No. 19-1540-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DONALD J. TRUMP, DONALD J. TRUMP, JR., ERIC TRUMP, IVANKA TRUMP, DONALD J. TRUMP REVOCABLE TRUST, TRUMP ORGANIZATION, INC., TRUMP ORGANIZATION LLC, DJT HOLDINGS LLC, DJT HOLDINGS MANAGING MEMBER LLC, TRUMP ACQUISITION LLC, TRUMP ACQUISITION, CORP.,

Plaintiffs-Appellants,

v.

DEUTSCHE BANK AG, CAPITAL ONE FINANCIAL CORPORATION,

Defendants-Appellees,

COMMITTEE ON FINANCIAL SERVICES OF THE UNITED STATES HOUSE OF REPRESENTATIVES, PERMANENT SELECT COMMITTEE ON INTELLIGENCE OF THE UNITED STATES HOUSE OF REPRESENTATIVES,

Intervenor Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE

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INTRODUCTION

A congressional effort to compel production of the President's records raises significant separation-of-powers issues. The President occupies a "unique position in the constitutional scheme," and his special constitutional role requires both "restraint" and "respect" on the part of Congress and the courts. *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 385 (2004). That principle applies even where, as here, the congressional subpoenas seek the President's personal records from third parties.

Regardless of the target, a congressional subpoena's validity presents questions "of unusual importance and delicacy." *McGrain v. Daugherty*, 273 U.S. 135, 154 (1927). A court must determine whether the congressional demand serves a legitimate legislative purpose (*e.g.*, to enact valid legislation), whether the information sought is pertinent to the legitimate purpose, and whether Congress's need for the information outweighs any constitutional interests of the individual resisting the inquiry. *See, e.g.*, *Watkins v. United States*, 354 U.S. 178 (1957). When a subpoena implicates constitutional interests, courts should avoid deciding the validity of the subpoena "unless no choice is left." *United States v. Rumely*, 345 U.S. 41, 46 (1953).

Those questions become more complex and sensitive when a congressional subpoena demands the President's records. Demands by the Legislative Branch for the personal records of the coequal head of the Executive Branch may, at a minimum, "distract [him] from the energetic performance of [his] constitutional duties," a risk that is particularly acute when a single chamber of Congress, or even individual committees,

issue a multitude of such subpoenas. *See Cheney*, 542 U.S. at 382. This risk requires that the Judicial Branch engage in a searching evaluation of subpoenas directed at the President at each step of the process.

A congressional committee may validly issue a subpoena only once authorized by the House or Senate, and such a subpoena is valid only if it is supported by a legitimate legislative purpose. Where, as here, the subject of the subpoena is the President, the House must provide clear authorization for the demand, and the House itself must identify the legislative need for the information with sufficient particularity to assess whether the information is pertinent and necessary. *See McGrain*, 273 U.S. at 176. When "the House of Representatives itself has never made" these "critical judgment[s]," courts should not be placed in the "impossible" role of speculating about Congress's purposes concerning an investigation into the President and whether they can justify the information requested. *See Watkins*, 354 U.S. at 206.

Here, as part of a blank-check approval in July 2019 of all existing and future subpoenas against the President and his family, the House retroactively authorized the subpoenas at issue, which were apparently issued around April 2019 by the Committee on Financial Services and the Permanent Select Committee on Intelligence. H.R. Res. 507, 116th Cong. (July 24, 2019); *see* JA50. Separately, the House announced in March 2019 that it supports "clos[ing] loopholes that allow corruption, terrorism, and money laundering to infiltrate our country's financial system." H.R. Res. 206, 116th Cong. 5 (Mar. 13, 2019); *see* Committees Br. 10, 18. But neither the House nor even the

Committees have ever adequately connected that legislative goal to the subpoenas at issue here. The Committees present no reason why a general legislative inquiry into money laundering or related abuses of the financial system needs to single out the President and his family, and those subjects cannot objectively account for the breadth of the subpoenas here.

Given the constitutional interests at stake when Congress seeks the President's records, each "particular inquiry [must be] justified by a specific legislative need," and the House, or at the very least the Committees, must establish "the relative necessity of specific disclosures." *Watkins*, 354 U.S. at 205-06; *see Cheney*, 542 U.S. at 388 (where discovery implicates separation of powers, the party demanding information "bear[s] the onus" of establishing need for information with "sufficient specificity"). Judicial "deference [to Congress's actions] cannot yield to an unnecessary and unreasonable" subpoena that could interfere with the President's constitutional role. *Watkins*, 354 U.S. at 204. Overly broad and loosely tailored congressional demands are not sufficiently "critical" to obtain the President's records. *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc). And, when faced with overbroad subpoenas that request information not central to a stated legislative need, courts may—consistent with principles of constitutional avoidance—require Congress "to explore other avenues" first, including by "narrow[ing] … the scope of the subpoenas" to cure their overbreadth. *Cheney*, 542 U.S. at 390.

