have not done the same here. Pet. Br. 32-35.

This analogy also ignores special concerns that arise when it comes to the exercise of implied powers by Congress. The default rule under the Constitution is that sovereign immunity applies unless it has been *expressly* abrogated or waived. *See INS v. St. Cyr*, 533 U.S. 289, 299 & n.10 (2001). The Constitution vests *all* "judicial power of the United States" in

Article III courts. U.S. Const. art. III, §1. By contrast, only those "legislative Powers *herein granted* shall be vested in a Congress of the United States." U.S. Const. art. I, §1 (emphasis added). Accordingly, Congress's exercise of implied power imperils the Constitution's structure in a manner other implied doctrines do not. *See NFIB*, 567 U.S. at 559 (opinion of Roberts, C.J.); *United States v. Kebodeaux*, 570 U.S. 387, 402-03 (2013) (Roberts, C.J., concurring in the judgment).[1] The Court's approach to sovereign immunity and judicial review provides no support for broadly interpreting Congress's implied power to legislatively subpoena the President's personal records.

The Committees retreat to the argument (at 43-46) that *McGrain v. Daugherty*, 273 U.S. 135 (1927), requires broad deference to Congress. That is wrong. *McGrain* and its progeny hold that Congress has the implied power to issue legislative subpoenas. Pet. Br. 26-27. But those disputes did not trigger the serious separation-of-powers concerns that this case does. *Id*. at 43-44. *Kilbourn v. Thompson*, 103 U.S. 168 (1880), is the only relevant case that comes close

[1] The ample historical support, as well as the differences in the respective vesting clauses, also distinguishes Congress's implied subpoena authority from the immunity that has been afforded to the Chief Executive. *See Nixon v. Fitzgerald*, 457 U.S. 731, 750 n.31 (1982); *Clinton v. Jones*, 520 U.S. 681, 711-22 (1997) (Breyer, J., concurring in the judgment). But, there too, the Court has been cautious in defining the scope of this right. *See Mitchell v. Forsyth*, 472 U.S. 511, 520-24 (1985) (denying absolute immunity to the Attorney General).

to triggering this kind of interbranch clash. It is unsurprising, then, that the congressional investigation "exceeded its constitutional limits." Brief for Respondent ("Resp. Br.") 44. The Court has not deferred to Congress when Congress takes an unprecedented step to invade the province of the other branches. Appendix to the Petition ("Pet. App.") 77a (Rao, J., dissenting); Pet. App. 217a (Katsas, J.); Joint Appendix ("App.") 343a (Livingston, J.). It should not reverse course.

The Committees respond (at 44-45) that the interbranch nature of this conflict counsels against judicial interference with an "ongoing Congressional inquiry." The Committees have a point—just not one that is helpful to them. There are strong arguments against federal courts deciding interbranch subpoena disputes. The Committees didn't send the subpoena to the President, however. Pet. Br. 3-8. Had they done so, the dispute might have been resolved through the well-worn path of accommodation and negotiation, *United States v. AT&T*, 567 F.2d 121, 130 (D.C. Cir. 1977), as it was during the Whitewater investigation, Pet. Br. 30; S. Rep. 104-204 (Jan. 22, 1996) (describing bipartisan cooperation and compromise); S. Hrg. 104-869 Vol. II, at 1521-1529.

Had an impasse been reached (which was no doubt likely here), the President could have resisted these subpoenas by taking contempt of Congress. In fact, the ability of the recipient to take contempt is why, ordinarily, "any interference with congressional action had already occurred when those cases reached the Court." Resp. Br. 45 (cleaned up). At

that juncture, the House could have pursued any remedies—judicial or otherwise—that might have been open to it. In all events, subpoenaing the President directly for his personal records would have sharply diminished the chances that this dispute blossomed into an Article III case or controversy.

But the Committees instead chose to subpoena the President's custodians in an effort to circumvent his ability to object. A civil action was thus the only means of ensuring that the President could assert his legal rights to challenge the subpoenas' legitimacy. Pet. Br. 59 n.7.[2] That the Committees would demand the President's records from third-party custodians and then cry foul (at 45) when they are drawn into a case that tests the scope of "the subpoena power itself" displays a stunning lack of understanding of how this serious separation-of-powers dispute started and how it reached the Court.

In the end, the Committees acknowledge (at 45-46) that the "investigatory power" of Congress is "'not unlimited.'" But they just repeat the test for assessing whether there is a legitimate legislative

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[2] Had the Committees directly subpoenaed Petitioners, they also could have raised First Amendment defenses, including political retribution. *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 509 n.16 (1975). But since the Committees subpoenaed third-party custodians, Petitioners may only test the subpoenas' legitimate legislative purposes. *See id.* at 501 n.14. Due to this unusual dichotomy, the Committees' tactics leave the President with *fewer* available defenses to legislative subpoenas than a typical target.

purpose instead of detailing how their conception of that inquiry would actually constrain Congress's ability to subpoena the financial, legal, medical, educational, or any other personal records belonging to the President. Pet. Br. 34-35; U.S. 20. Put bluntly, the Committees were challenged to identify *any* limiting principle for their position, and they came up empty. There is no legal precedent for deferring to Congress's use of an implied power in this unfettered way—certainly not when it is used to issue a legislative subpoena for the President's personal records.

