**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)

# REPLY BRIEF FOR APPELLANTS

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Dated: July 9, 2019

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In defending its unprecedented request for the private financial records of a sitting President, the Committee abandons several parts of the district court's opinion, responds to only some of Plaintiffs' objections, and makes arguments that were never pressed or decided below. For all its maneuvering, however, the Committee's defense of the Mazars subpoena faces the same major roadblocks it has from the start: the House rules do not clearly authorize the subpoena, it does not further a legitimate legislative purpose, and upholding it would require this Court to endorse a limitless conception of Congress's subpoena power. For any or all of these reasons, this Court should reverse.

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

The Committee offers this Court no basis for reaching the serious constitutional issues this appeal raises. The House Rules do not clearly grant this (or any) Committee jurisdiction to directly target the President with subpoenas—let alone to investigate his businesses and personal finances. Br. 15-16. The Committee's contrary arguments all miss the mark.

As an initial matter, the Committee (at 9-14) misportrays this case as an ordinary subpoena dispute between Congress and the Executive Branch. It started that way: the Committee initially made document requests to the Director of the Ethics Office and the White House Counsel. But the Committee later switched gears, abandoned that traditional approach, and subpoenaed the President's accountant instead. Rather than engaging in what then–Assistant Attorney General Scalia called the "hurly-burly, the

give-and-take of the political process between the legislative and the executive," 94th Cong. 87 (1975), the Committee targeted the President *himself*. The key question, then, is not whether the Committee can conduct "investigations concerning government ethics and conflicts of interest throughout the Executive Branch." Cmte. Br. 8-9. It is whether the Committee has jurisdiction to subpoena the President's accountant for his private financial records.

For the Committee to have *that* jurisdiction, the "'clear statement rule'" requires the House Rules to unequivocally grant it. *Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991). "'In traditionally sensitive areas, ... the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.'" *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). It is especially important when the Court is drawn into a separation-of-powers clash; the rule forces "Congress to take responsibility for testing the limits of its powers." *Lee v. Reno*, 15 F. Supp. 2d 26, 38 n.16 (D.D.C. 1998); *Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992); *Nixon v. Fitzgerald*, 457 U.S. 731, 748 n.27 (1982). Hence, congressional enactments must be "'construed not to include the President unless there is a specific indication that Congress intended to cover the Chief Executive.'" 19 Op. O.L.C. 350, 351-52 (1995) (quoting Memo. of William H. Rehnquist to Egil Krogh (Apr. 1, 1969)); 20 Op. O.L.C. 124, 178 (1996) ("The Supreme Court and [OLC] have adhered to a plain statement rule: statutes that do not expressly apply to the President must be construed as not applying to the President, where applying the statute to the President

would pose a significant question regarding the President's constitutional prerogatives.").

The clear-statement rule applies. The Committee claims jurisdiction to subpoena the President's accountant to investigate his businesses and private finances. Demands like this can "distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve." *Fitzgerald*, 457 U.S. at 753; *In re Lindsey*, 158 F.3d 1263, 1287 (D.C. Cir. 1998) (Tatel, J., concurring in part and dissenting in part). That intrusion on the President alone raises a serious constitutional issue. "The essential purpose of the separation of powers is to allow for independent functioning of each coequal branch of government within its assigned sphere of responsibility, free from risk of control, interference, or intimidation by other branches." *Fitzgerald*, 457 U.S. at 760-61 (Burger, C.J., concurring). But principles of constitutional avoidance also are implicated. The parties seriously dispute whether the subpoena has a legitimate legislative purpose. Hence, there must be an "express statement" before "assuming" the House has authorized the Committee to embark on this investigation. *Franklin*, 505 U.S. at 801; *see Shelton v. United States*, 327 F.2d 601, 605 (D.C. Cir. 1963) ("[E]ven a strained interpretation of the congressional resolution [i]s preferable to deciding the case on a constitutional basis."); *e.g.*, *Tobin v. United States*, 306 F.2d 270, 274-75 (D.C. Cir. 1962); *Rumely v. United States*, 345 U.S. 41, 47-48 (1953).

