ORAL ARGUMENT SCHEDULED FOR JULY 12, 2019

No. 19-5142

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DONALD J. TRUMP; THE TRUMP ORGANIZATION, INC.; TRUMP ORGANIZATION LLC; THE TRUMP CORPORATION; DJT HOLDINGS LLC; THE DONALD J. TRUMP REVOCABLE TRUST; and TRUMP OLD POST OFFICE LLC,

Plaintiffs-Appellants,

v.

MAZARS USA, LLP,

Defendant-Appellee,

COMMITTEE ON OVERSIGHT AND REFORM OF THE U.S. HOUSE OF REPRESENTATIVES,

Intervenor-Defendant–Appellee.

On Appeal from the United States District Court
for the District of Columbia, No. 19-cv-01136 (APM)

BRIEF FOR APPELLANTS

Stefan C. Passantino
MICHAEL BEST & FRIEDRICH LLP
1000 Maine Ave. SW, Ste. 400
Washington, D.C. 20024
(202) 747-9582
spassantino@michaelbest.com

Counsel for Appellants The Trump Organization, Inc., Trump Organization LLC, The Trump Corporation, DJT Holdings LLC, Trump Old Post Office LLC, and The Donald J. Trump Revocable Trust

William S. Consovoy
Cameron T. Norris
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
will@consovoymccarthy.com
cam@consovoymccarthy.com

Patrick Strawbridge
CONSOVOY MCCARTHY PLLC
Ten Post Office Square
8th Floor South PMB #706
Boston, MA 02109
patrick@consovoymccarthy.com

Counsel for Appellant President Donald J. Trump

Dated: June 10, 2019

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Parties and Amici. The parties, intervenors, and amici in this Court or who appeared before the district court are:

- Donald J. Trump
- The Trump Organization, Inc.
- Trump Organization LLC
- The Trump Corporation
- DJT Holdings LLC
- Donald J. Trump Revocable Trust
- Trump Old Post Office LLC
- Elijah E. Cummings
- Peter Kenny
- Mazars USA LLP
- Committee on Oversight and Reform of the U.S. House of Representatives

Per Circuit Rule 26.1, appellants The Trump Organization, Inc., Trump Organization LLC, The Trump Corporation, DJT Holdings LLC, and Trump Old Post Office LLC state that they have no parent companies or publicly-held companies with a 10% or greater ownership interest in them.

Rulings Under Review. The ruling at issue is District Judge Amit P. Mehta's grant of summary judgment, *Trump v. Comm. on Oversight & Reform of U.S. House of Representatives*, No. 19-cv-01136 (APM), ___ F. Supp. 3d ___, 2019 WL 2171378 (D.D.C. May 20, 2019), which can be found on pages 267-307 of the joint appendix (JA).

Related Cases. This case was not previously before this Court or any other. There are no related cases currently pending in this Court or any other, though *Trump v. Deutsche Bank*, No. 19-1540 (2d Cir.), does present similar issues.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

*Authorities we chiefly rely on are marked with asterisks.

Constitutional Provisions

Statutes

Other Authorities

INTRODUCTION

The separation-of-powers implications of this appeal are profound. The House Oversight Committee has subpoenaed the President's accountant for "financial documents relating to [him] personally as well as various associated businesses and entities dating back to 2011—years before he declared his candidacy for office." JA268. The Committee claims "the requested records will aid its consideration of strengthening ethics and disclosure laws" and "in monitoring the President's compliance with the Foreign Emoluments Clause[]." JA269. Plaintiffs challenged this subpoena mainly on three grounds: (1) the Committee is attempting to exercise law-enforcement powers that belong to the executive branch; (2) any proposed or contemplated legislation on these subjects would be unconstitutional; and (3) few of these records are pertinent to the Committee's stated purpose. The district court sided with the Committee. Indeed, it concluded that this subpoena does not even raise "serious constitutional questions." JA305 n.31.

That would surprise the Supreme Court. Congress has expressed an interest in legislating on the conflict-of-interest and financial-disclosure practices of the Justices too. *See, e.g.*, Supreme Court Transparency and Disclosure Act of 2011, H.R. 862, 112th Cong. (2011); Supreme Court Ethics Act, H.R. 1057, 116th Cong. (2019). These proposals raise serious constitutional concerns. As the Chief Justice has explained, there is "a fundamental difference between the Supreme Court and the other federal courts. Article III of the Constitution creates only one court, the Supreme Court of the United

States, but it empowers Congress to establish additional lower federal courts." 2011 Year-End Report on the Federal Judiciary 3-4, bit.ly/2Ku5ZvM. And although "Congress has directed Justices and judges to comply with both financial reporting requirements and limitations on the receipt of gifts and outside earned income" and the Justices comply with them, the Court has never decided "whether Congress may impose those requirements on the Supreme Court." *Id.* at 6. In short, "the limits of Congress's power" in this area have "never been tested." *Id.* at 7.

Yet replace "President" with "Justices" and the ruling below would, without question, authorize a congressional subpoena for the Justices' accounting records—even for many years before they joined the Court. There would "be little doubt" that "Congress's interest in the accuracy of the [Justices'] financial disclosures falls within the legislative sphere." JA288. Whether they are "abiding by the Foreign Emoluments Clause is likewise a subject on which legislation … could be had." JA288. "So, too, is an investigation to determine whether [the Justices have] any conflicts of interest" (even though those laws do not currently apply to them), given that "exposing conflicts" and "shed[ding] light" are "entirely consistent with potential legislation in an area where Congress already has acted." JA289. Finally, the subpoena would be "justified based on Congress's 'informing function'" since, according to the district court, Congress has "sweeping authority to investigate illegal conduct of a [Justice] before and after taking office." JA290.

The district court acknowledged that "the power to investigate may not 'extend to an area in which Congress is forbidden to legislate." JA283 (quoting *Quinn v. United States*, 349 U.S. 155, 161 (1955)). It recognized that a "prime example of" congressional "overreach is exercising the 'powers of law enforcement; those powers are assigned under our Constitution to the Executive and the Judiciary.'" JA283 (quoting *Quinn*, 349 U.S. at 161). And it insisted that Congress lacks a "general power to investigate into personal affairs." JA297.

But when the district court said that "limits on Congress's investigative authority ... do not substantially constrain Congress," it was serious. JA269. The court refused to "evaluate the constitutionality of proposed or contemplated legislation." JA303. It would not classify "a congressional investigation that seeks to uncover wrongdoing" for its own sake as prohibited law enforcement. JA294. And it rejected any meaningful review of whether the subpoenaed documents are actually pertinent to the Committee's stated legislative purpose. JA300-01. Instead, the district court vindicated the Committee's breathtaking position: Congress has "'plenary authority'" to subpoena anything except "probably" someone's "blood" or his "diary from when" he was "12 years old," JA274, 214-15. No congressional subpoena could ever be invalidated under this standard.

Ultimately, the district court lost sight of two bedrock principles. First, Article I does not enumerate a "subpoena" power; that power has been implied from the Necessary and Proper Clause. *McGrain v. Daugherty*, 273 U.S. 135, 161 (1927). Failing to

harness that authority, as the district court did, would "carry us from the notion of a government of limited powers." *NFIB v. Sebelius*, 567 U.S. 519, 552 (2012) (opinion of Roberts, C.J.). Second, the office of the President—like the Supreme Court—is created by the Constitution. Congress might have greater control over the lower courts and other executive-branch officials. But the presidency's "unique position in the constitutional scheme," *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982), means that Congress's power to legislatively control the occupant is severely constrained, *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 493 (2010).

Properly analyzed, this subpoena exceeds Congress's investigative authority. As the record demonstrates, and as Speaker Pelosi recently confirmed, this investigation is not about legislation. It is about trying to prove that the President broke the law—an exercise of law-enforcement authority that the Constitution reserves to the executive branch. But even if Congress genuinely had legislation in mind, then-Acting Attorney General Silberman long ago explained why such legislation would be unconstitutional: it would "establish a qualification for his serving as President (to wit, elimination of financial conflicts) beyond those contained in the Constitution" and would otherwise "disempower him" in the execution of his office. Ltr. from Acting Att'y Gen. Silberman to Chairman Cannon 5 (Sept. 20, 1974), bit.ly/31k3rql. And even if Congress overcame both these hurdles, it could never show that the vast majority of documents it has subpoenaed from Mazars are pertinent to any stated legitimate aim. The district court's judgment should be reversed.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. §1331 because Plaintiffs allege violations of federal law. This Court has jurisdiction under 28 U.S.C. §1291 because Plaintiffs appeal a final judgment that disposed of every claim. The district court entered that judgment on May 20, 2019, and Plaintiffs filed a notice of appeal on May 21, 2019. JA307-08.

ISSUE PRESENTED

Whether the Committee's subpoena for Plaintiffs' private accounting records is "related to, and in furtherance of, a legitimate task of the Congress." *Watkins v. United States*, 354 U.S. 178, 187 (1957).

STATUTES AND REGULATIONS

Rules of the House of Representatives, 116th Congress (Jan. 11, 2019):

- "The Committee on Oversight and Reform shall review and study on a continuing basis the operation of Government activities at all levels, including the Executive Office of the President." Rule X, cl. 3(i).
- "In addition to its duties under subparagraph (1), the Committee on Oversight and Reform may at any time conduct investigations of any matter without regard to clause 1, 2, 3, or this clause conferring jurisdiction over the matter to another standing committee…." Rule X, cl. 4(c)(2).