As the district court correctly recognized, the congressional subpoenas here are "undeniably broad." JA138. The Committees' identical subpoenas to Deutsche Bank AG broadly request nearly a decade's worth of information on particular financial transactions regarding the President, his children, his and his children's immediate family members, and his corporations; the Financial Services Committee's subpoena to Capital One Financial Corporation requests similar information from July 2016 to the present. *See* JA37-42 (Deutsche Bank); JA52-53 (Capital One). But the court appeared to conclude that, because at least some of the information requested in the subpoenas could be "reasonably relevant to [a congressional] inquiry," a judicial evaluation of the "'congressional approach or methodology'" in each subpoena was not permitted, even if those subpoenas included unreasonable or unnecessary requests. JA137-38 (citing *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491 (1975)).

That misunderstands the law. Especially when congressional inquiries implicate other constitutional interests, courts need not and indeed cannot rubberstamp an inquiry that "radiate[s] outward infinitely to any topic thought to be related in some way" to "the core of the investigations." *Watkins*, 354 U.S. at 204; *see id.* at 206 (holding subpoenas must satisfy "a jurisdictional concept of pertinency"). The district court here could and should have determined whether Congress had demonstrated the need for "particular inquir[ies]" or established "the relative necessity of specific disclosures." *Id.* at 205-06; *see Senate Select Comm.*, 498 F.2d at 731. Having determined the subpoenas were "undeniably broad," JA138, the court should have required the Committees to

proceed in a more tailored manner before "push[ing] to the fore difficult questions of separation of powers and checks and balances" that could otherwise be avoided. *Cheney*, 542 U.S. at 389.

ARGUMENT

I. CONGRESSIONAL SUBPOENAS THAT TARGET THE PRESIDENT'S RECORDS MUST BE CLEARLY AUTHORIZED AND STATE LEGISLATIVE PURPOSES SUFFICIENTLY PARTICULARIZED TO ASSESS THE PERTINENCE AND NEED FOR THE INFORMATION REQUESTED

A. The President's Unique Status Mandates Special Care From Congress And The Courts

1. "The President occupies a unique position in the constitutional scheme." *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982). The Constitution vests the legislative and judicial powers in collective bodies, but "the executive Power" is vested in the President alone. U.S. Const. art. II, § 1, cl. 1. The office of the President, unlike those of other executive officers, is not dependent on Congress for its existence or authority. The Constitution itself "entrust[s] [the President] with supervisory and policy responsibilities of utmost discretion and sensitivity." *Fitzgerald*, 457 U.S. at 750. And it is he alone "who is charged constitutionally to 'take Care that the Laws be faithfully executed.'" *Id.* (quoting U.S. Const. art. II, § 3).

Due to the "special nature of the President's constitutional office and functions" and "the singular importance of [his] duties," separation-of-powers principles require particular "deference and restraint" in the conduct of litigation involving the President. *Fitzgerald*, 475 U.S. at 751, 753, 756. The Supreme Court, for example, has refused to

infer that Congress intends an ambiguous or silent statute to apply to the President and has instead demanded a clear statement from Congress. *Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992); *see Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991). Separation-of-powers concerns have likewise led the Court to hold that the President is absolutely immune from civil damages liability for his official actions. *Fitzgerald*, 457 U.S. at 756. And the Court has held the President is entitled to special solicitude in discovery, *Cheney*, 542 U.S. at 385, even in suits solely related to his private conduct, *Clinton v. Jones*, 520 U.S. 681, 707 (1997) ("The high respect that is owed to the office of the Chief Executive … is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery."). Separation-of-powers concerns, moreover, must inform a court's assessment of the President's entitlement to judicial review and relief. *Cheney*, 542 U.S. at 385 (concerning mandamus relief from discovery order); *In re Trump*, 928 F.3d 360, 371-72 (4th Cir. 2019) (concerning certification of interlocutory appeal).

These separation-of-powers concerns are especially acute when the demand for the President's information comes from Congress. "[A] conflict between the legislative and executive branches over a congressional subpoena" implicates "nerve-center constitutional questions." *United States v. AT&T*, 551 F.2d 384, 390, 394 (D.C. Cir. 1976) (*AT&T I*). Such demands pose the threat that the Legislature may "aggrandize itself at the expense" of the Executive, *Bowsher v. Synar*, 478 U.S. 714, 727 (1986), or "impair [the Executive] in the performance of its constitutional duties" through

burdensome inquiries, *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 500 (2010). *See Watkins*, 354 U.S. at 187, 200 (recognizing legislators might improperly use their investigative powers for "personal aggrandizement" or "to expose for the sake of exposure"); *In re Trump*, No. 19-5196, 2019 WL 3285234, at * 1 (D.C. Cir. July 19, 2019) (per curiam) (recognizing "separation of powers issues present in a lawsuit brought by members of the Legislative Branch against the President").