B. These legislative subpoenas have no historical precedent.

The lack of historical precedent confirms that the Committees are entitled to no deference and, in fact, carry a heavy burden in upholding the validity of these subpoenas. Pet. Br. 27-31; U.S. 17-19. The Committees do not dispute that absent a "long settled and established practice," this Court must proceed skeptically in adjudicating the "allocation of power between two elected branches of government." *NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014). On appeal, moreover, the Committees did not contest the factual point, acknowledging that they are "not aware of others," *i.e.*, subpoenas, "that are like this." CA2 OA Recording 36:47-37:04.

But now the Committees assert (at 43) that there is historical precedent for issuing a legislative subpoena for the President's private papers. They had it right the first time. Each of the Committees'

examples is distinguishable from the subpoenas at issue here.

Like the D.C. Circuit, the Committees (at 4-5) point to the congressional inquiry into the St. Clair expedition. But they never claim that Congress actually issued a subpoena to President Washington; nor do they claim that Congress requested President Washington's personal papers. Pet. Br. 28-29. The request was expressly limited to papers of a "public nature." 3 Annals of Cong. 536.

The Committees' newfound reliance (at 7) on an 1832 investigation of President Jackson's Secretary of War fares no better. That investigation originated in contempt proceedings in the House against one of its own members; it was not in aid of any potential legislation. Pet. App. 105a n.8 (Rao, J., dissenting). The proceeding's non-legislative character is made clear by its concluding resolution, which declared that "John H. Eaton, the late Secretary of War, and Samuel Houston, do stand entirely acquitted … from all imputation of fraud." H. Rep. No. 22-502, 1. The only subpoena the Committees identified, moreover, was issued to a Major in the U.S. Army, requesting that he appear and produce certain correspondence between the President and the Secretary of War concerning a contract with the government for the provision of goods. H. Rep. No. 22-502, 64. This fight over official records provides no historical support for requesting the President's personal records in aid of legislation.

The same goes for the Committees' reliance (at 7-8) on the congressional investigations concerning Presidents Buchanan and Johnson. The Buchanan proceeding involved "no subpoena seeking evidence of unlawful conduct by the President." Pet. App. 108a (Rao, J., dissenting). And the Johnson *impeachment* inquiry plainly provides no support for congressional subpoenas that purport to be in aid of *legislation*. *Id.* at 109a, 146a.

The Committees' reliance (at 8-9) on Congress's 1869 investigation into the gold panic is just as weak. The testimony they identify concerned the contents of a single letter that a witness had composed to President Grant. No subpoena was ever issued to the President; the Committees do not suggest otherwise. Pet. App. 109a-10a (Rao, J., dissenting).

The Committees also point (at 11-12) to the Whitewater investigation. Again, the examples cited by the Committees—most of them involving the First Lady—were not challenged by the President or ever litigated in Court. And the Committees don't dispute that Whitewater is far too recent to shed any light on the original understanding of the scope of Congress's subpoena power. Pet. Br. 30-31.

Ultimately, the Committees never point to any examples that replicate this circumstance—or even anything remotely like it. Rather, they argue (at 43) that there is "history of Presidential cooperation with Congressional investigations" that lends the support they badly need. Indeed, in many of the

examples they give, like Whitewater, the President voluntarily complied with a request for information. Resp. Br. 8-12 (discussing cooperation with investigations by Presidents Johnson, Carter, Reagan, and Clinton).[3] As the Court has repeatedly explained, cooperation is not a measure of Congress's constitutional authority. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2091 (2015) (rejecting the claim of congressional authority even though "some Presidents have chosen to cooperate with Congress"); *Clinton*, 520 U.S. at 718 (Breyer, J., concurring in the judgment) ("voluntary actions on the part of a sitting President" "tell[] us little about what the Constitution commands"); Pet. Br. 48 n.5.

Nor is there any evidence that congressional subpoenas of the President's personal records have "been open, widespread, and unchallenged since the early days of the Republic." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2567 (2019) (citation omitted). There have been few such subpoenas, and none dating back to the Founding. Moreover, several Presidents, including George Washington, objected to demands by Congress for the presidential records of all kinds. Pet. Br. 28-29; Pet. App. 108a (Rao, J., dissenting) (discussing objections made by President Buchanan); *id.* at 109a-10a (discussing objections

[3] Congress's statutory request for some tax information concerning President Nixon appears to have been in response to a request *by the President himself* to provide these documents to Congress. Memo. from Chairman Richard Neal to the Members of the H. Comm. on Ways and Means, attachments (July 25, 2019), perma.cc/UYZ2-QTCU.

made by President Grant). Congressional requests (let alone subpoenas) for the President's personal records in aid of legislation have been limited, mostly recent, and subject to challenge.