The Committee does not deny that the clear-statement rule—and the avoidance canon from which it partially derives—apply to congressional subpoenas and the House Rules. Nor could it in light of *Tobin* and *Rumely*. The Committee (at 38) instead argues that the clear-statement rule exists only "to avoid a difficult constitutional question presented as a defense in a criminal case." But it offers no basis for confining the rule to criminal cases. *Rumely* and *Tobin* were criminal proceedings because that was the chosen "method ... for testing the merits" of those subpoenas. *Tobin*, 306 F.2d at 274. A civil suit like this one is another method. *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 501 n.14 (1975). Constitutional avoidance and the clear-statement rule apply to criminal and civil laws alike. *U.S. ex rel. Long v. SCS Bus. & Tech. Inst., Inc.*, 173 F.3d 870, 887 (D.C. Cir. 1999); *Franklin*, 505 U.S. at 801 (APA); *Gregory*, 501 U.S. at 461 (ADEA); *Fitzgerald*, 457 U.S. at 748 & n.27 (*Bivens*); *NAMUDO v. Holder*, 557 U.S. 193, 205 (2009) (VRA). As *Rumely* put it: "*Whenever* constitutional limits upon the investigative power of Congress have to be drawn by this Court, 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*." 345 U.S. at 46 (emphasis added); *accord Tobin*, 306 F.2d at 2766 (court was asked to decide "essentially civil and jurisdictional issues at the same time that we establish criminal precedent").

The Committee (at 40-41) also argues that the clear-statement rule is inapplicable because the President "is not asking the Court to avoid a constitutional question, but rather to reach out and decide constitutional issues that are not presented." This

assertion is mystifying. To be sure, the parties dispute whether courts must evaluate the constitutionality of the legislation that Congress claims is anchoring the deployment of its subpoena power. But even assuming the Committee prevails on that score, it is only one subsidiary question in the parties' broader constitutional dispute—*i.e.*, whether the subpoena has a legitimate legislative purpose. And *all* of the constitutional questions in this case can be avoided if the Court applies the clear-statement rule and holds that the Committee lacks jurisdiction to issue this subpoena. *Rumely*, 345 U.S. at 47. In fighting so doggedly to avoid any inquiry into the validity of its contemplated legislation, the Committee has lost the forest for the trees.

The Committee (at 36-37) searches the House Rules in vain for the unequivocal authorization it needs to justify this subpoena. The Rules giving it "general oversight responsibilities" and jurisdiction over "officers of the United States," "management of government operations and activities," and "operation of Government activities at all levels" are not express authorizations to subpoena the President's financial records. *Franklin* deemed similar language insufficiently clear. *See* 505 U.S. at 800-01 (holding that a law covering "'each authority of the Government of the United States'" did not clearly cover the President (quoting 5 U.S.C. §§701(b)(1); 551(1)). The Committee (at 6) is right that it has the authority under House Rule X.4(c)(2) to investigate "without regard to' whether the Rules confer 'jurisdiction over the matter to another standing committee.'" But *no* committee has express authority to subpoena the President for his personal financial records. And that is what matters.

The Committee chides the President for focusing too much on its jurisdiction over "the Executive Office of the President" (language the Committee tacitly admits does not cover the President). But contra the Committee's misapprehension, Plaintiffs do not claim that this new language *narrowed* the Committee's authority. This provision bears emphasis because it's the closest the House Rules ever come to a clear statement. The Committee's problem, however, is that it's not close enough. Br. 16.

The Committee (at 38) points to a House Report explaining that the Rules were amended to make "clearer ... that the Committee has jurisdiction over the White House." H. Rep. No. 116-40, at 156 (2019). But legislative history never satisfies the clear-statement rule; the "'unequivocal expression'" must be "in statutory text." *United States v. Nordic Village Inc.*, 503 U.S. 30, 37 (1992); *accord Dellmuth v. Muth*, 491 U.S. 223, 230 (1989); *Sch. Dist. of Pontiac v. Sec'y of U.S. Dept. of Educ.*, 584 F.3d 253, 294 (6th Cir. 2009) (Sutton, J., concurring). Regardless, adding "the Executive Office of the President" to the House Rules to reach the "White House" adds nothing; neither phrase clearly covers the President *himself*. In sum, the clear-statement rule "closes this case" because "resort to legislative history, which we turn to with textual ambiguity, is foreclosed, even if it offered answers, which it does not." *In re Supreme Beef Processors, Inc.*, 468 F.3d 248, 259 (5th Cir. 2006) (Higginbotham, J., concurring).

In passing, the Committee (at 38) incorrectly suggests that its jurisdiction over the Ethics in Government Act implicitly authorizes this subpoena, since the Act regulates "Presidential financial disclosures." Yet the Act's specific references to the

President only prove that Congress "knows how to make" its intention to regulate the President "manifest." *Jama v. ICE*, 543 U.S. 335 (2005). If the House intended to grant the Committee the authority to oversee that law by subpoenaing the President's accountant for his personal records (as opposed to the White House Counsel or federal agencies for official documents), it should have said so.

