U.S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

May 8, 2020

Honorable Scott S. Harris
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Donald J. Trump, et al. v. Mazars USA, LLP, et al., No. 19-715
Donald J. Trump, et al. v. Deutsche Bank AG, et al., No. 19-760

Dear Mr. Harris:

On April 27, 2020, this Court ordered the parties and the United States to file supplemental letter briefs addressing whether the political-question doctrine or related justiciability principles bear on the Court's adjudication of these cases. In the United States' view, these cases are justiciable.

The Court's order points at an understandable concern. "Repeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either." *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982) (citation omitted). That is especially true in the fraught context of disputes concerning the respective interests of the Legislative and Executive Branches in information, which can present "nerve-center constitutional questions." *United States v. AT&T Co.*, 551 F.2d 384, 394 (D.C. Cir. 1976). Indeed, historically, "in analogous confrontations between one or both Houses of Congress and the Executive Branch, no suit was brought on the basis of claimed injury to official authority or power," *Raines* v. *Byrd*, 521 U.S. 811, 826 (1997), reflecting the recognition that inter-Branch informational suits are not "traditionally thought to be capable of resolution through the judicial process," *id.* at 819 (citation omitted).

Critically, though, the reason why a suit directly between the Branches over a congressional subpoena for the records of an executive official generally would not be justiciable is that the plaintiff would be seeking to vindicate interests that are institutional in nature, and such institutional injuries do not support Article III standing. See *Raines*, 521 U.S. at 821-824. If, for instance, respondents had issued these subpoenas directly to the President, and he had resisted compliance on the ground that the subpoenas exceed respondents' Article I powers in light of his Article II prerogatives, respondents would not have had Article III standing to vindicate their purely institutional interest in enforcing those subpoenas. See *id.* at 826-829. Instead, the parties would have had to engage in the negotiation and accommodation process that ordinarily is used to resolve such nonjusticiable inter-Branch disputes. Involving courts in such disputes would risk "damaging the public confidence that is vital to the functions of the Judicial Branch, by embroiling

the federal courts in a power contest nearly at the height of its political tension" and raising the "specter of judicial readiness to enlist on one side of a political tug-of-war." *Id*. at 833-834 (Souter, J., concurring in the judgment) (citation omitted).

No doubt recognizing that it could not proceed directly against the President, respondents attempted to end-run the usual political process by instead targeting the third-party custodians of the President's records. Those third parties, unsurprisingly, have stated that they will comply with the subpoenas and disclose the requested information. The subpoenas thus threaten the President with a personal and concrete Article III injury: the disclosure of his personal records. That fact makes these cases different from direct suits between the Branches. This Court has long held that plaintiffs, including governmental officials, who seek to vindicate *personal* interests—even ones that flow from the public offices they hold—have suffered cognizable injuries-in-fact to support Article III standing, regardless of whether the merits of their legal claims touch on the separation of powers or implicate inter-Branch disputes. *E.g.*, *Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 566 U.S. 189 (2012); *Clinton* v. *City of New York*, 524 U.S. 417 (1998); *Powell* v. *McCormack*, 395 U.S. 486 (1969). In such cases, the political-question doctrine does not preclude adjudication of the merits of the dispute, unless "there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.'" *Zivotofsky*, 566 U.S. at 195 (citations omitted).

Under those settled principles, these cases are justiciable. Like any other litigant, President Trump is entitled to bring suit to vindicate his personal interest in preventing third-party disclosure of his personal records, including on the grounds that respondents exceeded their powers in issuing the subpoenas in light of the public office he holds. *E.g.*, *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 501 n.14 (1975). Although resolving the *merits* of that claim requires answering significant constitutional questions about the scope of legislative power under Article I and the protections afforded the Executive under Article II, the suit itself is justiciable because the President has Article III standing, see *City of New York*, 524 U.S. at 430; cf. *Raines*, 521 U.S. at 821-824, and because those questions are amenable to judicially manageable standards and their resolution is not committed to the political branches. Respondents surely recognize as much: despite having had every incentive to do so, they have never once raised justiciability concerns at any stage of this litigation.