STATEMENT OF CASE

From time to time, this Court adjudicates the legality of congressional subpoenas. Congress has often (but not always) prevailed in those cases, since its subpoenas were narrow and clearly furthered a legitimate task. But this Court has never seen anything like the current House. To quote Michael McConnell: "Never before have so many congressional committees issued so many subpoenas demanding documents and

testimony from so many executive-branch officials, with so little attempt at negotiation or accommodation." *Trump Resists Congressional Subpoenas – That's What Presidents Do*, Austin Am.-Statesman (May 2, 2019), atxne.ws/2EYIFTm. And never before have House committees subpoenaed third-party custodians for the private records of a sitting President.

This appeal is about one of those subpoenas. Two months ago, Chairman Elijah Cummings of the House Oversight Committee issued a subpoena to Mazars USA LLP, the longtime accountant for President Trump and several Trump entities (Plaintiffs here). The subpoena demanded that Mazars disclose eight years of information about Plaintiffs from four broad categories:

1. All statements of financial condition, annual statements, periodic financial reports, and independent auditors' reports prepared, complied, reviewed, or audited by Mazars USA LLP or its predecessor, WeiserMazars LLP;
2. Without regard to time, all engagement agreements or contracts related to the preparation, compilation, review, or auditing of the documents described in Item Number 1;
3. All underlying, supporting, or source documents and records used in the preparation, compilation, review, or auditing of documents described in Item Number 1, or any summaries of such documents and records relied upon, or any requests for such documents and records; and
4. All memoranda, notes, and communications related to the preparation, compilation, review, or auditing of the documents described in Item Number 1, including, but not limited to:
    a. all communications between Donald Bender and Donald J. Trump or any employee or representative of the Trump Organization; and
    b. all communications related to potential concerns that records, documents, explanations, or other information, including significant judgments, provided by Donald J. Trump or other

> individuals from the Trump Organization, were incomplete, inaccurate, or otherwise unsatisfactory.

JA26.

The Mazars subpoena emerged from a Committee hearing last February, featuring the testimony of Michael Cohen. JA268. Cohen had recently pleaded guilty to numerous dishonesty-based crimes (including lying to Congress), but had not been sentenced. JA275. Hoping that Committee members would help his quest for leniency, Cohen agreed to provide testimony criticizing the President. Among other things, Cohen alleged that the President had "inflated" and "deflated" his assets on "personal financial statements from 2011, 2012, and 2013" to obtain a bank loan for a (never materialized) deal "to buy the Buffalo Bills," "to reduce his [New York] real estate taxes," and to reduce his insurance premiums. *Hearing with Michael Cohen, Former Attorney to President Donald Trump: Hearing Before the H. Comm. on Oversight & Reform*, 116th Cong. 13, 38, 160-61 (2019), bit.ly/2IrXTkX. The financial statements in question were prepared by Mazars. JA42-86.

Chairman Cummings made clear why he was interested in hearing this testimony: "Mr. Cohen's testimony raises grave questions about the legality of Donald Trump's—President Donald Trump's conduct." Cohen Hearing 6. Several Committee members expressed their agreement. *E.g.*, *id.* at 107 (Hill: "I ask these questions to help determine whether our very own President committed felony crimes"); *id.* at 163-65 (Tlaib: "[O]ur sole purpose[] is exposing the truth…. President Donald J. Trump … commit[ed]

multiple felonies, and you covered it up, correct?"); *id.* at 37 (Clay: "I would like to talk to you about the President's assets, since by law these must be reported accurately."); *id.* at 160-61 (Ocasio-Cortez: "[D]id the President ever provide inflated assets to an insurance company? … Do you think we need to review his financial statements … to compare them?"); *id.* at 150-52 (Khanna: "[Y]ou have provided … compelling evidence of Federal and State crimes, including financial fraud…. I just want the American public to understand that … the President … may be involved in a criminal conspiracy."); *id.* at 30 (Maloney: lamenting that "while [Cohen is] facing the consequences of going to jail, [the President] is not").

Before issuing the Mazars subpoena, Chairman Cummings explained its purpose in two documents. The first, a March 20 letter to Mazars, explained that the Committee wanted to verify Cohen's testimony that "President Trump changed the estimated value of his assets and liabilities on financial statements prepared by your company—including inflating or deflating the value depending on [his] purpose." JA91. The Chairman identified what he perceived to be inconsistencies between the 2011, 2012, and 2013 statements produced by Cohen, and he asked Mazars "[t]o assist our review of these issues." JA92-94.

The second, an April 12 memorandum to the Committee, again referenced the need to verify Cohen's testimony, as well as two "news reports" discussing events that allegedly occurred years before President Trump was a candidate for office. JA104. In response to Ranking Member Jim Jordan's complaint that subpoenaing Mazars lacked

a legitimate legislative purpose, JA101-02, the Chairman's memo asserted that the subpoena did not need a legitimate purpose under the House Rules, and that "Republicans" were similarly guilty of "investigat[ing] the finances of 'private individuals.'" JA106. Still, the Chairman's memo offered four potential legislative purposes for the Mazars subpoena:

1. To "investigate whether the President may have engaged in illegal conduct before and during his tenure in office."
2. To "determine whether he has undisclosed conflicts of interest that may impair his ability to make impartial policy decisions."
3. To "assess whether he is complying with the Emoluments Clauses of the Constitution."
4. To "review whether he has accurately reported his finances to the Office of Government Ethics and other federal entities."

JA107. The Ranking Member was unpersuaded. JA111-19, 265-66.

On April 22, Plaintiffs filed suit against Mazars, Chairman Cummings, and the Committee lawyer who served the subpoena. JA9. Plaintiffs claimed that the Committee lacked statutory jurisdiction to issue the subpoena and that it sought Plaintiffs' private information with no "'legitimate legislative purpose.'" JA9-10 (quoting *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 501 n.14 (1975)). A few days later, the Committee intervened in place of the individual congressional defendants, Dkt. 15, and agreed to stay the subpoena until after the district court ruled on Plaintiffs' preliminary-injunction motion, JA4.

The parties briefed whether Plaintiffs were entitled to a preliminary injunction. Dkt. 11-1; 20; 24. Yet after those briefs were submitted, and just two business days before the preliminary-injunction hearing, the district court *sua sponte* announced that the hearing would also be the final trial on the merits. Dkt. 25. Plaintiffs objected, noting that the Committee had not sought dismissal or summary judgment and, thus, the parties had not adequately briefed the merits. Dkt. 29. The district court overruled Plaintiffs' objections and treated the preliminary-injunction filings as cross-motions for summary judgment. JA280-81.

The district court entered judgment for the Committee. JA269. It first concluded that several legal inquiries were not permitted:

- The court would not consider the constitutionality of any legislation—actual or potential—that the Mazars subpoena is supposed to help Congress investigate. That inquiry, the court reasoned, would violate the constitutional-avoidance canon and the prohibition on "advisory opinions." JA303.
- Because the court could not evaluate Congress's "motives," it refused to "decipher whether Congress's true purpose in pursuing an investigation is to aid legislation or something more sinister." JA284.
- The court refused to evaluate "the investigation's scope or the evidence sought." JA285, 304. Although Congress's requests must be "pertinent" to its investigation, the court thought this requirement applied only where a defendant is charged with criminal contempt. JA300-01.

Employing these "guideposts," JA294, the district court upheld the subpoena. Finding the Chairman's April 12 memo to be "the best evidence" of the subpoena's

purpose, JA287, the district court considered and endorsed each of the four purposes mentioned in the memo:

1. The Committee could investigate whether the President engaged in "illegal conduct" (even though the Committee did not defend this rationale in the district court). The court concluded that Congress's power to "inform[]" the public about agency "corruption" also applies to the President. The court also invoked, *sua sponte*, the House's power to impeach the President. It cited Watergate and Whitewater (examples the Committee never raised) as instances where Congress "investigated a sitting President for alleged law violations, *before* initiating impeachment proceedings." JA289-90.
2. The Committee could investigate "whether the President has any conflicts of interest." Congress could enact a range of ethics reforms based on this information, though the court refused to opine on their constitutionality. JA289-91.
3. The Committee could investigate "whether the President is abiding by the Foreign Emoluments Clause." The Committee did not defend this rationale, but the court sustained it anyway as "incident" to "Congress's constitutional function to approve or disapprove Emoluments." JA288-89.
4. The Committee could investigate "the accuracy of the President's financial reporting" to determine if he committed "violations" of the Ethics in Government Act. If he did, then Congress might "strengthen[] public reporting requirements or enhance[] penalties for non-compliance." JA287-88.

The district court entered summary judgment against Plaintiffs. JA308. Then, after issuing a 41-page opinion and describing the issues in this dispute as "important" and "serious," JA169-70—the district court denied a stay pending appeal, holding that Plaintiffs' claims did not even "present[] 'serious legal questions.'" JA304-07. Plaintiffs filed a notice of appeal the next day. JA37. The Committee again agreed to stay the subpoena. CADC Doc. #1789081.

SUMMARY OF ARGUMENT

The Mazars subpoena is not "related to, and in furtherance of, a legitimate task of the Congress." *Watkins*, 354 U.S. at 187. It is beyond the Committee's statutory jurisdiction and does not further a legitimate legislative purpose. The Committee is not legislating—it is exercising "powers of law enforcement." *Quinn*, 349 U.S. at 161. The Committee admits that the whole point is to discover "whether the President may have engaged in illegal conduct." JA107. The events that led to the subpoena's issuance, the public statements surrounding the subpoena, the nature of the demand itself, and other evidence confirm that the Committee's purpose is not legislative. It is an effort to investigate alleged legal violations—power that is vested in the Executive, not Congress. *Barenblatt v. United States*, 360 U.S. 109, 111-12 (1959).