Finally, the Committee (at 38) defends its jurisdiction by noting that this is "not a lawsuit against the President." But functionally it is, since Mazars is just a custodian. *United States v. AT&T Co.*, 551 F.2d 384, 385 (D.C. Cir. 1976). The Committee cannot disagree; its asserted legislative purposes all involve investigating the President precisely because he occupies the office. Cmte. Br. 44. "Because the Presidency is tied so tightly to the persona of its occupant," moreover, "the line between official and personal" is "elusive." *Lindsey*, 158 F.3d at 1286 (Tatel, J., concurring in part and dissenting in part). Treating this as a private subpoena—as if it has no implications for the Presidency—is therefore untenable. So is "lumping the President together with tax collectors, passport application processors, and all other executive branch employees—even cabinet officers." *Id.* This case triggers the separation-of-powers concerns that make litigation involving the President unique.

Nor would classifying this case as a subpoena to a private party bring it within the Committee's jurisdiction. The Committee's claimed power to oversee "Government activities at all levels" does not encompass private parties. "Government activity," after all, "must mean 'activity performed by the Government.'" *United States v. Kamin*, 136

F. Supp. 791, 802 (D. Mass. 1956) (quoting *Indian Towing Co., Inc., v. United States*, 350 U.S. 61, 67 (1955)). If it extended to private parties, the Committee's jurisdiction "would be enormous" and "would lead to avenues having no end." *Id.* at 802 n.14. "So comprehensive a purpose in such broad fields should require far more compelling statutory language." *Id.* No name change, Cmte. Br. 5 n.4, can fix that.

* * *

The Committee—with almost no supporting caselaw—asks this Court to accept that its "broad jurisdiction" authorizes this subpoena. Cmte. Br. 36. But the stakes are too high. Whether the Committee can subpoena the President's accountant for his private financial documents is itself a serious constitutional issue. But the Committee claims that the jurisdiction to issue this subpoena would give it jurisdiction to exact testimony from the President too. *See* Cmte. Br. 7 ("The Oversight Committee is also empowered 'to require, by subpoena or otherwise, the attendance and testimony of such witnesses ... as it considers necessary.'"). The same would be true for the Justices. In other words, the Committee is boldly asking this Court to hold that it has the most sweeping jurisdiction imaginable to subpoena its constitutional equals.

"Choice is left," however. *Rumely*, 546 U.S. at 47. "Experience admonishes" courts "to tread warily in this domain." *Id.* at 46. The constitutional "doubts" about this subpoena are anything but "fanciful or factitious." *Id.* And there is every reason to believe "that if Congress had intended the [Oversight] Committee to conduct such a novel investigation it would have spelled out this intention in words more explicit than

the general terms found in the authorizing resolutions under consideration." *Tobin*, 306 F.2d at 275. The House can "adopt a resolution which in express terms authorizes" this provocative subpoena. *Id.* at 276. But until it does so, this Court should avoid deciding "potential constitutional questions [of] farreaching import." *Rumely*, 345 U.S. at 43. The clear statement rule exists for cases like this.

## II. The subpoena lacks a legitimate legislative purpose.

As it did in the district court, the Committee (at 30) concedes that the Mazars subpoena is unconstitutional unless it furthers a "legitimate legislative purpose."[1] It does not. The subpoena exercises law-enforcement authority, pursues invalid legislation vis-à-vis the President, and cannot be recast as an effort to investigate agencies or other executive-branch officials.

### A. The subpoena's actual purpose is law enforcement.

A congressional subpoena lacks a "legitimate legislative purpose" if it attempts to conduct law enforcement. Br. 20. Such a subpoena is not "legislative" because nothing in Article I gives Congress law-enforcement powers. *Watkins v. United States*, 354 U.S. 178, 187 (1957). And such a subpoena is not "legitimate" because Congress cannot encroach on the law-enforcement powers of the other branches. *Kilbourn v. Thompson*, 103 U.S. 168, 191 (1880). Of course, Congress is not trying, convicting, or

[1] The Committee does not defend the subpoena under any of the House's non-legislative powers. There is *no* mention of impeachment, Watergate, or Whitewater in its brief. This confirms that the district court "overstepped its institutional role" by invoking them *sua sponte* and resolves that issue. Br. 45-48.

imprisoning anyone. But the prohibition on law-enforcement investigations recognizes that congressional investigations are *themselves* a form of "punishment" that legislators will be tempted to use for "personal aggrandizement" and to sway "the public mind." *Watkins*, 354 U.S. at 187; *Marshall v. Gordon*, 243 U.S. 521, 546 (1917).

The Committee agrees. While the Committee (at 29) notes that a subpoena is not unconstitutional unless it is "'*obvious* that there was a usurpation of functions exclusively vested in the Judiciary or the Executive,'" the power to enforce the law is obviously "assigned under our Constitution to the Executive and the Judiciary," *Quinn v. United States*, 349 U.S. 155, 161 (1955). Congress simply "cannot take actions that amount to execution of the laws." Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 Ala. L. Rev. 1205, 1216 (2014).