When congressional committees invoke implied power to target the individual affairs of the President, "policing" those boundaries "is one of the most vital functions of this Court." *Noel Canning*, 491 U.S. at 468. Historical support (or lack thereof) from "the beginning of the Republic" has thus "weighed heavily" in previous cases, and it warrants equal weight here. *NLRB v. SW General, Inc.*, 137 S.Ct. 929, 943 (2017) (citation omitted). The lack of any historical pedigree for these subpoenas means the Committees have an uphill battle in defending their legitimacy.

II. These subpoenas are an effort to engage in law enforcement, cannot result in valid legislation, and are not pertinent to any valid purpose.

The parties do not disagree over the test for determining whether the subpoenas are validly in aid of legislation: they cannot engage in law enforcement, must be in aid of valid legislation, and must be pertinent. *Compare* Pet. Br. 26-27 *with* Resp. 45-46. But the Committees seek to dilute these requirements at every turn. Their arguments ignore longstanding precedent, nullify the standards this Court has long applied, and disregard the threat that issuing legislative subpoenas to the President for his personal records represents to the Constitution.

In light of the unprecedented nature of this exercise of implied power against the President, these requirements must be applied more rigorously than the Committees admit. This Court's precedents—and the foundational principles they safeguard—require no less. Accordingly, any asserted purpose must be legislative and supported by the contemporaneous record the Committees generated. And this Court must be cognizant of the limited scope of congressional authority under Article I to regulate the President and thereby undermine his exercise of powers granted by Article II. Likewise, the Committees must clearly demonstrate why access to the President's personal documents—as opposed to someone else's—is needed to achieve that legitimate legislative purpose. These subpoenas fail that test.

A. The subpoenas seek to illegitimately engage in law enforcement.

1. The primary purpose of the subpoenas is what dictates if the Committees are engaging in law enforcement.

By focusing on the subpoenas' primary purpose, Pet. Br. 41-43, the Committees complain that Petitioners ask the Court "to look beyond the Committees' stated legislative or oversight purposes" and into "legislators' alleged motives." Resp. Br. 39, 44, 47. That is incorrect. Purpose and motive are not

the same. The Committees' effort to avoid scrutiny by conflating them should be rejected.

Under its existing precedent, this Court cannot probe for an unstated and illegitimate motive behind the subpoenas. *See Barenblatt v. United States*, 360 U.S. 109, 132 (1959). But that does not mean that an evaluation of the subpoenas' "real object" is off limits. *McGrain*, 273 U.S. at 178. This shouldn't be controversial. The Court has often said that it must determine a subpoena's "'primary purpose[],'" *Barenblatt*, 360 U.S. at 133, its "nature," and its "gravamen," *Kilbourn*, 103 U.S. at 194-95. After all, federal courts cannot assess whether a congressional subpoena has a "legitimate legislative purpose"—something the Committees recognize they must do—without identifying what that "purpose" is. And that judicial task is performed by evaluating the available evidence, including the relevant "Committee resolution[s]," any referenced "legislative proposals," and any "statement[s]" from Committee members or staffers. *Wilkinson v. United States*, 365 U.S. 399, 410 (1961); *see Watkins v. United States*, 354 U.S. 178, 209 (1957); Pet. Br. 4-8; Pet. App. 28a-29a; App. 276a; U.S. 12-13.

The Court recently reiterated this distinction between purpose and motive. Courts normally cannot inquire into the "'motivation'" or "unstated reasons" of "another branch of Government." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019). But they of course may "scrutinize[]" another branch's "reasons" by examining "the record" and "viewing the evidence as a whole." *Id.* at 2575-76.

That is the same line that Petitioners draw here. *See also* U.S. 12.

The Committees mistakenly argue (at 49) that *McGrain* and its progeny hold otherwise. Pet. Br. 41-43. In *McGrain*, the Court did not contradict the district court's legal conclusion that Congress cannot use its subpoena power to investigate if the Attorney General was guilty of wrongdoing. It disagreed with the conclusion that Congress was actually doing that. The "substance of the resolution" authorizing the investigation, as the Court explained, "show[ed] that the subject to be investigated was the administration of the Department of Justice"—an executive agency whose "duties" and budget "plainly" are "subject to regulation by congressional legislation." *McGrain*, 273 U.S. at 177-79. The resolution mentioned the Attorney General "by name," but only "to designate the period to which the investigation was directed." *Id*. at 179. And Congress did not have to "express[ly] avow[]" a legislative purpose in the authorizing resolution, since the Court was satisfied that legislation was "the real object" of the investigation. *Id*. at 178.