2. Even if Congress does not intend for its subpoenas to burden the President, there is a serious risk they will, especially where the President is drawn into myriad simultaneous congressional inquiries. Manifold congressional probes into the President's private affairs may "distract [him] from the energetic performance of [his] constitutional duties" in the public sphere. *Cheney*, 542 U.S. at 382; *see In re Trump*, 928 F.3d at 368. Unlike investigations in criminal and civil proceedings, which are confined to discrete controversies and subject to various protective measures that reduce the possibility of "vexatious litigation," *Cheney*, 542 U.S. at 382, congressional committees have the ability to issue successive subpoenas in waves, making far-reaching demands that harry the President and distract his attention. And unlike the formal process of enacting legislation, the House (or Senate) may initiate a legislative investigation "more casually and less responsibly," heightening the potential for constitutional interference. *Rumely*, 345 U.S. at 46.

These constitutional concerns regarding congressional subpoenas do not evaporate simply because the Committees here have directed their subpoenas toward the

President's accounts with financial institutions. Both before and since the President took office, his business interests have necessarily entailed holding accounts and conducting transactions with and through financial third parties, thereby placing his financial records in their hands. In terms of the potential impact on the President's discharge of his duties, the congressional subpoenas are in effect no different from ones served directly on the President. Even if nominally directed at third parties, a potential multitude of congressional demands for information concerning the President's personal matters may no less divert his attention from the performance of his Executive functions than demands served on the President himself. The burdens placed on the President's time and attention in monitoring and responding to potentially overbroad or otherwise improper inquiries into his private affairs remain. And the President would not personally compile the requested documents whether or not he were the subpoena's recipient.

Seeking the President's financial records by directing congressional subpoenas to financial institutions is simply an "end run" that raises the same separation-of-powers problems that a request directed at the President himself would provoke. *See Judicial Watch, Inc. v. U.S. Secret Service*, 726 F.3d 208, 225 (D.C. Cir. 2013); *cf. In re Trump*, 2019 WL 3285234, at *1 (recognizing that third-party discovery requests by Members of Congress concerning President's alleged receipt of emoluments raised separation-of-powers concerns). And treating the Committees' subpoenas as if they were run-of-the-mill congressional subpoenas served on private parties is particularly inappropriate

where doing so would not ensure protections parallel to the constitutionally mandated negotiation-and-accommodation process that applies to a congressional request for the President's records related to his public office. *See United States v. AT&T*, 567 F.2d 121, 130 (D.C. Cir. 1977) (*AT&T II*).

B. Separation-Of-Powers And Constitutional-Avoidance Considerations Inform Each Step In Determining The Validity Of Congressional Subpoenas Directed At The President's Records

When the validity of a Congressional subpoena is called into question, courts must engage in a multi-step inquiry. They must determine whether the committee has authority to issue the subpoena; whether the subpoena serves a legitimate legislative purpose; whether the information being sought is sufficiently germane to that purpose; and whether the legislative need for the information outweighs any countervailing constitutional interests. When the subpoena seeks the President's records, separation-of-powers principles and principles of constitutional avoidance inform the court's inquiry at each step.

1. Even when a congressional subpoena does not target the President's records, evaluating the subpoena's validity presents constitutional questions "of unusual importance and delicacy," *McGrain*, 273 U.S. at 154. Because "[e]xperience admonishes [courts] to tread warily in this domain," courts have refused to uphold legislative inquiries that lack clear authorization by Congress and that raise difficult constitutional questions. *See Rumely*, 345 U.S. at 46; *Tobin v. United States*, 306 F.2d 270, 276 (D.C. Cir.

1962). Whenever a court must draw "constitutional limits upon [Congress's] investigative power," it "ought only to be done after Congress has demonstrated its full awareness of what is at stake by unequivocally authorizing an inquiry of dubious limits." *Rumely*, 345 U.S. at 46.

Because the President is the subject of the Committees' inquiries, these principles apply with even greater force. The constitutional questions are more complex and delicate, and the potential for interference with the constitutional scheme is greater. Thus, just as the possibility that a congressional inquiry might violate the First Amendment requires that the full House (or Senate) clearly authorize the inquiry, *see Rumely*, 345 U.S. at 46-47, the possibility that a subpoena might transgress separation-of-powers limits and interfere with the President's functions as head of the Executive Branch (either on its own or when combined with other such subpoenas) mandates that the House clearly authorize a subpoena directed at his records. *See Armstrong*, 924 F.2d at 289 ("[T]he requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in decision."); *Franklin*, 505 U.S. at 800-01 (clear statement required "[o]ut of respect for the separation of powers and the unique constitutional position of the President").

2. If a subpoena has been duly authorized, a reviewing court must then determine whether it is in furtherance of a "valid legislative purpose." *Quinn v. United States*, 349 U.S. 155, 161 (1955). The special solicitude that courts and Congress owe the Head of the Executive Branch, and the particular separation-of-powers issues that arise when

Congress attempts to compel production of the President's information, also mandate that the House itself clearly identify a legitimate legislative purpose for seeking the President's information, with sufficient particularity that courts can concretely review the validity of any potential legislation and determine whether the information requested is pertinent and necessary to Congress's consideration of such legislation. At the very least, when there is an authorized congressional inquiry, the relevant committee must provide the requisite specificity.