To be sure, the Committee has pointed to potential legislation that the subpoena could theoretically further. But Congress cannot shoulder the burden of establishing a legitimate purpose through "mere assertion of a need to consider 'remedial legislation.'" *Shelton v. United States*, 404 F.2d 1292, 1297 (D.C. Cir. 1968). Claiming that the fruits of an investigation might lead Congress to amend existing law cannot transform a law-enforcement effort into a legislative agenda. If it could, Congress's unenumerated investigative powers, which rest on the Necessary and Proper Clause, would be truly limitless. Congress can always claim that a desire to see whether a law has been broken is really an inquiry into how well the law is working.

Regardless, the legislation that the Committee is contemplating targets "an area in which Congress is forbidden to legislate." *Quinn*, 349 U.S. at 161. The Committee asserts that Congress can extend federal conflict-of-interest restrictions to the President or impose more stringent financial-disclosure requirements on him. But the office of the President (like the Supreme Court and unlike other offices and courts) is created by the Constitution—not Congress. Accordingly, Congress cannot expand or alter the office's qualifications. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 803 (1995); *Powell v. McCormack*, 395 U.S. 486, 550 (1969). Nor can Congress interfere with the President's "responsibility to take care that the laws be faithfully executed." *PCAOB*, 561 U.S. at 493. The species of legislation that the Committee has in mind here would do both. Silberman Letter 5.

The subpoena's breadth underscores how far removed it is from any legitimate purpose. Naturally, "the records called for by the subpoena" must be "pertinent to the inquiry." *McPhaul v. United States*, 364 U.S. 372, 380 (1960). The Committee cannot possibly argue that all accounting records since 2011, all engagement letters between Plaintiffs and Mazars, and "all communications" where Mazars voiced "concerns" about Plaintiffs' accounting practices, JA109, are pertinent to a legislative agenda. The Court either must narrow the subpoena or invalidate it, since a subpoena cannot stand unless it is "good in its entirety." *United States v. Patterson*, 206 F.2d 433, 434 (D.C. Cir. 1953). This subpoena is the definition of overbroad.

That the Committee has no legitimate legislative purpose should have ended this case, as legislation is the only purpose that the Committee ever advanced in court. But it did not; the district court invoked the impeachment power on the Committee's behalf. That was remarkably inappropriate. Even in mine-run cases, courts should not raise arguments for sophisticated litigants. That is doubly true here, where the law prohibits congressional committees from using "retroactive rationalization" to justify subpoenas. *Watkins*, 354 U.S. at 204. And it is triply true when that retroactive rationalization is impeachment, a weighty constitutional matter with grave political ramifications. The Committee did not invoke impeachment because that is not why it issued the Mazars subpoena. The one thing the parties agree on is that this case is not about impeachment. The district court should not have suggested otherwise.

Finally, affirming the district court would betray the admonition that Congress's subpoena power "is not unlimited." *Id.* at 187. The Committee believes it has a general warrant authority: it can investigate any person, about any matter, at any time, with no limitation on relevance or scope. The district court accepted all of that, and then kept going. According to the district court, Congress can subpoena the records of *anyone* to root around for evidence of official crimes, conflicts, or "emoluments," or just to "inform" the public about whatever it finds. And courts cannot review the subpoena's overbreadth, its purpose, or the constitutionality of the legislation it is supposed to advance. If this view of Congress's unenumerated subpoena power sounds inconsistent

with a Constitution that gives Congress only "limited" powers, *Marbury v. Madison*, 5 U.S. 137, 176 (1803), that's because it is.

ARGUMENT

"No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress." *Watkins*, 354 U.S. at 200. The Committee's subpoena flunks that test. It is beyond the Committee's statutory jurisdiction. And it does not further any legitimate legislative purpose or any other legitimate congressional task. The subpoena thus exceeds Congress's constitutional authority. The district court disagreed and granted summary judgment against Plaintiffs. That ruling, which is reviewed de novo, *Nat'l Parks Conservation Ass'n v. Semonite*, 916 F.3d 1075, 1081 (D.C. Cir. 2019), should be reversed.

I. The subpoena exceeds the Committee's statutory jurisdiction.

The Committee's statutory jurisdiction must "first be settled" before the Court can reach the parties' constitutional dispute. *Rumely v. United States*, 345 U.S. 41, 42-43 (1953). As Plaintiffs argued below, the Mazars subpoena exceeds the Committee's jurisdiction because the House Rules do not authorize oversight of the President—let alone his personal finances. Dkt. 24 at 12.

The district court (implicitly and incorrectly) rejected this argument. JA270-71. It noted that the Committee has jurisdiction to "review and study ... the Executive Office of the President." House Rule X, cl. 3(i). But "the 'Executive Office of the President' ... does not include the Office of the President." *Kissinger v. Reporters Comm.*

for Freedom of the Press, 445 U.S. 136, 156 (1980); *accord Meyer v. Bush*, 981 F.2d 1288, 1299 (D.C. Cir. 1993). "The Executive Office of the President consists of a small group of federal agencies that most immediately aid the President on matters of policy, politics, administration, and management," JA271, and the President is not an agency, *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992).

This Court should invalidate the Committee's subpoena on statutory grounds for two reasons. First, the Court must avoid serious constitutional issues if possible. *Infra* II.B.1. Second, a "'clear statement' rule" applies "to statutes that significantly alter the balance between Congress and the President." *Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991). Both rules apply with equal force to the House Rules. *Rumely*, 345 U.S. at 45. Hence, if the Committee wants roving jurisdiction to investigate the personal finances of the President himself, Congress needs to clearly provide that authority first. *Watkins*, 354 U.S. at 201; *Exxon Corp. v. FTC*, 589 F.2d 582, 592 (D.C. Cir. 1978); *Tobin v. United States*, 306 F.2d 270, 275 (D.C. Cir. 1962). It has not done so. Even if the Committee has broad statutory jurisdiction over "the operations and administration of the Executive Branch," JA270, that does not mean it has jurisdiction over the President. *Fitzgerald*, 457 U.S. at 750.

II. The Committee's subpoena exceeds Congress's Article I authority.

A. When Congress issues subpoenas in aid of valid legislation, it needs a legitimate legislative purpose.

The power of Congress to issue subpoenas, enforceable through contempt, has always been controversial. "The powers of Congress ... are dependent solely on the

Constitution," and this power is not "found in that instrument." *Kilbourn v. Thompson*, 103 U.S. 168, 182 (1880); *accord McGrain*, 273 U.S. at 161; Note, *Congressional Power to Punish for Contempt*, 30 Harv. L. Rev. 384 (1917).

For over a century, however, the issue was not joined. "There was very little use of the power of compulsory process in early years to enable the Congress to obtain facts pertinent to the enactment of new statutes or the administration of existing laws." *Watkins*, 354 U.S. at 192-93. In those days, Congress mostly employed compulsory process to investigate its own members, *id.* at 192, a power it *does* expressly hold, Art. I, §5, cl. 2. "It is not surprising," then, that "[t]he Nation was almost one hundred years old before the first case reached the Court to challenge the use of compulsory process as a legislative device, rather than in inquiries concerning the elections or privileges of Congressmen." *Watkins*, 354 U.S. at 193-94.

That case was *Kilbourn*. There, Congress asserted "unlimited" power to issue and enforce subpoenas, which "it must be presumed … was rightfully exercised." 103 U.S. at 181-82. In pressing this view, Congress offered two arguments: first, "the House of Commons of England" held this power; and second, the power was "necess[ary]" to help Congress legislate. *Id.* at 183.

The Supreme Court rejected the first argument. Unlike Congress, "the assembled Parliament exercised ... the judicial authority of the king in his Court of Parliament." *Id.* The "powers and privileges of the House of Commons of England," in other words, "rest on principles which have no application to … the House of Representatives of

the United States—a body which is in no sense a court, which exercises no functions derived from its once having been a part of the highest court of the realm." *Id.* at 189; *accord* Note, *supra*.

The Court then determined that it did not need to pass on "the existence or non-existence of such a power in aid of the legislative function." 103 U.S. at 189. Another constitutional error rendered that issue immaterial: the "power" exercised by the House in *Kilbourn* was "judicial and not legislative," which violated the fundamental maxim that "the powers confided by the Constitution to one of [the] departments cannot be exercised by another." *Id.* at 192-93. As a result, the Court could assume that Congress had an implied subpoena power, since the investigation was unconstitutional in any event. *Id.* at 195-96.

It was not until 1927 that the Supreme Court decided "whether [the subpoena] power is so far incidental to the legislative function as to be implied." *McGrain*, 273 U.S. at 161. The Court decided that issue in Congress's favor, holding that "the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." *Id.* at 174. The Court was equally clear, however, that "neither house of Congress possesses a 'general power of making inquiry into the private affairs of the citizen'"; Congress may not "'assume[] a power which could only be properly exercised by another branch of the government'"; and Congress must be investigating a "matter" for which "valid legislation could be had." *Id.* at 170-71 (quoting *Kilbourn*, 103 U.S. at 190, 192).