The Committee (at 23, 44-45) insists that a congressional investigation does not become impermissible because it "may reveal unlawful conduct," but it is responding to an argument Plaintiffs have not made. Plaintiffs agree that congressional investigations must be evaluated *ex ante*, so an otherwise "legitimate legislative investigation need not grind to a halt whenever … crime or wrongdoing is disclosed." *Hutcheson v. United States*, 369 U.S. 599, 618 (1962). A legislative investigation is not "legitimate" in the first place, however, if its actual purpose is law enforcement. *Watkins*, 354 U.S. at 187; *United States v. Cross*, 170 F. Supp. 303, 309 (D.D.C 1959). That is the issue here.

To determine whether a subpoena is pursuing that impermissible goal, courts must inquire thoughtfully. They cannot delve into legislators' hidden motives, Br. 29-31, but they must determine the subpoena's *actual* purpose, *see McGrain v. Daugherty*, 273 U.S. 135, 178 (1927) ("real object"); *Barenblatt v. United States*, 360 U.S. 109, 133 (1959) ("'primary purpose[]'"); *Kilbourn*, 103 U.S. at 194-95 ("nature" and "*gravamen*"). After all, courts cannot assess whether a subpoena has a "legitimate legislative purpose" without first identifying what the "purpose" is, and they do that by evaluating the available evidence, including statements of committee members and committee documents, as well as the subpoena's nature, scope, and subject matter. Br. 29. The Committee does not disagree. Cmte. Br. 43.

Nor could it, especially given the Supreme Court's recent decision in *Department of Commerce v. New York*. That decision reiterated the distinction between motive and purpose that Plaintiffs draw. Courts normally cannot inquire into the "'motivation'" or "unstated reasons" of "another branch of Government." 139 S. Ct. 2551, 2573 (2019). But they must "scrutinize[]" another branch's "reasons" by examining "the record" and "viewing the evidence as a whole." *Id.* at 2575-76. While courts are "deferential," they "are 'not required to exhibit a naiveté from which ordinary citizens are free.'" *Id.* at 2575; *accord Rumely*, 345 U.S. at 44 (courts must not refuse to "see what all others can see and understand" when evaluating the "congressional power of investigation." (cleaned up)).

That is what happened in *McGrain*. True, the district court, which had invalidated the subpoena on separation-of-powers grounds, was reversed. But the Supreme Court did not contradict the district court's *legal* conclusion that Congress cannot use compulsory process to investigate if the Attorney General was guilty of wrongdoing; it disagreed with the district court's *factual* conclusion that Congress was actually doing that. 273 U.S. at 177-80. The "substance of the resolution" authorizing the investigation "show[ed] that the subject to be investigated was the administration of the Department of Justice"—an agency whose "duties" and budget "plainly" are "subject to regulation by congressional legislation." *Id.* at 177-79. The resolution mentioned the Attorney General "by name," but only "to designate the period to which the investigation was directed." *Id.* at 179. And Congress did not have to "express[ly] avow[]" a legislative purpose in the resolution, since the Court was satisfied that legislation was "the real object" of the investigation. *Id.* at 178.

As this detailed analysis reveals, *McGrain* carefully examined whether Congress was using compulsory process "to obtain testimony for th[e] purpose" of "exercis[ing] a [valid] legislative function." *Id.* at 154, 176. It made sure that the subpoena's "real object" was legislative, examining "the substance of the resolution," "the debate on the resolution," and "the subject-matter" of the investigation. *Id.* at 178-79. And it warned that the case would have come out differently "if an inadmissible or unlawful object were affirmatively and definitely avowed." *Id.* at 180; *Cross*, 170 F. Supp. at 306

(explaining that while courts often "presume[]" a "legitimate legislative purpose," "any presumption" can be "controverted by adequate evidence to the contrary").

This is the case *McGrain* warned about. The Committee has "affirmatively and definitely avowed" an "unlawful" law-enforcement purpose. At the Cohen hearing (the impetus for this subpoena), the Chairman and several Committee members admitted that their purpose was to assess "the legality of … President Donald Trump's conduct." Br. 7-8. Chairman Cummings' first request to Mazars likewise stated that he wanted to investigate the accuracy of the President's financial statements to see if he broke the law. Br. 34-35; JA91-94. In his formal memo, the Chairman's very first stated purpose for the Mazars subpoena was "to investigate whether the President may have engaged in illegal conduct before and during his tenure in office," JA107—a flagrantly unlawful purpose that the Committee does not try to defend. While these statements are enough on their own, Plaintiffs also have a smoking gun: Speaker Pelosi's recent statement about wanting to see the President "in prison." Br. 50-51.