The "legislative Powers herein granted" by Article I do not include any express authority to conduct investigations or issue compulsory process. U.S. Const. art. I, § 1. The Constitution grants Congress subpoena power only insofar as the exercise of that "auxiliary power[]" is "necessary and appropriate to make [Congress's] express powers effective." *McGrain*, 273 U.S. at 173; *see Watkins*, 354 U.S. at 197 (observing that congressional investigations are "justified solely as an adjunct to the legislative process"). Congress may not issue a subpoena for the purpose of "law enforcement," as "those powers are assigned under our Constitution to the Executive and the Judiciary." *Quinn*, 349 U.S. at 161. There is, moreover, "no congressional power to expose for the sake of exposure," *Watkins*, 354 U.S. at 200, and any general "informing function" of a congressional inquiry must be tied to "legitimate legislative needs of Congress," *Surely v. McClellan*, 553 F.2d 1277, 1285-86 (D.C. Cir. 1976) (en banc); *see Huchinson v. Proxmire*, 443 U.S. 111, 132-33 (1979). Likewise, setting aside the narrow circumstances in which Congress is expressly authorized to act other than through

legislation, Congress "exceed[s] the limits of its own authority" where "the subject matter of the inquiry" is "one in respect to which no valid legislation could be enacted." *Watkins*, 354 U.S. at 194; *see Quinn*, 349 U.S. at 161.[1]

The court's analysis of legislative purpose is more complex and delicate when Congress uses a subpoena to target the President's information. The President is not like federal agencies or private parties, all of whom are plainly subject to myriad forms of regulation within Congress's legislative sphere. *See, e.g.*, *McGrain*, 273 U.S. at 178; *Eastland*, 421 U.S. at 506. The Constitution establishes the President's office and vests "[t]he executive Power" in him, U.S. Const. art. II, § 1, cl. 1, and Congress's power to enact legislation that is "necessary and proper for carrying into Execution" the powers vested in the federal government, U.S. Const. art. I, § 8, cl. 18, does not allow it to curtail his constitutional prerogatives. Legislation regulating the President would bear the significant risk that it would unconstitutionally "impair [the President] in the performance of [his] constitutional duties." *Free Enter. Fund*, 561 U.S. at 493, 500.

The Supreme Court demanded a clear statement of legislative purpose when confronted with a Due Process and First Amendment challenge to a contempt conviction arising out of a congressional investigation. *See Watkins*, 354 U.S. at 198-200, 205-

[1] The House's impeachment power is an express authority whose exercise does not require a connection to valid legislation. But neither the House itself nor even the Committees have asserted jurisdiction over, or an objective of pursuing, impeachment. That interest thus cannot justify these three subpoenas. *Tobin*, 306 F.2d at 274 n.7; *see Kilbourn v. Thompson*, 103 U.S. 168, 193 (1880) (refusing to infer such a purpose).

06. The petitioner in *Watkins* refused to answer questions about suspected members of the Communist Party. *Id.* at 186. In evaluating the validity of the committee's inquiry, the Court emphasized that the petitioner raised serious questions regarding whether the inquiry was "in furtherance of … a legitimate task of the Congress." *Id.* at 187. In particular, the Court emphasized that the resolution authorizing the committee's inquiries was so "[b]roadly drafted," and the committee's jurisdiction so "nebulous," that it was "impossible" for the Court to determine whether the inquiry furthered a legitimate legislative purpose and was important to that purpose, or whether the committee improperly sought "to gather data that is neither desired by the Congress nor useful to it." *Id.* at 201, 205. Particularly in light of the "[p]rotected freedoms" that the committee's inquiry endangered, the Court demanded that the House justify the inquiry by "spell[ing] out [the committee's] jurisdiction and purpose" with "sufficient particularity" to allow the witness responding to the inquiry, and a reviewing court, to determine whether "any legislative purpose justifies the [information request] and, if so, the importance of that information to the Congress in furtherance of its legislative function." *Id.* at 201, 205-06; *see id.* at 214-15 (holding that House must describe "what the topic under inquiry is"). The separation-of-powers concerns that are presented by congressional subpoenas directed at the President provide a similarly compelling occasion for requiring the House to clearly identify the legislative purpose behind such subpoenas.

3. Of particular importance here, the court must next decide whether the information sought is "pertinent" to a legitimate legislative purpose that has been identified. *McGrain*, 273 U.S. at 176. Congressional subpoenas are subject to "a jurisdictional concept of pertinency drawn from the nature of a congressional committee's source of authority." *Watkins*, 354 U.S. at 206. For this limit "[t]o be meaningful," courts must assess "the connective reasoning whereby the precise questions asked relate to" the legitimate legislative purpose. *Id.* at 215. Congressional subpoenas cannot, for instance, "be used to inquire into private affairs unrelated to a valid legislative purpose." *Quinn*, 349 U.S. at 161; *see Kilbourn v. Thompson*, 103 U.S. 168, 195 (1881) (rejecting subpoena that is "simply a fruitless investigation into the personal affairs of individuals").