The Supreme Court has drawn these lines ever since. Congressional inquiries "must be related to, and in furtherance of, a legitimate task of the Congress." *Watkins*, 354 U.S. at 187. That usually means subpoenas need a "legitimate legislative purpose." *Eastland*, 421 U.S. at 501 n.14. The Supreme Court "has not hesitated" to invalidate subpoenas "when it found Congress was acting outside its legislative role." *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951). And it has not allowed Congress to be "the final judge of its own power and privileges." *Kilbourn*, 103 U.S. at 199. Specifically, four legal rules demark the line between a subpoena with a legitimate legislative purpose and one that exceeds Congress's legislative role.

First, "the records called for by the subpoena" must be "pertinent to [the congressional] inquiry." *McPhaul*, 364 U.S. at 380. This "pertinency" requirement ensures that Congress is "coping with a problem that falls within its legislative sphere." *Watkins*, 354 U.S. at 206. If the congressional subpoena is not "reasonably 'relevant to the inquiry,'" then it lacks a legitimate purpose. *McPhaul*, 364 U.S. at 381-82; *accord Hearst v. Black*, 87 F.2d 68, 71 (D.C. Cir. 1936); *Bergman v. Senate Special Committee on Aging*, 389 F. Supp. 1127, 1130 (S.D.N.Y. 1975). The "burden is on the court to see that the subpoena is good in its entirety." *Patterson*, 206 F.2d at 434.

Second, "the power to investigate ... cannot be used to inquire into private affairs unrelated to a valid legislative purpose." *Quinn*, 349 U.S. at 161; *accord Eastland*, 421 U.S. at 504 n.15. Put differently, "there is no congressional power to expose for the sake of exposure." *Watkins*, 354 U.S. at 200; *accord Exxon*, 589 F.2d at 588. "Investigations

conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated" are unconstitutional. *Watkins*, 354 U.S. at 187.

Third, Congress cannot exercise "any of the powers of law enforcement; those powers are assigned under our Constitution to the Executive and the Judiciary." *Quinn*, 349 U.S. at 161; *accord Watkins*, 354 U.S. at 187. "Lacking the judicial power given to the Judiciary" or the executive power given to "the Executive," Congress "cannot inquire into matters which are within the exclusive province of one of the other branches" or otherwise "trench upon Executive or judicial prerogatives." *Barenblatt*, 360 U.S. at 111-12; *accord McSurely v. McClellan*, 521 F.2d 1024, 1038 (D.C. Cir. 1975).

Fourth, an investigation cannot "extend to an area in which Congress is forbidden to legislate." *Quinn*, 349 U.S. at 161. "The subject of any inquiry always must be one 'on which legislation could be had.'" *Eastland*, 421 U.S. at 504 n.15; *accord Exxon*, 589 F.2d at 588. Legislation, by definition, cannot be had when it would violate the Constitution. *Tobin*, 306 at 272-76.

B. The district court misinterpreted the legitimate-legislative-purpose requirement.

The district court purported to apply this framework. JA282-304. But it made a series of critical mistakes that infected its decision.

1. The district court needed to decide whether the subpoena concerns a matter on which Congress can legislate.

The district court thought it was "improper" to decide if the Committee's investigation could result in legislation within Congress's constitutional authority. The

court held it has no "role in this context to evaluate the constitutionality of proposed or contemplated legislation." JA303. That is incorrect. Congress cannot subpoena information concerning a subject on which it "is forbidden to legislate." *Quinn*, 349 U.S. at 161. The court seemed to agree, emphasizing over and over that "the subject of any inquiry always must be one on which legislation could be had." JA285 (cleaned up); JA283, 287, 288, 291, 299. Because valid legislation could not "be had" if it would be unconstitutional, the court had to decide whether this subpoena is designed to advance unconstitutional legislation.

Tobin illustrates the point. There, the House subpoenaed the executive director of the Port of New York Authority. The Authority—a "bi-state agency ... between New York and New Jersey"—had been created via "the compact clause of the Constitution." 306 F.2d at 271. "Congress consented to the compacts but expressly retained ... 'the right to alter, amend or repeal' its resolutions of approval." *Id.* Later, as part of a congressional investigation, a subcommittee subpoenaed documents concerning "internal administration of the Authority" because the documents bore on "matters 'involving the activities and operation of interstate compacts.'" *Id.* Mr. Tobin countered that Congress lacked "the power, under the compact clause of the Constitution, to 'alter, amend or repeal' its consent to an interstate compact, which was the stated purpose of the Subcommittee's investigation." *Id.* at 272. This Court dodged these "serious constitutional questions" by holding that Congress had not "authori[zed] ...

the Subcommittee to conduct the sweeping investigation undertaken in the instant case." *Id.* at 274-75.

The *Tobin* court was relieved that it could "avoid … constitutional adjudication" by narrowly reading "the authorizing resolutions" not to permit the investigation into "the documents demanded by the subpoena in question." *Id.* It understood the "gravity ... of the constitutional questions," *id.* at 272, and expressed frustration at being pressed to "answer broad questions of civil law within the framework" of a subpoena-enforcement action—"not the most practical method of inducing courts to answer broad questions broadly," *id.* at 274. At the same time, the Court understood that Congress could force the issue:

> If Congress should adopt a resolution which in express terms authorizes and empowers the Committee and its duly authorized Subcommittee to initiate an investigation of the [Authority] as deep and as penetrating as the one attempted here, a challenge of the congressional power so to provide would of course *present constitutional issues which we should have to meet and decide*. Therefore, we emphasize that all we are saying here is that a due regard for the responsibility of administering justice prompts us to avoid serious constitutional adjudications *until such time as Congress clearly manifests its intention of putting such a decisional burden upon us*.

Id. at 276 (emphasis added).

The lesson *Tobin* taught, according to the district court, is that it should "sidestep important constitutional issues unless squarely presented and unavoidable." JA303-04 n.30. That is right. The avoidance canon means a court "will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Nw. Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009). If possible, then, the district

court should have resolved this case in a way that avoided deciding whether Congress's legislative goal is constitutional—for instance, by quashing the subpoena as beyond the Committee's statutory jurisdiction. But if a constitutional question cannot be avoided, it must be answered. Federal courts do "not shrink from [their] duty 'as the bulwark of a limited Constitution against legislative encroachments.'" *Id.*

The district court disagreed; it believed that answering the constitutional question would be an advisory opinion. JA303. But deciding whether Congress is investigating a subject on which it could validly legislate is hardly advisory. An "'advisory opinion' is ... what you call a decision that does not resolve an actual case or controversy." *Ill. ex rel. Barra v. Archer Daniels Midland Co.*, 704 F.2d 935, 941 (7th Cir. 1983). Put differently, "what makes [a decision] a proper judicial resolution of a 'case or controversy' rather than an advisory opinion ... is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff*." *Hewitt v. Helms*, 482 U.S. 755, 761 (1987). Settling this constitutional issue against the Committee would not just affect its behavior toward the President; it would resolve the subpoena's validity.

The district court's reliance on *United States v. Rumely* was equally misplaced. JA303. Mr. Rumely "refused to disclose to the House Select Committee on Lobbying Activities the names of those who made bulk purchases of [certain] books." 345 U.S. 41, 42 (1953). The Court invoked the avoidance canon, noting that the "duty to avoid a constitutional issue, if possible, applies not merely to legislation technically speaking but also to congressional action by way of resolution." *Id.* at 45. Courts, in other words,

must refrain from deciding whether Congress exceeded its constitutional authority "unless no choice is left." *Id.* at 46; *see id.* at 48 ("Grave constitutional questions are matters properly to be decided by this Court but only when they inescapably come before us for adjudication."). Thus, in *Rumely*, too, the Court avoided "constitutional questions [that] have farreaching import." *Id.* at 43. But not by *bypassing* them. The Court held that the Committee had exceeded its statutory authority. *Id.* at 47-48.

The district court expressed deep concern over deciding "abstract constitutional questions about prospective legislation that is not yet law." JA303-04 & n.30. While the issues here are not altogether abstract, *infra* II.C.2, II.C.4, the concern was understandable. *Rumely* and *Tobin* similarly lamented having to decide big constitutional issues "in such ill-defined circumstances." JA303. The blame for this situation, though, must be laid at the Committee's doorstep. Given Congress's broad legislative powers, most subpoenas do not raise serious constitutional disputes over whether valid legislation could follow. This case is the exception. The Mazars subpoena compels disclosure of *the President's* confidential financial documents and, in defense of this bold demand, the Committee claims sweeping authority to legislatively control the office of the President. Congress must have known that this demand would provoke serious concerns over whether it is investigating a "subject" upon "which legislation could be had." *Exxon*, 589 F.2d at 588; *accord Tobin*, 306 F.2d at 275 n.9 (noting "that no such massive investigation of a compact agency had ever been initiated by Congress before"). The Committee—not Plaintiffs—thus triggered this Court's unflagging "decisional

burden" to answer these constitutional questions. *Tobin*, 306 F.2d at 275. Unless, of course, the subpoena can be quashed on statutory grounds.

As in *Tobin* and *Rumely*, Plaintiffs offered the district court that option. Having declined it, the court was required to take the step that *Tobin and Rumely* avoided: to decide whether the subpoena concerns "a subject 'on which legislation could be had.'" JA287. But the court refused. It instead *upheld* the subpoena without ever deciding the "inescapably" presented constitutional questions it triggered. *Rumely*, 345 U.S. at 48. The district court's decision to shrink from its judicial duty was legal error. This Court should not repeat it.

2. Congress does not have an independent "informing" power.

The district court held that Congress has an independent "'informing function'" that, "though not wholly distinct from its legislative function," is "a critical responsibility uniquely granted to Congress under Article I." JA283. The court then held that the Committee's investigation of the President is a legitimate exercise of that "'informing function.'" JA289, 290 n.24, 298. That is incorrect. The "informing function" is a manifestation of Congress's legislative authority over federal agencies. It is not an independent power—partially, wholly, or otherwise—and it does not extend to the President.