The subpoena itself confirms that the Committee is pursuing a law-enforcement purpose. The Committee's concession (at 44) that the subpoena "share[s] some parallels with a law enforcement investigation" is a considerable understatement. A grand jury investigating criminal misconduct wouldn't change one word of it. The Committee still has never explained how its request for "[a]ll memoranda, notes, and communications," for example, is relevant to a "legislative" purpose, Br. 35—though those "statements" are precisely what a criminal "grand jury" would request. *Senate Select Comm. on Presidential*

*Campaign Activities v. Nixon*, 498 F.2d 725, 732 (D.C. Cir. 1974). The Committee's "indiscriminate dragnet" request for Plaintiffs' statements, reports, contracts, source documents, records, and communications over an eight-year period reveals its non-legislative bent. *Wilkinson v. United States*, 365 U.S. 399, 412 (1961). So do its targeting of the businesses and finances of one person and its singular focus on "precise reconstruction of past events." *Senate Select Comm.*, 498 F.2d at 732; *accord Hutcheson v. United States*, 369 U.S. 599, 617 (1962) (explaining that a congressional investigation would not be legislative if it tried to determine "whether petitioner had in fact defrauded the State of Indiana"). A "focus on the general or common good," instead of "particular matters" or "the law's particular applications," is what, in the end, separates legislating from law enforcement. Rao, *Why Congress Matters: The Collective Congress in the Structural Constitution*, 70 Fla. L. Rev. 1, 17 (2018).

The Committee never rebuts, refutes, challenges, or even tries to explain all of this evidence of its impermissible purpose. In fact, the Committee adds fuel to the fire by repeatedly describing the subpoena's purpose in law-enforcement terms. *E.g.*, Cmte. Br. 2 ("accuracy of Mr. Trump's statutorily mandated federal financial disclosures" and "possible violations of the Emoluments Clauses"); Cmte. Br. 33 ("misstated his assets and liabilities"); Cmte. Br. 34 ("Mr. Trump's potential violations of the Emoluments Clauses"); Cmte. Br. 44 ("whether Mr. Trump inaccurately represented liabilities on his

statutorily mandated financial disclosures, impermissibly benefited from a lease with a government agency, and violated the Constitution").[2]

The Committee's only response (at 44) is that the Court should ignore all of this evidence of its impermissible purpose because the subpoena also "might ... inform [its] legislative judgments." But an illegitimate subpoena cannot be saved by "the mere assertion of a need to consider 'remedial legislation.'" *Shelton*, 404 F.2d at 1297. And it cannot be justified by "retroactive rationalization[s]"—lawyers "[l]ooking backward" to find "any legislative purpose which might have been furthered by the [subpoena]" instead of evaluating the reasons "the House of Representatives itself" gave. *Watkins*, 354 U.S. at 204, 206. "It is the responsibility of the Congress, in the first instance, to insure that compulsory process is used only in furtherance of a legislative purpose." *Id.* at 201.

But tack-on remedial legislation and retroactive rationalizations are all that the Committee offers. Instead of making "specific" references to potential legislative solutions, *Shelton*, 404 F.2d at 1297, the Committee states in the vaguest, most generic terms that its law-enforcement investigation will help it determine whether to "reform" or "strengthen" the laws that were allegedly broken (or the agencies that failed to detect the alleged violations). *E.g.*, Cmte. Br. 31-33 (""whether reforms are necessary""); Cmte.

[2] The Committee (at 9, 23, 33) acknowledges that it also wants "to shed light" on the President's finances. But "expos[ur]e for the sake of exposure" is just as illegal as law enforcement. *Watkins*, 354 U.S. at 200.

Br. 43 ("whether current law enables [OGE] to perform its statutory functions" and "whether additional legislative reforms are required to strengthen [OGE]"); Cmte. Br. 42 (whether legislation "regulating officers or agencies" might be needed to "mitigate the effects" of Plaintiffs' supposed misconduct). This is precisely the kind of nonfalsifiable rationale that *Shelton* forbids, as it turns the ban on law-enforcement investigations into a mere word game. Br. 34. It is a "retroactive rationalization" of the highest order.

Tellingly, the subpoena is not "reasonably relevant" to these (or any other) legislative goals. *McPhaul v. United States*, 364 U.S. 372, 381 (1960). As explained, subpoenas must be pertinent to their legitimate legislative purposes, this pertinency requirement is not limited to criminal-contempt cases, and subpoenas that make impertinent requests must be invalidated (or at least narrowed). This subpoena is plainly impertinent and overbroad. Br. 31-32, 13, 19, 42-43. Such a sweeping demand would make little sense if the Committee were actually pursuing legislation. It makes perfect sense, however, because the Committee is really pursuing an unlawful law-enforcement agenda.