The Court's long history of answering similar questions confirms that these cases are justiciable. Most notably, this Court already held in *United States* v. *Nixon*, 418 U.S. 683 (1974), that a President's motion to quash a special prosecutor's subpoena for his records—which is closely analogous to the dispute here—was justiciable, including under the political-question doctrine. And the Court has decided many cases adjudicating the validity of congressional subpoenas, *e.g.*, *Kilbourn* v. *Thompson*, 103 U.S. 168 (1881); *McGrain* v. *Daugherty*, 273 U.S. 135 (1927); *United States* v. *Rumely*, 345 U.S. 41 (1953); *Watkins* v. *United States*, 354 U.S. 178 (1957), as well as many cases addressing the scope of presidential prerogatives under Article II, *e.g.*, *Mississippi* v. *Johnson*, 71 U.S. (4 Wall.) 475 (1867); *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982); *Clinton* v. *Jones*, 520 U.S. 681 (1997), without ever suggesting that they were not justiciable. There is no sound basis to conclude that cases raising both of those issues somehow transform into nonjusticiable disputes. To the contrary, these cases raise none of the factors this Court has identified as indicating a nonjusticiable political question. Nor do any other

jurisdictional or prudential doctrines preclude adjudication of these cases. If anything, prudential concerns counsel in favor of resolving the merits of this dispute.

1. As noted, the dispute over these subpoenas for the President's personal records presents a justiciable Article III controversy because of the unusual manner in which respondents chose to draft and enforce the subpoenas: respondents targeted the private third-party custodians of the President's records, and the threat that those third parties would disclose his personal information is what created an Article III injury allowing the President to sue. See *Raines*, 521 U.S. at 833-834 (Souter, J., concurring in the judgment); cf. *City of New York*, 524 U.S. at 430. If respondents instead had sought the President's records directly from him, he could have "resist[ed]," *Eastland*, 421 U.S. at 501 n.14, in which event the parties would have had to engage in the "accommodation" process that generally governs informational disputes between the political branches, *United States* v. *AT&T Co.*, 567 F.2d 121, 130 (D.C. Cir. 1977); see *ibid.* ("Negotiation between the two branches should thus be viewed as a dynamic process affirmatively furthering the constitutional scheme.").

The parties would have been relegated to that accommodation process because respondents could not themselves have sought judicial enforcement of subpoenas for the President's records; responsibility for enforcing congressional subpoenas ordinary falls to the Executive Branch. See 2 U.S.C. 192. Unlike the President's suits here to vindicate his personal interest in protecting his private information from disclosure, a suit by a House committee seeking to enforce a legislative subpoena would be asserting only "a type of institutional injury" that cannot support Article III standing. *Raines*, 521 U.S. at 821. Neither history nor precedent supports finding Article III standing in a suit brought by "one or both Houses of Congress * * * on the basis of claimed injury to official authority or power." *Id.* at 826; see *id.* at 821-829. As a general matter, the constitutional separation of powers "contemplates a more restricted role for Article III courts," with the judicial power exercised to protect "'the constitutional rights and liberties of individual citizens'" rather than "'some amorphous general supervision of the operations of government.'" *Id.* at 828-829 (citation omitted). And more specifically, the "[a]uthority to exert the powers of the [Legislative Branch] to compel production of evidence differs widely from authority to invoke judicial power for that purpose," *Reed* v. *County Commissioners of Delaware County*, 277 U.S. 376, 389 (1928), consistent with the fundamental principle that "responsibility for conducting civil litigation in the courts of the United States for vindicating public rights" is vested in the Executive Branch, *Buckley* v. *Valeo*, 424 U.S. 1, 140 (1976) (per curiam). Indeed, a panel of the D.C. Circuit recently held that the House Judiciary Committee could not bring suit for a claim "that the Executive Branch's assertion of a constitutional privilege is 'obstructing the Committee's investigation.'" *Committee on the Judiciary* v. *McGahn*, 951 F.3d 510, 517 (D.C. Cir. 2020) (citation omitted), reh'g granted, No. 19-5176, 2020 WL 1228477 (D.C. Cir. Mar. 13, 2020).