To begin, the "informing function" is not "distinct from [Congress's] legislative function"; it is an *application* of it. As *Watkins* explained, Congress's power to "expose corruption, inefficiency or waste" must be part of "the legislative process." 354 U.S. at

187. It can be "justified solely as an adjunct to the legislative process," *id.* at 197, and cannot "be inflated into a general power to expose" private information, *id.* at 200, simply because Congress believes it will "promote transparency," JA301. In other words, congressional investigations to gather information and inform the public—without a tie to valid legislation—are constitutionally illegitimate. That is what the Court meant when it held that "there is no congressional power to expose for the sake of exposure." *Watkins*, 354 U.S. at 200.

The "informing function" referenced by the district court allows "Congress to inquire into and publicize corruption, maladministration or inefficiency in *agencies* of the Government." *Id.* at 200 n.33 (emphasis added). Congress can conduct "probes into *departments* of the Federal Government to expose corruption, inefficiency or waste," *id.* at 187 (emphasis added), because such probes are an adjunct to the legislative process. An agency, after all, is a "creature of statute. It has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress." *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001); *accord La. Public Service Comm'n v. FCC*, 476 U.S. 355, 357 (1986). Investigating agencies and departments is thus integral to Congress's power "to enact and appropriate under the Constitution." *Barenblatt*, 360 U.S. at 111. But since the Constitution creates the office of the President, he is not an agency that Congress creates or controls, and the Committee's "informing function" cannot justify *this* subpoena.

The district court acknowledged that *Watkins* "refers to the informing function in connection with 'agencies of the Government,'" but concluded that this reference is "better understood as a case-specific statement—the investigation there involved the Attorney General—rather than a limiting principle." JA290 n.24. In the district court's view, "the original conception of that function as embraced ... in *Rumely* was not so limited." JA290 n.24. But the "original conception" of the informing function did not come from *Rumely*. It came from *McGrain*, where the Court framed and applied the principle exactly like *Watkins*. The *McGrain* Court explained that "the administration of the Department of Justice" was a subject "on which legislation could be had" because "the functions of the Department of Justice, the powers and duties of the Attorney General, and the duties of his assistants *are all subject to regulation by congressional legislation*" and "*under such appropriations as in the judgment of Congress are needed from year to year.*" 273 U.S. at 177-78 (emphasis added).

Rumely did not alter this understanding. The decision did not speak "more generally of shining a light on 'every affair of government' … without qualification." JA290 n.24 (quoting *Rumely*, 345 U.S. at 43). The Court merely quoted Woodrow Wilson's writings and noted that the government had "asked" the Court to adopt the full "reach" of "Woodrow Wilson's characterization" of Congress's "informing function." 345 U.S. at 43. But the Court declined that invitation. It cautioned that "the 'rights' which [the informing] function implies" should not be pushed "to their logical extreme," that this function is "'limited'" by other constitutional principles, and that

Wilson never anticipated Congress would use this power to investigate *private individuals*—a new problem of "wide concern." *Id.* at 43-44. Of course, the *Rumely* Court never explored Congress's "informing function" because it resolved the case on statutory grounds. Thus, the discussion of Wilson's views on Congress's investigative powers was, at most, "dictum." *Russell v. United States*, 369 U.S. 749, 777 (1962) (Douglas, J., concurring).

The notion that *Rumely* endowed Congress with a unique "informing function" to which *Watkins* must be reconciled is therefore untenable. *McGrain* and *Watkins* are the relevant decisions, and they hold that "[t]he power to inform is ... no broader than the power to legislate." *Id.* at 778. This is not "artificial line-drawing" that is "antithetical to the checks and balances inherent in the Constitution's design." JA290 n.24. It respects "the division of the powers of the government among the three departments" by confining Congress to the legislative arena. *Kilbourn*, 103 U.S. at 192. Congress can "inquire into and publicize corruption, maladministration or inefficiency in agencies of the Government" because a "legislative purpose is being served" by those inquiries. *Watkins*, 354 U.S. at 200 & n.33. But that reasoning is inapplicable to the President. Arming Congress with an "informing function" where it lacks legislative power is what flouts "the Constitution's design." JA290 n.24.

3. The district court mischaracterized reliance on contemporaneous evidence of the Committee's "purpose" as an attempt to inquire into the Committee members' hidden "motives."

The district court (at times) confused the required inquiry into legislative purpose with a search for hidden "'motives of committee members.'" JA284 (quoting *Watkins*, 354 U.S. at 200). The difference between "purpose" and "motive" is important. The court knew it needed to identify the "purpose of the Mazars subpoena" to decide if that purpose is legitimate. JA287. It also recognized that the purpose can be distilled from varied sources. "Relevant evidence includes the resolution authorizing the investigation, statements by Committee members, and questions posed during hearings." JA285 (citing *Shelton*, 404 F.2d at 1297); *accord United States v. Cross*, 170 F. Supp. 303, 308-09 (D.D.C 1959) (finding improper purpose based on "the things said and done by [the committee's] chairman, counsel, and members"); *Hentoff v. Ichord*, 318 F. Supp. 1175, 1182 (D.D.C. 1970) (finding improper purpose based on the "face" of a congressional "Report"). The subpoena's "legislative purpose," at bottom, "must be gleaned from the evidence before the court." *United States v. Icardi*, 140 F. Supp. 383, 386 (D.D.C. 1956).

In other words, courts must discern for themselves what the Committee's *actual* purpose is through the available evidence. That is why "retroactive rationalization" is barred. *Watkins*, 354 U.S. at 204. While "the mere absence of public statements identifying the investigation's purpose or subject matter is not, by itself, conclusive proof of an *invalid* purpose," courts must "consider what Congress has said publicly to decide whether it has exceeded its authority." JA285 (citing *Shelton*, 404 F.2d at 1297).

There is no other way to apply a "legitimate legislative *purpose*" test. *E.g.*, *McGrain*, 273 U.S. at 178 (deferring to Congress only after looking at "the subject-matter" of the investigation and determining that legislation "was the real object"); *Barenblatt*, 360 U.S. at 152 (checking to make sure "'the primary purposes of the inquiry were in aid of legislative processes'"); *Cross*, 170 F. Supp. at 309 (giving the relevant materials "a reading and realistic construction" and concluding that the committee was "usurp[ing] the functions of a … prosecuting attorney in the guise of legislative investigation"); *Icardi*, 140 F. Supp. at 388 (holding that "if the committee is not pursuing a bona fide legislative purpose … , it is not acting as a 'competent tribunal', even though [the same request] could be the subject of a valid legislative investigation").

No aspect of this inquiry involves a search for Congress's "motives." It involves discerning *what* the Committee is doing, not *why* the Committee is doing it. The question is whether the Committee—based on what it is doing and what it has stated publicly—is inappropriately engaging in law enforcement instead of legislating. Yet the district court repeatedly characterized Plaintiffs as challenging *why* the Mazars subpoena was issued, *i.e.*, for "sinister" reasons like "political retribution." JA69, 284-85, 298. While the court was right that controlling precedent bars it from "question[ing] whether the Committee's actions are truly motivated by political considerations," JA269, that did

not eliminate its duty to review the evidence to determine whether the subpoena's actual purpose is legislative.[1]

4. The "pertinency" requirement is not limited to criminal contempt.

The district court incorrectly rejected the "pertinency" requirement as only "an element of criminal contempt." JA300. To be sure, the issue has arisen most often in the contempt setting; challenges to congressional subpoenas are frequently litigated in that posture. But contrary to the court's suggestion, "pertinency" is also required in lawsuits that affirmatively challenge congressional subpoenas. *Hearst*, 87 F.2d at 71; *Bergman*, 389 F. Supp. at 1130. Plaintiffs cited these decisions below, but the district court never addressed them.

The posture of the dispute cannot dictate whether a congressional subpoena must be pertinent to its avowed purpose. All agree that a subpoena can be challenged as beyond the issuing committee's statutory jurisdiction. JA300-01. And that inquiry plainly requires courts to determine whether a request falls within the committee's

[1] This precedent is why Plaintiffs have not yet attacked Congress's motives. Had the Committee subpoenaed *Plaintiffs* for their records, they could have raised First Amendment defenses, including political retribution. *Eastland*, 421 U.S. at 509 n.16. But since the Committee abandoned its direct pursuit of this information, JA273-74, and demanded the documents from a third-party custodian, Plaintiffs can only contest the subpoena's legitimate legislative purpose. *Eastland*, 421 U.S. at 501 n.14. The court thus was correct that Plaintiffs "have not asserted that disclosure of the records sought from Mazars would implicate any 'specific individual guarantees of the Bill of Rights.'" JA284 n.22. But that is not because the argument lacks merit. This investigation was motivated by political retribution. Plaintiffs proffered evidence to that effect in their complaint so they can raise the First Amendment issue should the Supreme Court revisit this peculiar and unwarranted dichotomy in its jurisprudence.

purview. *Eastland*, 421 U.S. at 506. Plaintiffs similarly can challenge a subpoena as not pertinent to the committee's legitimate legislative purpose. That Congress is considering comprehensive immigration reform, for example, could not be a legitimate purpose for subpoenaing the President's medical records.