Courts must conduct a more searching review of pertinency when Congress seeks information from the President. When a congressional demand for information implicates constitutional interests, courts must determine whether each "particular inquiry is justified by a specific legislative need" and assess "the relative necessity of specific disclosures." *Watkins*, 354 U.S. at 205-06. Constitutional concerns cannot be sacrificed to inquiries that "radiate outward infinitely to any topic thought to be related in some way" to a legislative purpose, or subpoenas that "turn … to the past to collect minutiae of remote topics, on the hypothesis that the past may reflect upon the present." *Id.* at 204. Such congressional subpoenas would not be "reasonably relevant to the inquiry," particularly where the President is involved. *McPhaul v. United States*, 364 U.S. 372, 381-82 (1960) (quotation omitted). And the usual "deference" to

congressional actions cannot support "an unnecessary and unreasonable dissipation of" important constitutional interests. *Watkins*, 354 U.S. at 204.

Congressional subpoenas that request information that is not "demonstrably critical" should be deemed insufficiently pertinent when directed at the President's records. *Senate Select Comm.*, 498 F.2d at 731. The Supreme Court's decision in *Cheney*, in the related context of civil discovery, is instructive. *Cheney* held that, when a party sought discovery from the "highest level[s]" of the Executive Branch, separation-of-powers concerns dictated that courts were not "powerless to modify a party's overly broad discovery requests." 542 U.S. at 389. Instead, courts must ensure that the party requesting the information "bear[s] the onus" of first "showing the propriety of the requests" by demonstrating a "need for information" with "sufficient specificity," even before the target needs to object to each request and before the court needs to balance the need for information with the burdens on the Executive Branch. *Id.* at 384, 388. The logic behind protections of this sort, which prophylactically limit the burdens on "the office of the Chief Executive," *id.* at 385 (quoting *Clinton*, 520 U.S. at 707), is also applicable in the congressional-subpoena context. Just as the President could be the subject of unjustifiably broad discovery in private civil cases where parties are pursuing "meritless claims," *id.* at 386, the President may potentially be the subject of numerous and collectively oppressive congressional subpoenas, including even "nonproductive enterprises," *Eastland*, 421 U.S. at 509.

4. Finally, where necessary, the court must balance Congress's interest in the information against any constitutional interests of the party withholding it. *See Watkins*, 354 U.S. at 198-99. In doing so, the court must assess the "weight to be ascribed to" Congress's interest in the information and whether that interest "overbalances" or "unjustifiably encroach[es]" upon countervailing constitutional interests. *Id.*; *see Cheney*, 542 U.S. at 385 (stating that requester's "need for information is only one facet of the problem"). Principles of constitutional avoidance counsel courts to approach this inquiry with the utmost caution. When a congressional subpoena involves serious constitutional concerns, courts should avoid resolving the validity of the subpoena and weighing competing constitutional interests "unless no choice is left." *Rumely*, 345 U.S. at 46.

Application of constitutional-avoidance principles is even more appropriate in a congressional inquiry directed toward the President. *See Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 466 (1989) ("Our reluctance to decide constitutional issues is especially great where … they concern the relative powers of coordinate branches of government."). The Judiciary's ultimate assessment "pushes to the fore difficult questions of separation of powers and checks and balances" and sets the Executive and Legislature as "coequal branches of the Government … on a collision course." *Cheney*, 542 U.S. at 389. The Supreme Court has explained that "'constitutional confrontation[s] between the two branches' should be avoided whenever possible," and has

instructed district courts to "explore other avenues" and to consider "the choices available" before ruling on such a confrontation. *Id.* at 389-90; *see AT&T I*, 551 F.2d at 394 ("A court decision selects a victor, and tends thereafter to tilt the scales.").

Especially when the President is involved, a number of judicial options are available for ensuring that congressional subpoenas do not impinge on a serious constitutional interest. Courts should carefully determine whether a subpoena is invalid on threshold grounds to avoid confronting difficult constitutional questions. *See Rumely*, 345 U.S. at 45-46; *Tobin*, 306 F.2d at 275-76. Courts may require Congress first to determine whether records relevant to a legitimate legislative purpose are not, in fact, available from other sources that would not impinge on constitutional interests. *See Watkins*, 354 U.S. at 206 (examining "relative necessity of specific disclosures"). Courts may require the Committees first "to narrow … the scope of the subpoenas" to first seek critical information in light of the President's constitutional interests. *Cheney*, 542 U.S. at 390.