2. These cases are different because petitioners, including President Trump in his personal capacity, plainly have Article III standing. They have alleged an imminent concrete and particularized harm (the exposure of confidential personal information), fairly traceable to the congressional subpoenas demanding that information, which would be redressed by an injunction against the disclosure of that information. See *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1547-1548 (2016). Respondents have never contended otherwise. An ordinary citizen obviously would have Article III standing to seek an injunction preventing compliance with third-party subpoenas

seeking to compel the production of his or her private documents. There is no reason that the President in his personal capacity should be uniquely disabled in that respect.

To the contrary, this Court has recognized that elected officials who "claim that they have been deprived of something to which they *personally* are entitled" have standing to bring their claims, even when the alleged entitlements arise solely by virtue of their elected offices—"such as their seats as Members of Congress after their constituents had elected *them*." *Raines*, 521 U.S. at 821. That was why, for example, this Court found Article III standing in *Powell* v. *McCormack*, *supra*, for a congressman's claim that he had been unlawfully excluded from the House and denied his salary. See *Raines*, 521 U.S. at 821 (discussing *Powell*); see also *Powell*, 395 U.S. at 512-514; *Nixon*, 418 U.S. at 697; cf. *Jones*, 520 U.S. at 707; *Cheney* v. *United States District Court*, 542 U.S. 367, 385 (2004). Likewise, President Trump has standing here because disclosure of his private records, in addition to harming the Office of the President, also injures his personal interests.

3. The political-question doctrine does not prevent this Court from adjudicating these cases any more than in *Powell* or *Nixon*. The mere fact of a clash between the interests of the Legislative and Executive Branches does not preclude justiciability when, as here, the dispute involves a public official who has an Article III injury to his personal interests and a legal claim susceptible to judicial resolution.

a. "In general, the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky*, 566 U.S. at 194 (citation omitted). The political-question doctrine is a "narrow exception to that rule," *id.* at 195, for certain disputes that "revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch," *Japan Whaling Association* v. *American Cetacean Society*, 478 U.S. 221, 230 (1986). These cases involve neither policy choices nor value determinations; instead, they present the straightforward legal question whether respondents exceeded their constitutional authority in issuing the subpoenas here. That question is plainly of a type appropriate for judicial resolution when raised by a plaintiff with Article III standing to invoke the power of federal courts. Indeed, this Court has adjudicated many cases raising similar issues without any suggestion that they raised political questions.

Most notably, in *Nixon*, this Court expressly held that President Nixon's motion to quash a special prosecutor's subpoena seeking his records did *not* present a nonjusticiable political question. See 418 U.S. at 692-697. The dispute in *Nixon* was between the special prosecutor, who sought "the production or nonproduction of specified evidence," and the President, who "resisted" disclosure "on the ground of his duty to preserve the confidentiality of the communications of the President." *Id.* at 697. "Whatever the correct answer on the merits," the Court explained, "these issues are 'of a type which are traditionally justiciable.'" *Ibid.* (citation omitted). So too here. These cases involve a dispute between respondents, who seek the production of certain financial records, and the President, who resists disclosure to protect both the confidentiality of his personal information and the prerogatives of the Office of the President. If *Nixon* did not present a political question, these cases do not either. Indeed, unlike in *Nixon*, the adversaries here are not both in the same branch of government, making this an even easier case. Cf. *id.* at 693.

Even apart from *Nixon*, this Court has a long history of adjudicating cases similar to this one. The Court has frequently adjudicated cases examining the limits of a congressional

committee's power to issue compulsory process. See p. 2, *supra* (listing cases); see also 19-715 Pet. App. 13a-22a (describing more cases). Likewise, this Court has adjudicated several cases examining the protections implicit in Article II that enable the President and Executive Branch officials to carry out their constitutional responsibilities. See p. 2, *supra* (listing cases). No sound basis exists to conclude that the combination of those two issues, each of which independently is justiciable, somehow creates a nonjusticiable political question.