This "concept of pertinency" is "jurisdictional" because it keeps the committee "within its legislative sphere" and ensures witnesses are not "compelled to make disclosures on matters outside that area." *Watkins*, 354 U.S. at 206; *see Bergman*, 389 F. Supp. at 1130. This pertinency requirement therefore "is not wholly different from nor unrelated to the element of pertinency embodied in the criminal statute" for congressional contempt. *Watkins*, 354 U.S. at 206. And although Congress cannot be penalized if an otherwise valid investigation turns out to be a dead end, JA285-86, its demand must be "reasonably relevant" to the purpose it gave when issuing the subpoena, *McPhaul*, 364 U.S. at 381.

C. The Committee's subpoena lacks a legitimate legislative purpose.

Having identified the district court's legal errors, the question is whether the Mazars subpoena can be upheld under the correct legal framework. The Committee claims the subpoenaed information will allow it to determine four things: (1) "whether the President may have engaged in illegal conduct before and during his tenure in office"; (2) "whether he has undisclosed conflicts of interest that may impair his ability to make impartial policy decisions"; (3) "whether he is complying with the Emoluments Clauses of the Constitution"; and (4) "whether he has accurately reported his finances

to the Office of Government Ethics and other federal entities." JA107. None of these justifications constitutes a legitimate legislative purpose.

1. Illegal Conduct

The district court upheld the Mazars subpoena as an effort "to investigate whether the President may have engaged in illegal conduct." JA107, 289-90. If this rationale does not violate the prohibition on Congress conducting law-enforcement investigations, then nothing does. It should not be affirmed on appeal (as the district court seemed to anticipate, JA290 n.25).

As explained, one of the recognized limits on Congress's subpoena power is that it "must not be confused with any of the powers of law enforcement." *Quinn*, 349 U.S. at 161. This principle is rooted in Articles II and III of the Constitution, which "assign[]" law-enforcement powers to the executive and judicial branches alone. *Id.* This principle is also rooted in Article I, since Congress cannot exceed its enumerated powers and nothing in Article I gives it a law-enforcement power. *Watkins*, 354 U.S. at 187; *Buckley v. Valeo*, 424 U.S. 1, 139 (1976).

While "a permissible legislative investigation" does not become impermissible merely because it might "expose law violations," JA293, an investigation is not "permissible" in the first place if tries to exercise powers that Congress does not have. And because the ban on congressional law-enforcement investigations is a question of *power*, it does not matter whether Congress is "coordinating" with federal or state law-enforcement officials. JA294. Congress simply cannot "trench" on the executive's law-

enforcement power or "aggrandize" law-enforcement powers to itself. *McSurely*, 521 F.2d at 1038; *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2096 (2015). The key question is the "nature" of the power the Committee is exercising: legislative (legitimate) or law enforcement (illegitimate). *Kilbourn*, 103 U.S. at 192.

If the nature of the investigation is law enforcement, Congress cannot cure this constitutional violation through "the mere assertion of a need to consider 'remedial legislation.'" *Shelton*, 404 F.2d at 1297. In other words, Congress cannot launch an investigation to determine whether someone broke the law, and then justify the investigation by claiming that Congress is considering strengthening or studying the law that the person allegedly broke. Congress could always make this (non-falsifiable) argument to justify any law-enforcement investigation. Because this argument would erase the lines separating the branches of government, courts have wisely rejected it. *E.g.*, *Icardi*, 140 F. Supp. at 387-88 (holding that subcommittee could not "cure the invalidity" of its law-enforcement investigation by tacking on a professed interest in investigating "'whether the Federal statutes were inadequate in any respect or had been improperly administered'").

The Mazars subpoena is an impermissible attempt at law enforcement. Chairman Cummings admitted as much. His original request to Mazars cited a solitary purpose: verifying Cohen's testimony that Plaintiffs "inflat[ed] or deflat[ed] the value of assets" in financial statements from 2011-2013 that were given to a bank, an insurance company, and real-estate taxing authorities. JA91-94. In other words, as several

members admitted at the Cohen hearing, the Committee wanted to know if Plaintiffs committed bank fraud, insurance fraud, or tax evasion. Likewise, in the Chairman's follow-up memo, the very first justification he gave for the Mazars subpoena was "to investigate whether the President may have engaged in illegal conduct," JA107—classic law enforcement. *Icardi*, 140 F. Supp. at 387. Even without these statements, the nature of the subpoena confirms its law-enforcement purpose. It is indistinguishable from something federal prosecutors might issue; especially telling is the request for "all communications" where Mazars voiced "concerns" about Plaintiffs' accounting practices. JA26. The subpoena is also laser-focused on the businesses and finances of one person—a particularity that is the hallmark of executive and judicial power, not legislating. *Kilbourn*, 103 U.S. at 195; *Icardi*, 140 F. Supp. at 387. The subpoena's "*gravamen*" is an attempt to engage in law enforcement rather than legislation. *Kilbourn*, 103 U.S. at 195.

Congress is simply not allowed to conduct law-enforcement investigations of the President, and the district court's invocations of Whitewater and Watergate do not suggest otherwise. JA289-90. Congressional committees were formed to investigate those scandals, but the district court identified no *subpoenas* that the committees issued to private individuals or the President—much less subpoenas that were resisted, litigated, and upheld. That is because the lion's share of the Watergate and Whitewater subpoenas were issued by actual law-enforcement authorities (special prosecutors, independent counsel, and grand juries), not Congress. When some of those subpoenas

were upheld, the courts were careful not to suggest that Congress had similar power. *See United States v. Nixon*, 418 U.S. 683, 712 n.19 (1974) ("We are not here concerned with … congressional demands for information."); *In re Lindsey*, 158 F.3d 1263, 1277-78 (D.C. Cir. 1998) (reserving whether President Clinton's unavailing objections to a grand-jury subpoena would prevail against "a congressional hearing" since that "issue is not presently before the court").

Nor did any court ever consider whether the congressional investigations into Watergate and Whitewater had a legitimate *legislative* purpose. Both investigations quickly morphed into impeachment proceedings—a non-legislative power that the Committee does not invoke here. *Infra* III. In the one litigated case that Plaintiffs found (a congressional subpoena to President Nixon), this Court avoided deciding whether "Congress may have, quite apart from its legislative responsibilities, a general oversight power" because the House had "begun an inquiry into presidential impeachment." *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 732 (D.C. Cir. 1974). And far from recognizing "sweeping" congressional authority to investigate the President, JA290, this Court refused to enforce Congress's subpoena. 498 F.2d at 733. Reaching the same judgment here thus would not "roll back the tide of history," JA290,

even assuming these two investigations count as "history" in any meaningful sense, *cf. NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 943 (2017).[2]

2. Conflicts of Interest

The district court upheld the Mazars subpoena as part of "an investigation to determine whether the President has any conflicts of interest." JA289. Indeed, the House has proposed "several pieces of actual legislation" that would impose conflict-of-interest restrictions on the President. JA291. This made the subpoena legitimate, according to the district court, because "it lies within Congress's province to legislate regarding the ethics of government officials." JA289, 301. That is wrong. There is a reason why the federal conflict-of-interest laws that govern other executive-branch officials exclude the President: Article II of the Constitution. With respect to the President, this is "an area in which Congress is forbidden to legislate." *Quinn*, 349 U.S. at 161.

The Constitution vests "[t]he executive power ... in a President of the United States of America," Art. II, §1, cl. 1, delineates the qualifications for President, cl. 5, and entrusts the President alone to "take Care that the Laws be faithfully executed," §3. "The President," consequently, "occupies a unique position in the constitutional scheme." *Fitzgerald*, 457 U.S. at 749; *accord Lindsey*, 158 F.3d at 1286 (Tatel, J., concurring

[2] Plaintiffs could have pointed out these distinctions had the Committee relied on Watergate and Whitewater in its briefing below. But because the district court raised these examples itself, and declined to allow any summary-judgment briefing, JA280-81, Plaintiffs were not afforded that chance.

in part and dissenting in part) (noting "the unique nature of the Presidency"). The President is not a creature of statute. Congress did not create the office of the President, it did not establish the qualifications for holding that position, and it cannot impair the occupant's exercise of his constitutionally-assigned functions. In short, Congress is severely constrained in the ways it can regulate the President. *Kendall v. U.S. ex rel. Stokes*, 37 U.S. 524, 610 (1838). Extending federal conflict-of-interest laws to the President (or imposing new ones on him) would exceed Congress's narrow legislative authority over the office. This is true for two main reasons.

First, such legislation would change or expand the qualifications for serving as President. *Thornton*, 514 U.S. 779; *Powell,* 395 U.S. 486. The Supreme Court has held that Congress lacks "the power to add to or alter the qualifications of its Members." *Thornton*, 514 U.S. at 787. "Congress" instead "is limited to the standing qualifications prescribed in the Constitution." *Powell*, 395 U.S. at 550. That rule applies equally to the President. *Thornton*, 514 U.S. at 803. Because Congress cannot "add to the constitutional qualifications for holding federal elective office," *Walker v. United States*, 800 F.3d 720, 723-24 (6th Cir. 2015), its legislative purpose here is invalid. Requiring the President to "'divest all financial interests,'" hold them "'in a qualified blind trust,'" or refrain from "conducting business directly with the Federal Government," JA291, would "establish a qualification for his serving as President (to wit, elimination of financial conflicts) beyond those contained in the Constitution." Silberman Letter 5.