To reach this conclusion, the Court examined whether Congress was using compulsory process "to obtain testimony for th[e] purpose" of "exercis[ing] a [valid] legislative function." *Id*. at 154, 176. It made sure that the subpoena's "real object" was legislative, examining "the substance of the resolution," "the debate on the resolution," and "the subject-matter" of the investigation. *Id*. at 178-79. And the Court warned that the case would have come out

differently "if an inadmissible or unlawful object were affirmatively and definitely avowed." *Id*. at 180.

Yet the Committees argue (at 52) that *McGrain* stands for the proposition that they may expressly avow an *improper* purpose just so long as they also somewhere reference a proper one. But that is not what *McGrain* holds. Were it otherwise, a "legitimate legislative purpose" requirement that is intended to prevent Congress from reaching "beyond the powers conferred upon [it] in the Constitution," *Watkins,* 354 U.S. at 198, would be toothless, Pet. Br. 43. There would be no way to keep Congress from using "the powers appropriate to its own department and no other." *Kilbourn*, 103 U.S. at 191. And the prohibition on "retroactive rationalization," *Watkins*, 354 U.S. at 204, or reliance on "the mere assertion of a need to consider 'remedial legislation,'" *Shelton v. United States*, 404 F.2d 1292, 1297 (D.C. Cir. 1968), would be pointless.

According to the Committees, Congress could legitimately issue a subpoena for the banking records of a civil rights organization for the avowed purpose of investigating whether the group has engaged in sedition so long as the resolution included a sentence that Congress may also consider remedial nonprofit legislation. The subpoena would be valid since "all this Court has required is the presence of a valid purpose, not the absence of an allegedly improper one." Resp. Br. 51. As *McGrain* makes clear, that is not the law. A legislative subpoena's validity turns on its primary purpose.

2. The primary purpose of these subpoenas is law enforcement.

There is overwhelming proof that the primary purpose of the Committees' subpoenas is to gather and expose evidence about whether the President violated various laws. Pet. Br. 37-40; U.S. 26-30. And the Committees do not disagree; they double down. In the Committees' view, the point of these subpoenas is to track down the President's "alleged ties to criminal organizations or money laundering," Resp. Br. 22, find out whether the President's "'real estate projects were laundromats for illicit funds from countries like Russia,'" *id.*, uncover if the President's properties were used to "launder[] large sums of money for more than a decade," *id.* at 26, determine whether the President is in "compliance with the Ethics in Government Act and the Emoluments Clauses," *id.* at 51 n.46, and, ultimately, investigate "whether the President may have engaged in illegal conduct before and during his tenure in office," *id.* at 34.

The Committees seem comfortable confessing to engaging in law enforcement because, in their view, there is nothing wrong with it. As the Committees put it (at 47), the "premise of Petitioners' law-enforcement argument is wrong" because Congress's "'interest in alleged misconduct' can be 'in direct furtherance of [a] legislative purpose.'" (citing Pet. App. 34a). That is of course correct—it *can be*. But whether it *is* turns on whether the primary purpose of a given subpoena is

examining "whether existing laws should be changed," *id*., or is instead an effort to uncover and expose wrongdoing. Despite having multiple chances to do so, the Committees have offered no argument as to why the primary purpose of these subpoenas is in fact legislative.[4]

Here too, the Committees ask the Court to accept an argument with no limiting principle. No investigation into individual wrongdoing could ever cross the line into prohibited law enforcement if *any* interest in evaluating the status of existing law is all that is needed. That is untenable. Pet. Br. 42-45. Congress cannot exercise "*any* of the powers of law enforcement; those powers are assigned under our Constitution to the Executive and the Judiciary." *Quinn v. United States*, 349 U.S. 155, 161 (1955) (emphasis added). And they "are within the exclusive province" of those "other branches." *Barenblatt*, 360 U.S. at 111-12. The Committees cannot plead their way around the separation of powers.

Neither *Sinclair* nor *Hutcheson* say otherwise. Pet. Br. 42. In *Sinclair*, the Court concluded that the

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[4] In passing, the Committees ask the Court to defer to the lower courts' determination of the Committees' purpose. Resp. Br. 49-50 (citing *Glossip v. Gross*, 135 S. Ct. 2726, 2740 (2015)). This case, however, presents a question of law. *See Guerrero-Lasprilla v. Barr*, --- S. Ct. ---, 2020 WL 1325822, at *4 (Mar. 23, 2020) (describing the question of "whether a given set of facts meets a particular legal standard as presenting a legal inquiry"). There is no dispute here over the historical facts; the parties disagree about whether those facts violate the applicable legal standard.