The Committee makes no contrary argument. It instead insists, in one sentence (at 30), that Plaintiffs "do[] not meaningfully contend" that the subpoena lacks pertinency. But Plaintiffs explained in detail why "large swaths of the Mazars subpoena" are impertinent to the Committee's purported legislative purposes. Br. 42-43, 13. For example, the subpoena reaches back many years before the President was even a

candidate for public office and well before the GSA had a lease to allegedly mismanage. That Cohen gave the Committee a document from 2011, Cmte. Br. 33, does not make 2011 a relevant date for legislative purposes. Furthermore, the subpoena seeks "agreements," "contracts," "memoranda," "communications," and "notes" that have nothing to do with the financial statements the Committee says it needs. Here, too, the Committee offers no response to Plaintiffs' arguments. Waiving their pertinency objections away as "[un]meaningful[]" is no response at all. *Democratic Cent. Comm. of D.C. v. WMATC*, 485 F.2d 786, 790 n.16 (D.C. Cir. 1973).

### B. The subpoena could not result in valid legislation regarding the President.

Any legislation that might result from this subpoena would be unconstitutional. Br. 37-44. The Committee's only developed response to this argument (at 38-42) is that it would be inappropriate to evaluate the constitutionality of the legislation that "could be had." *McGrain*, 273 U.S. at 177. Even then, the Committee just repeats the reasons the district court gave for reaching that conclusion. Those reasons remain unpersuasive, especially the Committee's attempt (at 39-40) to distinguish *Tobin*. That case invoked the avoidance canon because, otherwise, the Court would have been forced to decide whether the subpoena could result in valid legislation under the Compact Clause. 306 F.2d at 276. It correctly understood that whether a subpoena concerns a "matter" for which "valid legislation could be had," *McGrain*, 273 U.S. at 170-71, requires the Court to determine whether the legislation would be valid. It recognized that Congress cannot

use "the power to investigate" to "extend to an area in which Congress is forbidden to legislate." *Quinn*, 349 U.S. at 161.[3]

On the merits, the Committee gives the Court nothing to work with. Faced with serious arguments that imposing new conflict-of-interest and financial-disclosure laws on the President would be unconstitutional, Br. 37-40, 43-44, the Committee (at 42) declares that Plaintiffs' position finds "no support in the Constitution or the case law interpreting it." Yet the Committee does not *explain* how any of the legal doctrines or cases support its stance. And confronted with Plaintiffs' arguments that the subpoena could not lead to valid legislation under the Foreign Emoluments Clause because the House has made clear it has no interest in consenting to any emoluments, Br. 41-42, the Committee again offers no response. It merely reiterates (at 34-35) its Emoluments Clause rationale and insists that it made this argument below, which incidentally it did not. The word "emolument" does not even appear in the Committee's district-court

[3] There is no other way to read *Tobin*. That is why amicus CAC (at 25 n.6) asks the Court to treat the avoidance discussion in *Tobin* as "dicta" or, alternatively, to ignore it as inconsistent with *McPhaul*. But the discussion was not extraneous to the judgment. The *Tobin* Court invoked the avoidance canon because otherwise it would have needed to "meet and decide" the kind of constitutional issue the Committee argues should be bypassed here. 306 F.2d at 276. Nor does *Tobin* conflict with *McPhaul*. By explaining that the subpoena was not "plainly incompetent or irrelevant to any lawful purpose," the *McPhaul* Court meant that it was "reasonably 'relevant to the inquiry.'" 364 U.S. at 381-82. No one in *McPhaul* challenged whether the subpoena could lead to valid legislation. Regardless, *Tobin* postdates *McPhaul*, and while CAC may (wrongly) believe that *Tobin* misapplied a Supreme Court decision, it is binding circuit precedent nonetheless. *LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (en banc).

brief, and a passing general reference to the issue in the fact section of its brief is not even close to an argument.

In all, the Committee's assertion that its subpoena could result in valid legislation regarding the President offers *conclusions* but no *arguments*. "It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones.... Consequently, a litigant has an obligation to spell out its arguments squarely and distinctly, or else forever hold its peace." *Schneider v. Kissinger*, 412 F.3d 190, 200 n.1 (D.C. Cir. 2005) (cleaned up). Here, the Committee made no argument—let alone an inappropriately "skeletal" one. The Committee's acknowledgment (at 42) that its "potential legislation might raise difficult constitutional questions" should be accepted for the concession it is. The issue has been forfeited. *POM Wonderful, LLC v. FTC*, 777 F.3d 478, 499 (D.C. Cir. 2015).