Second, extending conflict-of-interest laws to the President would unduly interfere with his ability to exercise the duties of his office. "'The Nation's 'executive Power' is vested in him alone.'" *Lindsey*, 158 F.3d at 1286 (Tatel, J., concurring in part and dissenting in part). "It is *his* responsibility to take care that the laws be faithfully executed." *PCAOB*, 561 U.S. at 493. But federal conflict-of-interest laws prevent every executive-branch official from participating in matters in which "he, his spouse, minor child," or business associate "has a financial interest." 18 U.S.C. §208(a). Extending these conflict-of-interest laws to the President would violate "the basic principle that [he] 'cannot delegate ultimate responsibility or the active obligation to supervise that goes with it,' because Article II 'makes a single President responsible for the actions of the Executive Branch.'" *PCAOB*, 561 U.S. at 496-97. That is why "'disqualification of the President from policy decisions because of personal conflicting interests is inconceivable.'" Silberman Letter 4.

As noted, the district court never decided whether imposing conflict-of-interest requirements on the President would be constitutional. But it expressed skepticism of Plaintiffs' constitutional objection, assuming that "Plaintiffs' argument, if accepted, would wipe out" the Presidential Records Act and the STOCK Act. JA303. That was an incorrect assumption.

The Presidential Records Act does not add or alter the qualifications for office. And when crafting it, "Congress was ... keenly aware of the separation of powers concerns that were implicated by legislation regulating the conduct of the President's

daily operations." *Armstrong*, 924 F.2d at 290. Congress "sought assiduously to minimize outside interference with the day-to-day operations of the President and his closest advisors and to ensure executive branch control over presidential records." *Id.*; *accord CREW v. Trump*, __ F.3d __, 2019 WL 2261089, at *6 (D.C. Cir. May 28, 2019). The Presidential Records Act thus did not cause a "disruption of executive functions significant enough to trigger separation of powers analysis." *Duplantier v. United States*, 606 F.2d 654, 667 n.27 (5th Cir. 1979). The legislation Congress is contemplating here bears no resemblance to the Presidential Records Act.

Nor is the contemplated legislation anything like the provision of the STOCK Act that the district court invoked, *i.e.*, the provision barring the President and other officials from making use of "'nonpublic information derived from" their position "'as a means for making a private profit." JA302-03 (quoting Pub. Law No. 112-105, §9). This provision seeks to keep the President from personally profiting from his office. The conflict-of-interest laws, by contrast, would influence and control who can serve as President and would interfere with the President's ability to "'fulfill his manifold duties and functions.'" *Lindsey*, 158 F.3d at 1286 (Tatel, J., concurring in part and dissenting in part). Regardless, the constitutionality of the STOCK Act—as applied to the President himself—has never been tested. Extension of federal conflict-of-interest laws to the President cannot be justified based on the mere existence of a recently-enacted statute that no court has upheld in this setting.

3. Foreign Emoluments

The district court held that access to Plaintiffs' confidential financial "records will assist" the Committee "in monitoring the President's compliance with the Foreign Emoluments Clause[]." JA269. But this purpose is just another attempt to engage in prohibited law enforcement. It does not matter that the Committee wants to know whether the President is complying with a constitutional provision instead of a federal statute; "the Constitution and valid federal statutes" are both "the supreme law." *Alden v. Maine*, 527 U.S. 706, 757 (1999).

This rationale also has no bounds. The Foreign Emoluments Clause applies to anyone holding an "Office of Profit or Trust under [the United States]." Art. I, §9. According to Congress, that is *millions* of federal government employees. 5 U.S.C. §7342(a); 6 O.L.C. Op. 156-59 (1982). If Congress's mere interest in "monitoring ... compliance with the Foreign Emoluments Clause" is a legitimate purpose, JA269, then the Committee could subpoena the accounting records of *anyone* at *any* time to see whether a federal employee accepted foreign emoluments. This cannot be a valid use of the Necessary and Proper Clause if we are to maintain "a government of limited powers." *NFIB*, 567 U.S. at 552.

Indeed, the Committee never defended the foreign-emoluments rationale below. It had to abandon this point. The only authority that the Constitution gives Congress is to "Consent" to foreign emoluments. Art. I, §9, cl. 8. The Committee could not genuinely argue that the House is considering *approving* the President's alleged

acceptance of foreign emoluments, however, given the House Democrats' suit against him and their many public statements on this issue. *E.g.*, *Press Release*, Rep. Nadler (Oct. 1, 2018), bit.ly/2wNyPz7 (explaining that the Democrats sued the President to vindicate their "right and … responsibility to prevent the president from corrupting his office"); Ltr. from House Judiciary Democrats to Chairman Goodlatte (Jan. 24, 2017), bit.ly/2K3vkxd (asserting that the President's alleged acceptance of emoluments is "an *inescapable* conflict of interest" (emphasis added)).[3] Any suggestion that the "real object" of this subpoena, *McGrain*, 273 U.S. at 178, is to see whether the President has accepted emoluments so Congress can consent to them would be untrue.

At the very least, the Mazars subpoena is not pertinent to an investigation into foreign emoluments (or conflicts of interest, for that matter). Even under the House Democrats' (sweeping and indefensible) definition of "emolument," commercial transactions with foreign governments are "entirely legitimate" in "the context of private businesses"; they did not become "emoluments" until the President "took his oath of office." Ltr. from House Judiciary Democrats, *supra*. Thus, large swaths of the Mazars subpoena are not even arguably relevant to "the President's compliance with

[3] The district court should not have resurrected the argument on the Committee's behalf. "Congress" may or may not be "required to announce its intentions in advance." JA285. But, like any litigant, the Committee is subject to the ordinary rules of waiver and forfeiture. *United States v. Bullock*, 632 F.3d 1004, 1014 n.1 (7th Cir. 2011); *Cissell Mfg. Co. v. U.S. Dep't of Labor*, 101 F.3d 1132, 1143 (6th Cir. 1996). It was inappropriate for the district court to invoke potential legislative purposes for the Mazars subpoena that the Committee chose not to press in court.

the Foreign Emoluments Clause," JA269—including all pre-inauguration records, Item No. 2 ("engagement agreements and contracts"), Item No. 4 ("memoranda, notes, and communications"), and anything in Item Nos. 1 and 3 unrelated to transactions with foreign governments. JA26.

The district court concluded that it lacked authority to narrow the subpoena. JA304. That is incorrect. *Supra* II.B.4; *e.g.*, *Bergman*, 389 F. Supp. at 1130-31. But if subpoenas are an all-or-nothing proposition, then the answer must be nothing. *Patterson*, 206 F.2d at 434. Otherwise, Congress could easily circumvent limits on its constitutional power by bundling a legitimate demand with an illegitimate one. For example, Congress could demand a business owner's personal medical records in an otherwise legitimate subpoena for corporate documents. Congress is not entitled to everything because it has a valid claim to something.

4. Financial Disclosures

The district court held that the subpoena advanced the Committee's interest in evaluating "the accuracy of the President's financial reporting" in accordance with the Ethics in Government Act. JA287-88. Again, this is paradigmatic law enforcement. The Committee wants to know if he broke this law. And the assertion that discovery of "disclosure violations by the President could influence whether Congress strengthens public reporting requirements or enhances penalties for non-compliance," JA288, is exactly the type of non-falsifiable remedial justification courts reject. *Supra* II.C.1. Furthermore, the subpoena—which seeks accounting records and communications

from as far back as 2011—is vastly overbroad if the Committee is relying on its stated interest in knowing whether the President's financial disclosures *from 2018* were accurate. JA35.

Last, the provisions of the Ethics in Government Act that require the President to disclose his finances to Congress once he is in office are unconstitutional, so any effort to "strengthen[]" or "enhance[]" them is too. JA287-89, 302 (citing 5 U.S.C. App. 4 §§101(a), (f); 102(a), (b); 103(b)). The President has voluntarily complied with those statutory requirements. But compliance is not the measure of constitutionality. *See* Year-End Report, *supra*, at 4-6. That Congress can require other executive-branch officials and lower-court judges to submit financial disclosures, *Duplantier*, 606 F.2d at 666-68, does not mean it can require the President or the Justices to do so. It is unfortunate that the Committee is forcing this Court to test "the limits of Congress's power," *id.* at 7, in this regard. But the Constitution was designed so the President (like the Supreme Court) would operate "free from risk of control, interference, or intimidation by the other branches." *Fitzgerald*, 457 U.S. at 761 (Burger, C.J., concurring). The Ethics in Government Act, as applied or extended here, "improperly impinges on and hence interferes with the independence that is imperative to the functioning of the office of a President." *Id.*

III. The Committee's subpoena does not further any non-legislative task of Congress.

As explained, the Constitution never expressly gives Congress the power of compulsory process; Article I has no "Oversight Clause," "Investigation Clause," or "Subpoena Clause." The subpoena power is, at most, implied by the Necessary and Proper Clause—which means it must be "derivative of, and in service to, a granted power." *NFIB*, 567 U.S. at 560. For the reasons detailed above, the Mazars subpoena does not advance Congress' *legislative* powers. But the Constitution also grants Congress non-legislative powers. Each House can "punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a member." Art. I, §2, cl. 2. And the House and Senate can, respectively, impeach and try impeachments. Art. I, §2, cl. 5; §3, cl. 6. These powers are "judicial" in nature. *Henry v. Henkel*, 235 U.S. 219, 226 (1914); *Kilbourn*, 103 U.S. at 191.