"record [did] not sustain" the argument that "the committee intended to depart" from its asserted legislative purpose. *Sinclair v. United States*, 279 U.S. 263, 295 (1929). It had no occasion to even discuss—let alone disavow—constraints on Congress's exercise of the law-enforcement power.

The Committees' reading of *Hutcheson* is even less defensible. Pet. Br. 42. Contra their suggestion (at 48-49), the controlling opinion belongs to Justice Brennan, who confirmed that the Court would give "the closest scrutiny to assure that indeed a legislative purpose was being pursued and that the inquiry was not aimed at aiding the criminal prosecution." *Hutcheson v. United States*, 369 U.S. 599, 625 (1962). He also reiterated the prohibition on Congress's exercise of "any of the powers of law enforcement." *Id.* at 624. Along with the plurality, he ultimately held that the record—including the "full context of the congressional inquiry and its relevance to legislation in process"—demonstrated that the inquiry had not crossed the line into law enforcement. *Id.* at 625, 617-18. The same cannot be said here. Thus, nothing about the "*holding* of the case contradicts" Petitioners' legal position. Resp. Br. 49. The Court applied the same test to different facts.

To be certain, a "committee which is engaged in a legitimate legislative investigation need not grind to a halt whenever responses to its inquiries might potentially be harmful to a witness in some distinct proceeding," *Hutcheson*, 369 U.S. at 618, or "might possibly disclose crime or wrongdoing on his

part," *McGrain*, 273 U.S. at 180. But that "a valid legislative inquiry" may have "no predictable end result," *Eastland*, 421 U.S. at 509, is not a license for a committee to purposely set out to uncover and expose wrongdoing.

That is especially true when it comes to the President himself. Pet. Br. 44-45; U.S. 29-31. Indeed, it is precisely *because* a legislative inquiry may enter "'blind alleys'" and have "no predictable end result," *Eastland*, 421 U.S. at 509, that any analysis of these subpoenas must account for the threat of harassment and distraction from the President's exercise of his constitutional duties. U.S. 21-23. The cases on which the Committees rely involved investigations into national economic matters and oversight of federal agencies. But Congress's legislative authority over the Office of the President is vanishingly small, *see infra* 22-26, and impeachment is the proper avenue for investigating presidential wrongdoing, U.S. Const. art. I, §2. In the main, congressional investigations may engage in some "nonproductive enterprises." *Eastland*, 421 U.S. at 509. There is no basis, however, for allowing Congress to conduct "a roving inquisition over a co-equal branch of government" to uncover and expose evidence of presidential wrongdoing. Pet. App. 77a (Rao, J., dissenting).

B. These subpoenas cannot be justified by any legislation Congress could validly enact.

The Committees' subpoenas are not in aid of any "subject" on "which legislation could be had." *McGrain*, 273 U.S. at 177; Pet. 45-52. No argument that the Committees make alters this understanding. The legislation the Committees claim to be pursuing would be unconstitutional.

1. The Mazars subpoena cannot lead to valid legislation.

The Committees claim (at 46) that the Mazars subpoena concerns possible "financial disclosure and conflict-of-interest" laws. But pervasive regulation of the Office of the President exceeds the authority of Congress under Article I. Pet. Br. 45-49; U.S. 27-28. The Committees' responses miss the mark.

To begin, Respondents incorrectly claim (at 55) that deciding this constitutional question would be an "advisory opinion." But deciding whether Congress is investigating a subject on which it could pass valid legislation is hardly advisory. As the Court explained, "what makes [a decision] a proper judicial resolution of a 'case or controversy' rather than an advisory opinion" is "the settling of some dispute which affects the behavior of the defendant towards the plaintiff." *Hewitt v. Helms*, 482 U.S. 755, 761 (1987) (emphasis omitted). Settling this serious constitutional issue against the Oversight Committee wouldn't just affect its behavior toward

Petitioners; it would resolve the subpoena's validity. *See Tobin v. United States*, 306 F.2d 270, 276 (D.C. Cir. 1962). The stakes here are no doubt high. That is why the Court should, if possible, avoid deciding this issue. *See infra* 31-35. But if the constitutional question cannot be avoided, the Court must reach and decide this question. The Committees initiated this separation-of-powers clash by issuing these unprecedented subpoenas, and the President has the right to resolution of his claims.

The Committees fare no better on the merits. They observe (at 55) that existing financial disclosure laws apply to the President, and that finding them to be unconstitutional would raise doubts about whether other laws that apply to the President are valid. But they do not dispute that all of these statutes are of recent vintage, and none have been tested in court—much less prevailed against constitutional challenge. Pet. Br. 48 n.5. That some Presidents have elected to comply also proves nothing. "'Neither Congress nor the Executive can agree to waive' the structural provisions of the Constitution any more than they could agree to disregard an enumerated right." *SW General*, 137 S.Ct. at 949. Refraining from challenging a law does not make it constitutional.