In addition, courts may require the House to take a more "gradual approach" to obtaining information, rather than holding that the House "is entitled to all that it seeks when time and experience may confirm that it does not need, in any genuine and substantial sense, more than [has been] provided." *AT&T II*, 567 F.2d at 131. Resolving competing constitutional claims of coequal branches has never been the "sole option" for a court, *Cheney*, 542 U.S. at 389, and courts are under an obligation to

attempt to avoid a conflict between constitutional interests before it can "intervene responsibly," *AT&T II*, 567 F.2d at 131.

Thus, a reviewing court must determine whether each particular demand for information is pertinent and necessary to a specific legitimate legislative need, and carefully counterbalance the congressional need with the President's constitutional interests. These basic requirements—and the courts' utmost caution in assessing those requirements—reflect both the high respect owed the President and the particular risk of unconstitutional interference posed by one or more congressional subpoenas targeting the President's records. *See supra* pp.5-9.

II. THE DISTRICT COURT FAILED TO PROPERLY EVALUATE THE COMMITTEES' SUBPOENAS IN LIGHT OF SEPARATION-OF-POWERS AND CONSTITUTIONAL-AVOIDANCE PRINCIPLES

A. Until last month, the House had not provided a clear statement authorizing the committee subpoenas at issue in this case. On July 24, 2019, the House passed a resolution retroactively authorizing the subpoenas. *See* H.R. Res. 507. Notably, the resolution provided a blanket authorization, not only for these subpoenas, but for all "current and future" subpoenas by any committee issued "directly or indirectly" to the President "in his personal or official capacity," his family, or his businesses, among others, without regard to the purpose or scope of the subpoenas. *Id.* at 2, 3; *see id.* at 1 (asserting existence of unidentified "legitimate legislative purposes of the respective committees").

While House Resolution 507 clearly authorizes the Committees' subpoenas, the resolution's indiscriminate approach of authorizing all existing and future investigations and subpoenas, for whatever legislative purpose, reinforces the need for a clear statement of a valid legislative purpose to justify each particular subpoena concerning the President. The House's blank-check resolution for all committees to investigate the President directly and indirectly without any guidance or limitation on their investigative authority is a substantial departure from "procedures which prevent the separation of power from responsibility." *Watkins*, 354 U.S. at 215. Such a failure by the House to exercise "preliminary control of the Committee[s]," *id.* at 203, would be remarkable and troubling even for a subpoena to a private party or federal agency, but it is manifestly improper as to the President, given the "high respect that is owed to [his] office," which "should inform the conduct of the entire proceeding" in Congress as in the courts. *Cheney*, 542 U.S. at 385.

B. The Committees argue that the objective of these subpoenas can be derived from House Resolution 206, a separate resolution passed by the House in March 2019, four months before House Resolution 507. House Resolution 206 concerns the threats to this country posed by money laundering and "other financial crimes." H.R. Res. 206, at 1. It states, *inter alia*, that "the lack of sunlight and transparency in financial transactions poses a threat to our national security and our economy's security." *Id.* at 4. It discusses various aspects of the money-laundering problem, including "the influx of illicit money" into U.S. investments, "including luxury high-end real estate." *Id.* at 3.

And it states that the House "supports efforts"—presumably legislation—"to close loopholes that allow corruption, terrorism, and money laundering to infiltrate out country's financial system." *Id.* at 5; *see* Committee Br. 13, 18-19 (citing pending bills).

Although legislation designed to close regulatory loopholes in the financial system that facilitate money laundering, terrorism, or corruption is undoubtedly within Congress's constitutional competence, House Resolution 206 does not call for any congressional investigations regarding these matters, much less an investigation of the President and his family. This is not a case where "the subject-matter" is such that a "presumption should be indulged" that the particular legislative initiatives discussed in that earlier House resolution are "the real object[s]" of these three subpoenas. *McGrain*, 273 U.S. at 178. The Committees' assertion to that effect has never been ratified by the House itself, and is in any event in stark tension with the subpoenas' objective scope.

There is no objective reason for a congressional investigation into the general problem of money laundering and other illicit financial transactions to focus on the President and his family. Countless numbers of persons and businesses have engaged in the sorts of financial transactions that could implicate existing statutory or regulatory loopholes. A legislative inquiry into the subjects of "corruption, terrorism, and money laundering," H.R. Res. 206, at 5, would cast a wide net rather than employ a harpoon. The Committees' brief represents (Br. 9) that, in addition to the Deutsche Bank and Capital One subpoenas, the Financial Services Committee has served subpoenas on seven other unnamed financial institutions. But it says only that "the majority" of those

seven subpoenas do not request documents "specific to" the President (and does not clarify whether even those subpoenas in fact relate to the President's information). *Id.* The bare fact that a "majority" of *other* subpoenas may not be confined to the President's information hardly suggests that the *present* subpoenas are part of a general inquiry into reforms of the financial system, in which the President and his family have been caught up merely by chance—especially given the broad scope and temporal sweep of the information demanded. To the contrary, the subpoenas provide "strong reason to doubt," *Watkins*, 354 U.S. at 213, that furthering the legislative goals identified in House Resolution 206 is the "real object," *McGrain*, 273 U.S. at 178.[2]

C. The disconnect between the legislative purposes identified by the House and the Committees' subpoenas is underscored by the subpoenas' breadth. The district court correctly recognized that, when measured against the Committees' stated legislative purposes, the subpoenas are "undeniably broad." JA138.