While Congress could presumably use subpoenas to advance these non-legislative powers, the Committee has not invoked them. The Mazars subpoena has nothing to do with internal House discipline, and the Committee has never tried to defend it under the House's impeachment authority. Indeed, the word "impeachment" never appears in any of the Chairman's letters or memoranda or in the Committee's briefs. The only time the word was invoked below was at the hearing, when the district court declared that "[t]his is not an impeachment proceeding." JA238. The Committee

did not disagree. It has consistently defended the Mazars subpoena as an exercise of its "legislative" powers. Dkt. 20 at 19-29.

Plaintiffs were thus understandably surprised when, in its opinion, the district court *sua sponte* invoked the "impeachment" power as a justification for the subpoena. JA290. The district court held that the House's impeachment authority allows it to "investigate[] a sitting President for alleged law violations[] *before* initiating impeachment proceedings." JA290. "It is simply not fathomable," the district court stated, "that a Constitution that grants Congress the power to remove a President for reasons including criminal behavior would deny Congress the power to investigate him for unlawful conduct—past or present—even without formally opening an impeachment inquiry." JA290.

But what is truly "not fathomable" is that an Article III court—in a constitutional dispute between Congress and the President—would *itself* invoke the specter of impeachment. Impeachment is a "'grave'" matter and "extreme" remedy. *Ritter v. United States*, 84 Ct. Cl. 293, 296 (1936); *Schneider v. Kissinger*, 412 F.3d 190, 200 (D.C. Cir. 2005). It is the most serious clash between Congress and the President contemplated by our Constitution, and it entails massive costs to our nation's economy, national security, diplomacy, and political health. The Framers took great pains to ensure this "'awful discretion'" could not be invoked by "'a small number of persons'"—much less a single district judge. *Nixon v. United States*, 506 U.S. 224, 234 (1993) (quoting The Federalist No. 65, at 441-42 (J. Cooke ed. 1961)).

The Committee's failure to invoke its non-legislative powers should have been the end of it. The Committee is perfectly capable of defending its own subpoena, and governmental parties are not exempt from ordinary rules of litigation like waiver and forfeiture. The district court overstepped its institutional role by raising arguments the Committee never made. Under "the principle of party presentation," courts must "rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Greenlaw v. United States*, 554 U.S. 237, 243 (2008). Our "'adversary system is designed around the premise that the parties know what is best for them,'" and "'this must be particularly true of counsel for the United States, the richest, most powerful, and best represented litigant to appear before us.'" *Id.* at 244-45.

The Committee had an obvious reason for not arguing that the Mazars subpoena is related to the House's impeachment authority: it's not true. *See Marshall v. Gordon*, 243 U.S. 521, 547 (1917) (refusing to credit Congress's assertion that "the House was … contemplating impeachment proceedings" because it was factually "unfounded"); *Kilbourn*, 103 U.S. at 193 (similar). Speaker Pelosi has steadfastly denied that the House's investigations are in any way related to impeachment. In March, she unequivocally told the Washington Post, "I'm not for impeachment." *Nancy Pelosi on Impeaching Trump: 'He's Just Not Worth It'*, Wash. Post (Mar. 11, 2019), wapo.st/2KsATVx. In late May, the Speaker reiterated that "any suggestion that Democrats are planning to pursue impeachment 'simply isn't the truth.'" *Pelosi Says Democrats "Not on a Path to Impeachment"*

Despite Trump's "Stunt", CBS News (May 23, 2019), cbsn.ws/2VM9z6H. After she received the district court's ruling in this case, the Speaker boasted that the Committee had prevailed despite "the fact the House Democratic caucus is not on a path to impeachment." *Pelosi Says White House Is "Crying Out for Impeachment"*, CNN (May 23, 2019), cnn.it/2XwwGnm. Just four days ago, the Speaker again told senior Democratic leaders that "she isn't open to the idea" of impeachment, and Chairman Cummings "sided with Pelosi." *Pelosi Tells Dems She Wants to See Trump 'in Prison'*, Politico (June 5, 2019), politi.co/2MKWrQ7. The district court's *sua sponte* invocation of impeachment thus was not only inappropriate under the separation of powers and ordinary principles of civil litigation—it had no basis in fact.

IV. The district court's conception of Congress's subpoena power has no limiting principle.

One way to evaluate the district court's decision is to ask whether it places any meaningful limits on Congress's subpoena power. If not, then it must be wrong. "The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury*, 5 U.S. at 176; *accord United States v. Lopez*, 514 U.S. 549, 564-68 (1995). Congress's subpoena power is no exception. The Supreme Court has never described that power as "broad" without simultaneously warning it is "not unlimited." *E.g.*, *Eastland*, 421 U.S. at 504 n.15 ("[T]he power to investigate … is not unlimited."); *Barenblatt*, 360 U.S. at 111 ("[Congress's] power of inquiry … is not … without limitations."); *Watkins*, 354 U.S. at 187 ("[Congress's]

power of inquiry … is not unlimited."); *Quinn*, 349 U.S. at 161 ("[Congress's] power to investigate … is … subject to recognized limitations."); *McGrain*, 273 U.S. at 173-74 ("[Congress] is invested … only with [a] limited power of inquiry.").

So far in this litigation, the Committee has refused to recognize *any* limits on its subpoena power. It insists that it can investigate "*any matter*" at "*any time*." Dkt. 20 at 18. When the district court asked the Committee "where you think the limits are," it could only muster two examples of things it could not subpoena: "the President's blood" ("probably"), and "the President's diary from when he was … 12 years old" (again, only "probably"). JA214-15. It is difficult to imagine a more breathtaking assertion of government power.

Yet the district court endorsed this unchecked view of Congress's subpoena power—if anything, it went *further*. In the district court's view, Congress can subpoena anyone to investigate the private life of any federal employee or official, either to search for evidence of illegal conduct, foreign emoluments, or conflicts of interest, JA287-90, or to simply "inform[]" the public, JA282-83, JA289. There are no enforceable limits on the "scope" of Congress's investigation, JA285-86; subpoenas need not be "pertinent" to the investigation, JA300-01; and it is does not matter whether Congress's legislative goals are unconstitutional, JA303. This cannot be right. It "is belied by the entire structure of the Constitution," with "its careful enumeration of federal powers and explicit statement that all powers not granted to the Federal Government are reserved." *United States v. Morrison*, 529 U.S. 598, 618 n.8 (2000); *accord Shelby Cty. v.*

Holder, 570 U.S. 529, 543 (2013). Unless this Court is prepared to say that Congress's unenumerated subpoena power is truly limitless, it cannot affirm the district court's judgment.

The district court was unbothered by the limitless nature of its decision because, according to its calculations, "no [precedent] since *Kilbourn* from 1880 … has interfered with a congressional subpoena" based on the principles Plaintiffs invoke here. JA305. Of course, Congress has never used its subpoena power to rummage through the private financial records of a sitting President either, so the district court's observation is largely irrelevant. But it is wrong too. Congress's subpoenas of private information were blocked in *Watkins*, *Rumely*, and *Tobin*—to name a few cases. The Supreme Court "has not hesitated to sustain the rights of private individuals" against congressional subpoenas "when it found Congress was acting outside its legislative role." *Tenney*, 341 U.S. at 377. This Court should not hesitate either.

* * *

The district court held that Plaintiffs lacked sufficient evidence to "support the conclusion that the subpoena to Mazars is a usurpation of an exclusively executive or judicial function." JA294. That was incorrect. But it has also been overtaken by recent events. Speaker Pelosi has now admitted what this investigation is actually about: "I don't want to see him impeached," she told senior Democratic leaders. "I want to see him in prison." Politico, *supra*; *Nancy Pelosi Doesn't Want Trump Impeached: "I Want to See Him in Prison"*, Vanity Fair (June 6, 2019), bit.ly/2Xt9Ixo. It is difficult to imagine a

clearer admission that the Committee has never been interested in legislating. It wants to see if the President broke the law. From the founding, however, the "successful working" of our tripartite system has required that "persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other." *Kilbourn*, 103 U.S. at 191. That is still true. The Committee has no more power to engage in law enforcement than to institute proceedings that are "clearly judicial" under the pretense of lawmaking. *Id.* at 192. The Mazars subpoena is invalid.

CONCLUSION

This Court should reverse the district court and remand with instructions to enter judgment for Plaintiffs.

Dated: June 10, 2019

Respectfully submitted,

s/ William S. Consovoy

Stefan C. Passantino
MICHAEL BEST & FRIEDRICH LLP
1000 Maine Ave. SW, Ste. 400
Washington, D.C. 20024
(202) 747-9582
spassantino@michaelbest.com

Counsel for Appellants The Trump Organization, Inc., Trump Organization LLC, The Trump Corporation, DJT Holdings LLC, Trump Old Post Office LLC, and The Donald J. Trump Revocable Trust

William S. Consovoy
Cameron T. Norris
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
will@consovoymccarthy.com
cam@consovoymccarthy.com

Patrick Strawbridge
CONSOVOY MCCARTHY PLLC
Ten Post Office Square
8th Floor South PMB #706
Boston, MA 02109
patrick@consovoymccarthy.com

Counsel for Appellant President Donald J. Trump

CERTIFICATE OF COMPLIANCE

This brief complies with Rule 32(a)(7)(B) because it contains 12,799 words, excluding the parts exempted by Rule 32(f) and Circuit Rule 32(e)(1). This brief also complies with Rule 32(a)(5)-(6) because it is prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Garamond font.

Dated: June 10, 2019 *s/ William S. Consovoy*

CERTIFICATE OF SERVICE

I filed a true and correct copy of this brief with the Clerk of this Court via the CM/ECF system, which will notify all counsel.

Dated: June 10, 2019 *s/ William S. Consovoy*