The Committees retreat (at 55-56) to sweeping generalizations about separation of powers. But those broad principles are neither in dispute nor especially helpful in deciding this issue. The unwillingness (or inability) of the Committees to grapple with the relevant cases is telling. Pet. Br. 47-

48; U.S. 27. The Committees are free (at 55) to call it "remarkable" that Congress may not impose disclosure requirements on an office created by the Constitution itself. But they are unable to point to *any* decision of this Court that would let Congress pervasively regulate the President in this fashion.

Indeed, the Committees' reference (at 56) to the Twenty-Fifth Amendment (which allows Congress a role in determining presidential incapacity) and the Foreign Emoluments Clause only highlights why their position is flawed. Those provisions illustrate that when the Framers "sought to confer special powers" on Congress, "independent of … the President, they did so in explicit, unambiguous terms." *INS v. Chadha*, 462 U.S. 919, 955 (1983). Granting Congress a "direct congressional role" over the President absent a textual basis for doing so thus "is inconsistent with separation of powers." *Bowsher v. Synar*, 478 U.S. 714, 723 (1986).[5]

The Committees half-heartedly argue (at 56-57) that the subpoenas could also inform "conflict-of-

[5] The Committees briefly note (at 56) that, even if current financial disclosure laws are unconstitutional, Congress can fix them by keeping the forms confidential within the Executive Branch and allowing them to be used only to implement conflict-of-interest laws. But this would still go beyond any regulation of the President that the Court has permitted. Pet. Br. 48 n.5. Regardless, extending conflict-of-interest laws to the President would be unconstitutional. Pet. Br. 46; *infra* 24-26.

interest legislation" covering the President. But the D.C. Circuit was unpersuaded on this point. Pet. App. 43a-44a. The Committees do not even try to explain why forcing the President to divest certain assets or refrain from certain decisions would not "disempower [him] from performing some of the functions prescribed [by] the Constitution or … establish a qualification for … serving as President … beyond those contained in the Constitution." *Id.* (citation omitted) (some alternations in original).

Nor can the Committees explain (at 57) why conflict-of-interest laws would not create "additional qualifications indirectly." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 836 (1995). Prohibiting the President from engaging in certain transactions would, by definition, impose restrictions on him as a condition of holding office. This is precisely what the Court had in mind when it held that the Framers did not devote "significant time and energy in debating and crafting" the Qualifications Clauses only to see them "easily evaded" by clever legislative maneuvers. *Id.* at 831; *accord Schaefer v. Townsend*, 215 F.3d 1031, 1035 n.4 (9th Cir. 2000).[6]

In the end, the Committees all but concede that their proposed legislation could never be

[6] The Committees add (at 57) that they could "restrict government agencies' ability to contract with the President and entities with which he is affiliated." But this is just another effort to cleverly evade the restrictions imposed by Article II and the Qualifications Clause. In any event, Congress may not subpoena the President under the guise of performing oversight of federal agencies. *Infra* 32-33.

enforced against the President. But they nonetheless insist (at 57) that they can subpoena the President's private records anyway to "determine what the proper remedy (if any) should be." This underscores the radical power that the Committees are asserting. Even if Congress could never apply or enforce any requirement of disclosure or divestment against the President, the Committees contend that they can still use implied power to subpoena volumes of the President's most personal financial details.

And once they obtain these records—which by law they could never force the President to disclose—the Committees have reserved for themselves the right to publicize their contents (presumably under the protection of the Speech and Debate Clause). *See* App. 235a. There could be no clearer indication that the Committees are in fact exercising a "substantive and independent" power, rather than one that is "auxiliary and subordinate." *Anderson*, 19 U.S. at 225–26. The Court should reject such a transparent "aggrandizement of one branch at the expense of the other." *Clinton v. City of New York*, 524 U.S. 417, 482 (1998) (citation omitted).

2. The bank subpoenas cannot lead to valid legislation.

The Committees incorrectly contend (at 54) that "Petitioners have not disputed that the Financial Services and Intelligence Committees may enact constitutional legislation on the subjects of their investigations." Petitioners expressly argue that the Committees lack "a valid statutory outlet for

the banks investigation." Pet. Br. 51-52. That is not because the Committees lack the authority to regulate money laundering or other matters within their respective jurisdictions. It is because a "subpoena that seeks a sitting President's financial information" would not be legitimate "except to facilitate an investigation into *presidential* finances." Pet. App. 42a-43a (emphasis added). Respondents ignore this argument presumably because they have no answer to it.

Instead, they assume the power to subpoena any documents they wish from the President that could conceivably inform such broad topics as "the use of banks in the United States" or "the adequacy of existing intelligence community resources." Resp. Br. 46. But if that is permissible, then the Committees could also "subpoena the President's high school transcripts in service of an investigation into K-12 education" or "subpoena his medical records as part of an investigation into public health." Pet. App. 43a. The Committees' silence ought to be seen as a concession that they seek this type of subpoena authority over the President. The Court should make clear that, at least when it comes to the President, the authority to issue legislative subpoenas is not nearly so expansive. Pet. Br. 51-52; U.S. 20.