Finally, the Committee (at 41) claims that it should be given a pass because any "statute would be presumed valid and entitled to deference by the courts." But that just repackages its assertion that the constitutionality of the contemplated legislation should not be evaluated. Regardless, the presumption of validity does not apply to inter-branch disputes. In *Morrison v. Olson*, for example, it was "not recited by the Court" because where the "political branches are ... in disagreement, neither can be presumed correct." 487 U.S. 654, 705 (1988) (Scalia J., dissenting). "The playing field for the present case, in other words, is a level one. As one of the interested and coordinate parties to the

underlying constitutional dispute, Congress, no more than the President, is entitled to the benefit of the doubt." *Id.*[4]

### C. The subpoena cannot be recharacterized as routine oversight of the GSA or other executive-branch officials.

In an eleventh-hour plea, the Committee now asks the Court to accept that its subpoena has purposes other than investigating the President's finances. According to the Committee (at 42-43), the subpoena could be upheld as an effort "to investigate the GSA's management of its lease for the Trump International Hotel" or to "regulat[e] officers or agencies other than the President to mitigate the effects of Presidential conflicts of interest." But the notion that this subpoena is about anything other than investigating the President is invented. The Court should reject these newly-minted and unsupported arguments.

To begin, neither of these "purposes" appears in the Chairman's memorandum setting forth the "Oversight Committee's purpose in seeking the records from Mazars."

[4] For its part, CAC (at 24-25) continues the trend of decrying Plaintiffs' position as "astounding" and "remarkable" without engaging with it. CAC tries to draw (at 24) a forgiving standard for evaluating the constitutionality of legislative proposals from *McPhaul*, even though the case does not address that issue. CAC argues (at 24) that applying financial-disclosure laws to the President is constitutional because they have been "on the books for years" without grappling with the Chief Justice's reminder that the Court has not yet passed on that issue. Br. 1. And CAC asserts (at 25-26 & n.7) that *U.S. Term Limits, Inc. v. Thornton* and *Powell v. McCormack* are immaterial to whether these legislative proposals would impose impermissible qualifications on the Presidency without explaining why that is. Like the Committee, CAC declares its opposition to Plaintiffs' arguments without rebutting them.

Cmte. Br. 17 (citing JA104-107). This memorandum confirmed the Chairman's "intent to issue a subpoena to Mazars" and justified to the members of the Committee the "need for [it]." Cmte. Br. 16; *see also* Cmte. Br. 21 (acknowledging that "the district court found that the Mazars subpoena advanced four areas of investigation" based on "Chairman Cummings's April 12 memorandum"). As a consequence, these arguments are prohibited "retroactive rationalization[s]." Br. 29 (quoting *Watkins*, 354 U.S. at 204).

Furthermore, the GSA argument was not pressed or passed on below. Nowhere did the Committee argue that the subpoena was issued as part of an investigation into GSA's leasing or management policies. That is why the Committee's discussion of this issue on appeal does not include any record citations. And while the district court noted that the Committee had sent GSA a letter asking for documents about the lease, JA272-73, it discussed GSA only in connection to the Committee's investigation into whether the President is "'complying with the Emoluments Clauses of the Constitution,'" JA287 (quoting JA107). If the Committee had defended the subpoena as an attempt to conduct GSA oversight, the district court would have mentioned that purpose. It was intimately familiar with the Committee's *separate* investigation of GSA, *see Cummings v. Murphy*, 321 F. Supp. 3d 92, 96 (D.D.C. 2018) (Mehta, J.), and was willing to credit every conceivable purpose for the Mazars subpoena (even ones the Committee did not argue). Because the Committee did not press the GSA argument below, and the district court did not decide it, this argument is as forfeited as it possibly could be. *Byers v. CIR*, 740 F.3d 668,

681 (D.C. Cir. 2014). Regardless, the idea that this sweeping subpoena of the President is "reasonably relevant" to oversight of GSA is untenable. *Supra* II.A.

The Committee did argue below that the subpoena might advance legislation concerning other executive-branch officials. Dkt. 20 at 16-17. But the district court did not accept this rationale, likely because the Committee never explained how a subpoena that requests the President's records dating back to 2011 is pertinent to legislation about other officials currently serving in the executive branch. The Committee (at 19, 42) fails to square this circle on appeal. It again alludes to executive-branch officials other than the President in passing. But that's it. The Committee does not say who these officials are (other than the Vice President) or explain how this subpoena has anything to do with them. Such amorphous and cursory assertions of purpose are not even arguments, let alone winning ones.