To be sure, many of those cases arose in different procedural postures, but the procedural posture of a case ordinarily does not bear on whether it presents a political question unamenable to judicial resolution. If the enforceability of a congressional subpoena is not a political question when raised as a defense to noncompliance with the subpoena, *e.g.*, *Watkins*, 354 U.S. at 181-182, it does not become a political question by virtue of being raised as an affirmative argument to enjoin the subpoena's enforcement in the first place (assuming, of course, it is raised by a plaintiff with Article III standing). The applicability of the political-question doctrine to a substantive legal question ordinarily does not change based on the procedural posture in which it arises.

b. That these cases do not present a nonjusticiable political question is confirmed by case law applying that doctrine in other contexts. This Court has explained that certain features are "[p]rominent on the surface of any case held to involve a political question." *Baker* v. *Carr*, 369 U.S. 186, 217 (1962). They include: (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department"; (2) "a lack of judicially discoverable and manageable standards for resolving it"; (3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"; (4) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government"; (5) "an unusual need for unquestioning adherence to a political decision already made"; and (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Ibid.* The first two appear to be the most important. See *Zivotofsky*, 566 U.S. at 195; *Walter Nixon* v. *United States*, 506 U.S. 224, 228 (1993).

None of those features is present in these cases, much less "[p]rominent on the surface" of them. *Baker*, 369 U.S. at 217. The question presented here is whether respondents had the authority to subpoena the personal records of the sitting President of the United States from private third-party custodians. The Constitution does not textually commit the resolution of that issue to the political branches. See, *e.g.*, *McGrain*, 273 U.S. at 173-174; see also *Zivotofsky*, 566 U.S. at 197; *Walter Nixon*, 506 U.S. at 238. Nor is there a lack of judicially manageable standards for resolving these cases. This Court has repeatedly held that a congressional committee may issue compulsory process only pursuant to a legitimate task of Congress (usually legislation), and only for information pertinent to that legitimate task. *E.g.*, *Kilbourn*, 103 U.S. at 195; *McGrain*, 273 U.S. at 176-178; *Quinn* v. *United States*, 349 U.S. 155, 161 (1955). That is a judicially manageable standard this Court has been applying for roughly a century. Likewise, this Court has long adjudicated cases addressing the President's protections from incursions on his authority that would harass him or distract him from the performance of his constitutional duties. See, *e.g.*, *Johnson*, 71 U.S. (4 Wall.) at 501; *Fitzgerald*, 457 U.S. at 749; *Jones*, 527 U.S. at 707. For example, a qualified executive privilege protects the President's official records from disclosure absent a "demonstrated, specific need" for the records in a federal criminal trial, *Nixon*, 418 U.S. at 713, or absent a showing that the records are "demonstrably critical" to a congressional committee requesting them, *Senate Select Committee on Presidential Campaign Activities* v.

Nixon, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc). Those, too, are judicially manageable standards. Whether the Court ultimately adopts one of those standards for the President's personal records at issue here, or instead articulates a different pertinence standard that respondents must satisfy, that standard will be judicially manageable as well.

To the extent the remaining four features listed in *Baker* remain of continued vitality, but cf. *Zivotofsky*, 566 U.S. at 197 (discussing only the first two), none of them is present in these cases either. The Court need not make any "initial policy determination" about the wisdom of issuing the subpoenas here to decide these cases; it need decide only whether the subpoenas are a valid exercise of congressional authority with respect to the President's records. *Baker*, 369 U.S. at 217. And resolving an Article III controversy between the House and the President as to the power of the former concerning the latter does not express a "lack of * * * respect" for either coordinate branch of government. *Ibid.* Likewise, these cases present no need, much less an "unusual need," for "unquestioning adherence to a political decision." *Ibid.* To the contrary, whether the committees have the constitutional authority to subpoena the President's personal records under these circumstances is a legal question, not a political one. Finally, abstention will not avoid any "embarrassment from multifarious pronouncements by various departments on one question," *ibid.*, given that a House of Congress and the President already have taken opposite sides in this litigation and "it is the responsibility of this Court to act as the ultimate interpreter of the Constitution" when such disputes are presented in an Article III controversy, *Powell*, 395 U.S. at 549.