C. The subpoenaed documents are not pertinent to the asserted legislative purposes of the Committees.

Even in an ordinary case, a congressional committee must demonstrate that its subpoenas are "pertinent to [its] inquiry." *McPhaul v. United States*, 364 U.S. 372, 380 (1960). But this is no ordinary case. Pet. Br. 53. Accordingly, the Committees must show a heightened need for these documents in order to establish the legitimacy of these subpoenas. *See id.*; U.S. 13-17 (same). A showing by the Committees that "the subpoenaed materials are critical to the performance of [their] legislative functions" is not too much to ask before ruling "that the President is required to comply with the … subpoena[s]." *Senate Select Comm. v. Nixon*, 498 F.2d 725, 732-33 (D.C. Cir. 1974) (en banc).

The Committees offer a meager response. They claim (at 58) that "no one here, much less a 'court,' is proceeding 'against' the President." But that is not true. These subpoenas seek the President's private papers. That the subpoenas were directed to third-party custodians does not change that fact. Pet. Br. 59-60 n.7; U.S. 24-25.

The Committees argue (at 58, 63) that imposing a heightened-need requirement would also needlessly introduce a "judicially managed" standard that could "disable Congressional investigations concerning the President in all but the most extreme circumstances." But subpoenaing the personal records of the sitting President *is itself* an extreme

circumstance. Without judicial oversight, it imposes a "threat to presidential autonomy and independence" that is "far greater than that presented by compulsory process issued by prosecutors in criminal cases, … or even by private plaintiffs in civil cases." Pet. App. 216a (Katsas, J.).

The Committees' complaint (at 63) about "judicial micromanagement of every Congressional subpoena to which the President objects" also rings hollow. Any citizen whose records are the subject of a legislative subpoena already has the right to challenge its validity in court on pertinency grounds. *See Watkins*, 354 U.S. at 194-200 (collecting cases). The adjudication of those cases by the courts during the preceding century has not handcuffed Congress. The Committees do not object to having to establish pertinency. They object to having to explain why they actually need all of these documents in aid of legislation.

Indeed, the Committees' justification (at 66-67) for why they have a "critical need" for these records is conclusory at best. This kind of general explanation cannot even satisfy the ordinary pertinency standard. Pet. Br. 54-55. That is unsurprising: the pertinence of the President's personal records is especially tenuous for the hypothetical and post-hoc legislation that the Committees have belatedly suggested in litigation to avoid the serious constitutional problems with the proposed legislation they relied on when issuing the subpoenas. *Supra* 23-27. The Oversight Committee can consider legislation concerning federal disclosure

laws without demanding from the President "everything under the sky," *Cheney v. U.S. Dist. Court for Dist. of Columbia,* 542 U.S. 367, 387 (2004); *see* U.S. 28.

The explanation for why the Intelligence and Financial Services Committees need these records—including those predating the President's candidacy—is equally problematic. Pet. Br. 54-55; U.S. 29-31. The desire to use the President as a "case study," *see* App. 293a n.67, cannot establish a heightened need for these records, and, notably, the Committees do not attempt to argue otherwise.

Instead, the Committees take the position (at 65) that these investigations concern "industry-wide" reforms to generally applicable laws and that most of "the subpoenas have nothing to do with President Trump." If that is true, then the Committees have no chance of establishing heightened need. The President's unique constitutional role should make him the *last* person the Committees target—not the first. But general banking practices are manifestly not the focus of the disputed subpoenas. This is made painfully clear by the Capital One subpoena, which seeks documents "starting from the exact date on which he became the Republican nominee for President—an unusual date, to be sure, for" an alleged industry-wide investigation. *See* App. 345a-46a n.16 (Livingston, J.).

The Committees respond (at 54) that none of this should trouble the Court because pinning the subpoena to that date makes sense—gaining the

nomination "increased [the President's] and his businesses' profile and exposure … as potential avenues for illicit funds through the types of accounts held by Capital One." That just confirms that this is about exposing wrongdoing—not legislating. If this were an "industry-wide investigation into financial institutions' compliance with banking laws," *id.* at 17, it would make little sense to demand the President's banking documents *starting* when he became the most atypical real-estate developer in the world. The date makes sense only if the Committees wanted to target the President.

The district court correctly observed that these subpoenas were not "reasonable" under even the forgiving standards of relevance *ordinarily* applied in civil actions. Pet. Br. 54-55. The President deserves even greater protection when one house of Congress, purporting to exercise its legislative powers, sets him in their sights. The Court should thus invalidate the subpoenas for lack of pertinency. But if there is any doubt, the Court should remand the dispute (while preserving the status quo) to require the Committees to demonstrate a "critical need" for each category of documents they have requested.