[2] The Chairman of the Intelligence Committee has stated that the Intelligence Committee is also exploring how foreign powers have influenced the U.S. political process and what legislative changes might address that problem. *See* 165 Cong. Rec. H3481 (daily ed. May 8, 2019). As explained above, the unique position of the President and the separation-of-powers concerns that attend legislative demands for the President's records require the House itself to clearly specify the legislative purposes for seeking information from the President. House Resolution 206 does not appear to encompass or adopt each of the specific purposes put forth by the Intelligence Committee, let alone tie them to this subpoena. Moreover, for similar reasons as stated above, even taking cognizance of those purposes, the subpoena is narrowly focused on the President alone, and yet "undeniably broad" as to him, as even the district court concluded. JA138.

Indeed, the scope of the subpoenas is sweeping. The identical Deutsche Bank subpoenas request a universe of financial documents that spans a decade, from 2010 to present, relating to the President, his children, his and his children's immediate family members, and his corporations. JA37. Those documents encompass a constellation of transactions that would permit the Committees to reconstruct in detail the financial history of the President and his family members with that institution—including fund transfers, deposits, withdrawals, investments, loans, mortgages, and lines of credits. *See* JA37-40. The Financial Service Committee's Capital One subpoena is somewhat narrower in its temporal reach, but it too seeks a wide range of financial documents regarding the President and his businesses over that period. *See* JA52-53. And the July 19, 2016 starting date for the Capital One subpoena—the date on which the President became the Republican nominee—has no evident connection to the stated object of investigating money laundering, while raising obvious questions about an alternative political object. *See Watkins*, 354 U.S. at 204 ("Remoteness of subject can be aggravated by a probe for a depth of detail even farther removed from any basis of legislative action.").

The Committees have not connected the dots between the "undeniably broad" scope of these subpoenas and the general legislative purpose that the House has articulated: closing regulatory loopholes that permit corrupt financial activity. What is missing is adequate "connective reasoning whereby the precise questions asked relate to" the legitimate legislative purpose. *Watkins*, 354 U.S. at 215. The Committees have

not explained how the full reach of their inquiries could be "demonstrably critical to the responsible fulfillment of [their] function[s]." *Senate Select Comm.*, 498 F.2d at 731. Ordinarily, of course, congressional committees have considerable latitude about which private transactions and events to examine. But committees investigating far-reaching public problems, such as money laundering, do not properly exercise that discretion by making the President and his family the sole or primary target of their inquiries, or even one of their targets. Even if the Committees believed that the President may have engaged in transactions that implicate the regulatory loopholes discussed in House Resolution 206, the House has not "assay[ed] the relative necessity" of seeking the President's records as opposed to the records of others. *Watkins*, 354 U.S. at 206; *see* JA133 (stating President might "serve as a useful case study"); *cf. Cheney*, 542 U.S. at 389-90 (holding that, even before the President needed to object to disclosure, the requester should clarify particular needs by "narrow[ing] … the scope of the subpoenas"). Information regarding the President's personal finances is plainly not "demonstrably critical," *Senate Select Comm.*, 498 F.2d at 731, to a general legislative inquiry into the improper exploitation of the financial system, and the "relative necessity" of demanding voluminous records of the President's financial transactions is

minimal when numerous other sources that do not raise separation-of-powers concerns are available, *Watkins*, 354 U.S. at 205-06.[3]

Moreover, the Committees have not explained why their legislative inquiries require them to reconstruct an entire decade of the financial transactions of the President and his family. Congressional subpoenas, of course, "cannot be used to inquire into private affairs unrelated to a valid legislative purpose" or for the purpose of "law enforcement" against individuals. *Quinn*, 349 U.S. at 161. And legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability[] than on precise reconstruction of past events." *Senate Select Comm.*, 498 F.2d at 732. It is not enough that the "minutiae" in the requested information are "thought to be related in some way" to a present legislative activity. *Watkins*, 354 U.S. at 204. The Committees have no evident need to compel the disclosure of highly detailed information concerning ten years of the President's financial activities.

[3] Although the Intelligence Committee's stated objective of legislating to prevent foreign influence on federal elections has a more natural connection to the President as a recent political candidate, the President is not the only person to examine, or even necessarily the most natural person to begin with. It is also unclear to what extent the full scope of the Intelligence Committee's subpoena to Deutsche Bank—which is conspicuously identical to the subpoena issued by the Financial Services Committee—is based on independent purposes, rather than merely a request for "information from financial institutions" in an effort to "[w]ork[] with the Financial Services Committee." 165 Cong. Rec. at H3481. This only underscores the need for the full House to exercise the "critical judgment" of clearly identifying the legitimate legislative purpose supporting these subpoenas. *See Watkins*, 354 U.S. at 206.