## III. The Committee's view of Congress's subpoena power has no limiting principle.

Although the Committee does not defend large swaths of the district court's opinion, its view of Congress's subpoena power is no less sweeping. The Committee (at 6) insists that it can investigate "'*any matter*'" at "'*any time*.'" *But see Watkins*, 354 U.S. at 187 ("[Congress's] power of inquiry … is not unlimited."). The Committee (at 43) asserts that it can conduct law-enforcement investigations and expose any and all private information so long as it points to some agency with jurisdiction over the misconduct in question. But that is no limit at all; the federal bureaucracy "touches

almost every aspect of daily life." *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 499 (2010). And, like the district court, the Committee would have the Court assume that the subpoena could lead to valid legislation, rendering this essential limitation on Congress's investigative authority a dead letter. *Supra* II.B.

Put simply, "if we were to accept the [Committee's] arguments, we are hard pressed to posit any activity by an individual that Congress is without power to [investigate]." *United States v. Lopez*, 514 U.S. 549, 564 (1995). That is unacceptable under our Constitution. It would be unacceptable even for one of Congress's enumerated powers. Br. 48-50. But the subpoena power is not even enumerated. Br. 16-18. The idea that the Framers hid a "'great'" and "extraordinary" power in the Necessary and Proper Clause flouts the constitutional design. *NFIB v. Sebelius*, 567 U.S. 519, 559-60 (2012) (opinion of Roberts, C.J.).[5]

Yet the district court was not troubled. It claimed to take the high ground, emphasizing that courts are not "a political referee" and that abusive congressional investigations should be left to "'[s]elf-discipline and the voters.'" JA286 (quoting *Tenney v. Brandhove*, 341 U.S. 367, 378 (1951)). No doubt, courts should exercise restraint in

[5] CAC's reliance (at 7-8 & n.2) on the 1792 investigation of the St. Clair incident to support its claim of an unbounded subpoena power is misplaced. The House initially demanded information from the Secretary of War. But President Washington and his cabinet (including Jefferson and Hamilton) rebuffed the House, agreeing that the President could broadly withhold information from Congress. The House ultimately yielded, changing its demand for the information to a mere request. *See* McConnell, *Trump Resists Congressional Subpoenas – That's What Presidents Do*, Austin Am.-Statesman (May 2, 2019), atxne.ws/2EYIFTm.

these cases, *supra* I, and they might abstain altogether from refereeing subpoena fights between the political branches, *e.g.*, *AT&T*, 551 F.2d at 384. But here, the Committee circumvented the executive branch and subpoenaed a private accountant for the documents of a then-private citizen and his private businesses. The Supreme Court has never "hesitated to sustain the rights of private individuals." *Tenney*, 341 U.S. at 377. The whole reason "the Framers adopted a written Constitution" is so "the scope of legislative power" would not be "limited only by public opinion and the Legislature's self-restraint." *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000). The Framers trusted the courts to "'say what the law is'" and enforce the limits on "'the constitutional authority of … the three branches,'" even when it would "'have political implications.'" *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012).

Here, it is the implications of upholding—not invalidating—the Committee's unprecedented demand that should trouble the judicial branch. If this subpoena is valid, then Congress is free to investigate every detail of a President's personal life, with endless subpoenas to his accountants, bankers, lawyers, doctors, family, friends, and anyone else with information that a committee finds interesting. Because the President is such an "easy target," these investigations will become our new normal in times of divided government, no matter which party is in power. *Lindsey*, 158 F.3d at 1286 (Tatel, J., concurring in part and dissenting in part) (cleaned up).

This Court should not usher in this new era of endless presidential investigations. And it certainly should not do so lightly or "quickly." Cmte. Br. 3. "[T]he Supreme

Court's expectation that [courts] proceed expeditiously" cannot supersede the judiciary's "obligation to engage in fully reasoned and informed decision-making"; "[t]he importance to the Presidency" of these questions "requires no less." *Lindsey*, 158 F.3d at 1289 (Tatel, J., concurring in part and dissenting in part). As it has wisely done before, this Court should make every effort to "refrain from a decision upholding [the Committee's] claims of absolute authority." *AT&T*, 567 F.2d at 123. While Congress will inevitably complain about "delay," delay is an "inherent corollary of the … Separation of Powers" and a small price to pay for "the long-term staying power of government." *Id.* at 133.

## CONCLUSION

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

Dated: July 9, 2019

Respectfully submitted,

*s/ William S. Consovoy*

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## CERTIFICATE OF COMPLIANCE

This brief complies with Rule 32(a)(7)(B) because it contains 6,468 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: July 9, 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: July 9, 2019 *s/ William S. Consovoy*