III. There is no clear statement of authority authorizing the Committees to subpoena the President's private papers.

Before reaching the grave constitutional issues presented here, the Court must first consider "whether the committee[s]" were "authorized to exact

the information" they subpoenaed. *United States v. Rumely*, 345 U.S. 41, 43 (1953). The House of Representatives has not expressly authorized any of the Committees to subpoena the President's records. Pet. Br. 55-65. That alone is sufficient to reverse the decisions below and abstain "from adjudication" of the larger issues until the House makes clear that "no choice is left." *Rumely*, 345 U.S. at 46.

The Committees' response is clarifying. They acknowledge (at 70) that Resolution 507 "does not expand the Committee's jurisdiction." The resolution on its face confirms as much, *see* H. Res. 507, and in any event the Committees' authority "must be clearly revealed in its charter," *Watkins*, 354 U.S. at 198. Because both parties agree that Resolution 507 does not alter the House Rules, it should play no role in the Court's decision. Pet. Br. 61-63.

As to the Rules themselves, the Committees agree (at 68-69) that they do not expressly authorize a subpoena to the President. They instead argue (at 69) that the general language of the House is "'expansive'" enough to include the President.[7] But that was also true of the Administrative Procedure Act, which applied to "'each authority of the Government of the United States.'" *Franklin v. Massachusetts*, 505 U.S. 788, 800 (1992). And the Court determined that general breadth was

[7] The Committees' suggestion (at 70) that this Court lacks the authority to narrowly interpret the House rules is refuted by numerous decisions. *See, e.g.*, *Rumely*, 345 U.S. 47-48; *Shelton v. United States*, 327 F.2d 601, 605 (D.C. Cir. 1963); *Tobin*, 306 F.2d at 274-75.

insufficient to reach the President; "respect for the separation of powers and the unique constitutional position of the President" demanded "an express statement by Congress." *Id.* at 800-01.

The Committees dismiss *Franklin* (at 69-70) on the ground that, unlike the APA, these subpoenas do not "'direct[]' the President to take any action." That misses the point. The point of the clear-statement rule is to avoid the need to reach difficult constitutional questions. These subpoenas clearly fit the bill. The suggestion (at 70) that serious constitutional issues can simply be ignored because a subpoena was directed to third party—and thus "merely *concerns*" the President—has no legal basis. *See supra* 8 & n.2.

In fact, there is even more reason to invoke the avoidance canon in this setting. Statutes, at least, are subject to the requirements of bicameralism and presentment. The Committees' reading of the Rules, in contrast, would authorize dragnet subpoenas for the President's personal records on the "whim" of "one committee of one House of Congress." Pet. App. 217a (Katsas, J.).[8]

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[8] The analogy (at 69) to the application of Federal Rule of Criminal Procedure 17(c) in *United States v. Nixon*, 418 U.S. 683 (1974), is unavailing. *Nixon* applied the same "high respect" to the President—"rooted in the separation of powers under the Constitution"—to require the special prosecutor to establish a "demonstrated, specific need" for the President's records. *Id.* at 707-08, 713. In contrast, the Committees resist *any* respect for the President through the clear-statement rule or the heightened-need requirement.

The Committees also ignore the implications of their arguments. If it is true that the House rules have always authorized any committee, conducting any investigation that falls within the general description of its jurisdiction, to subpoena decades' worth of the personal records of the President, then this case is a harbinger of a much greater threat to the Presidency. Pet. Br. 64-65.

And although the targeting of the President's private papers may have "begun with the committees of *this* House of Representatives," history suggests retaliation is inevitable; "future Presidents will be *routinely* subject to the distraction of third-party subpoenas emanating from standing committees in aid of legislation." App. 344a n.14, 348a (Livingston, J.). This would, in turn, require the Court to consider broader immunity for the President from legislative subpoenas. Pet. Br. 64-65; U.S. 31-32.

The Committees contend (at 58) that those impositions on the President can be considered in the future, on a subpoena-by-subpoena basis. But that ignores the Court's longstanding categorical approach to presidential immunity. Pet. Br. 64 (citing *Clinton*, 520 U.S. at 701-02). History and precedent "support a principle of the President's independent authority to control his own time and energy." *Clinton*, 520 U.S. at 711 (Breyer, J., concurring in the judgment). Broad legislative subpoenas seeking detailed records of the President—be they financial, medical, employment, travel, educational, or other personal papers—cannot help but "risk interfering with the President's official

functions." U.S. 16. If the Committees are right about their unbridled authority, this Court will have no choice but to confront the serious ramifications for the Presidency.

CONCLUSION

The Court should reverse the judgments of the D.C. Circuit and Second Circuit.

Respectfully submitted,

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