D. The district court observed that if it were presented with a comparably over-broad subpoena in "an ordinary civil case," it would "send [the parties] into a room and tell [them not to] come out until [they] come back with a reasonable subpoena." JA94. But the court assumed that it had no authority to deal with the overbroad character of the congressional subpoenas here. *See* JA138. That assumption was incorrect, and all the more so where the President is involved. Broad congressional demands for the President's records have the potential to interfere with the President's constitutional duties, and courts are not "powerless to modify a party's overly broad" requests for information to protect those constitutional interests. *Cheney*, 542 U.S. at 389; *see AT&T II*, 567 F.2d at 130. The court here did not take heed of these separation-of-powers considerations in upholding these subpoenas. Rather, the court misunderstood the proper extent of its authority.

The district court misconstrued the Supreme Court's statement in *Eastland* that "the wisdom of congressional approach or methodology is not open to judicial veto" to mean that courts cannot evaluate the pertinence of particular requests in a subpoena. JA138. *Eastland* addressed a challenge to the *motives* behind a congressional subpoena, and considered whether "the mere allegation that a valid legislative act was undertaken for an unworthy purpose" was enough to defeat the subpoena. 421 U.S. at 508-09. The Court held that allegations of "dishonest or vindictive motives" were insufficient. *Id.* at 509. *Eastland* did not suggest, however, that the identification of a single legitimate purpose meant that any congressional demand for information—however remote the

information might be from that purpose and however much the demand might impinge on constitutional interests—was valid. Instead, the very "nature of a congressional committee's source of authority" means that the committee must satisfy "a jurisdictional concept of pertinency." *Watkins*, 354 U.S. at 206; *cf. McGrain*, 273 U.S. at 178 (determining that "real object" of subpoena plainly was "to aid [the Senate] in legislating"). Even when facing other constitutional interests, and not the serious separation-of-powers concern presented here, the Supreme Court has stated that judicial "deference [to Congress's actions] cannot yield to an unnecessary and unreasonable" subpoena that could interfere with those interests. *Watkins*, 354 U.S. at 204.

The district court incorrectly assumed that, so long as the general undertaking of the subpoenas was "reasonably relevant to [a congressional] inquiry," it was irrelevant that "some requests [were] more pertinent than others." JA137-38. The Committees, however, must "assay the relative necessity" of their requests for information, and it is not enough that information is "thought to be related in some way" to a legitimate legislative purpose. *Watkins*, 354 U.S. at 204, 206. Each "particular inquiry [must be] justified by a specific legislative need," and the Committees must assess "the relative necessity of specific disclosures." *Id.* at 205-06. The court, moreover, erred in presuming that this approach would require "a line-by-line review" here, JA138, where the subpoenas set out discrete categories of financial information that would not require such detailed review to properly determine each category's pertinence and necessity. No case suggests either that a committee is entitled to demand records that have no

bearing on a legitimate legislative purpose simply by bundling such a demand with a request for items that are pertinent to that purpose, or that a court is obligated to stand aside when presented with such a demand, particularly when the subject of the demand is the President.

The district court was not confined to rubberstamping overbroad congressional subpoenas. It would be anomalous for a court to afford the President fewer protections from a congressional subpoena than the protections that private litigants enjoy in "an ordinary civil case." JA94. To the contrary, even in ordinary civil litigation concerning the President, the Supreme Court has instructed that, despite the additional procedural protections against "meritless claims," courts must "explore other avenues" and consider "the choices available" before requiring disclosure in the face of separation-of-powers concerns. *Cheney*, 542 U.S. at 384, 386, 389-90.

Nothing requires a court to send the parties into a room for negotiations. But this case is also not yet in a posture that requires a court to rule on thorny constitutional questions involving separation of powers. Principles of judicial restraint and constitutional avoidance counsel recourse to other means of avoiding those questions. The district court could have required the House to exhaust other sources of information that do not involve the President before directing subpoenas at his records. As noted above, the Financial Services Committee appears to have sought information from other financial institutions regarding individuals who are not the President, but it has made no representation that it has exhausted those efforts or that, even after doing so,

its legislative goals could be accomplished only by inspecting financial transactions of the President and his family. The court could also require the Committees to narrow the subpoenas, *see Cheney*, 542 U.S. at 390, or to take a "gradual approach" of obtaining the most critical information first, *AT&T II*, 567 F.2d at 131. Any of these options would have been more appropriate than what the court did here. Principles of constitutional avoidance counsel courts to avoid occasions for constitutional conflict and to intervene responsibly. *See Rumely*, 345 U.S. at 46; *see also Cheney*, 542 U.S. at 390-91; *AT&T II*, 567 F.2d at 131.

CONCLUSION

The order of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 29(a)(5) and Second Circuit Local Rule 29(c) and 32.1(a)(4) and because it contains 6,994 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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