Finally, these cases bear little resemblance to the three cases in which this Court has found a political question in the last half-century: *Gilligan* v. *Morgan*, 413 U.S. 1 (1973); *Walter Nixon*, *supra*; and *Rucho* v. *Common Cause*, 139 S. Ct. 2484 (2019). *Gilligan* involved a challenge "to the composition, training, equipping, and control of a military force" that allegedly resulted in excessive "'use of fatal force'" when "'nonlethal force would suffice.'" 413 U.S. at 4, 10 (citation omitted). *Walter Nixon* involved a challenge by a former federal district judge to his Senate impeachment proceedings on the ground that the Senate failed to "try" him under Article I because only a committee, and not the full Senate, took part in certain evidentiary hearings. See 506 U.S. at 227-228. *Rucho* involved claims that two States had engaged in excessive partisan gerrymandering of electoral districts. See 139 S. Ct. at 2491.

"Prominent on the surface" of all three cases were "a textually demonstrable constitutional commitment of the issue to a coordinate political department" and "a lack of judicially discoverable and manageable standards for resolving it." *Baker*, 369 U.S. at 217. The Constitution's text expressly commits military oversight, impeachment trials, and districting to the political branches or the state legislatures, not the federal judiciary. See *Gilligan*, 413 U.S. at 10; *Walter Nixon*, 506 U.S. at 230-236; *Rucho*, 139 S. Ct. at 2497, 2508. And there is no judicially manageable standard for determining how best to train a military force, how to determine whether the Senate has sufficiently "tried" an impeachment, or how to determine how much partisanship in districting is too much. See *Gilligan*, 413 U.S. at 10; *Walter Nixon*, 506 U.S. at 230; *Rucho*, 139 S. Ct. at 2498.

4. No other justiciability principle precludes this Court's adjudication of these cases. The dispute here plainly is ripe: the private respondents have been served with the subpoenas and have indicated that they will produce the requested materials absent a court order to the contrary, so this is not merely an "abstract[] disagreement" whose "effects [will not be] felt in a concrete

way by the challenging parties." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148-149 (1967). And the dispute obviously is not moot; the respondent committees have not withdrawn the subpoenas and petitioners have not consented to disclosure of the requested information, and thus "the parties [still] have a concrete interest * * * in the outcome of the litigation." *Chafin* v. *Chafin*, 568 U.S. 165, 172 (2013). At no point in this litigation have respondents identified any other justiciability concerns that would preclude this Court's review, and thus have forfeited any such argument insofar as it is prudential rather than jurisdictional.

In fact, prudential concerns weigh in favor of the Court's resolution of these cases. Refusing to adjudicate the merits of this dispute would in effect give congressional committees free rein to issue subpoenas to *any* third-party custodian without any meaningful checks or balances, because such third parties often would be inclined to comply (as the third parties in these cases have indicated they will). The President would be stripped of any ability to prevent disclosures that are sought as an end-run around the negotiation and accommodation process, and courts would be deprived of any ability to review whether the committees had the power to issue the subpoenas in the first instance. Cf. *Eastland*, 421 U.S. at 501 n.14; *Church of Scientology* v. *United States*, 506 U.S. 9, 18 n.11 (1992) (observing that a "third party presumably lacks a sufficient stake in the proceeding to risk contempt by refusing compliance" with an order directed to it).

That said, the prudential doctrine of constitutional avoidance suggests that this Court may wish to decide these cases in a manner that avoids opining on the constitutional limits of congressional power to issue the subpoenas here. As the government has explained (Gov't Br. 31-34), the House's indiscriminate blessing of all past, current, and future investigations of the President by any committee, for any reason, falls short even of the insufficient resolutions in *Rumely* and *Watkins*. Here, as in those cases, the chamber has not "demonstrated its full awareness of what is at stake" in this litigation. *Rumely*, 345 U.S. at 46. Indeed, there is no evidence that the nature and scope of the informational requests in the subpoenas were ever specifically examined by the full chamber. And the full House's failure to set forth a legitimate legislative purpose for each of the subpoenas and how the types of information sought are essential to achieving those purposes—and instead delegating those tasks to the various committee chairs—"insulates the House" from accountability and creates "a wide gulf between the responsibility for the use of investigative power and the actual exercise of that power." *Watkins*, 354 U.S. at 205.

For their part, the committee chairs too made little attempt to articulate why the information the subpoenas seek is critical to a legitimate legislative purpose. The Oversight Committee chair set forth law-enforcement and other purposes unlikely to result in legitimate legislation with respect to the President, and then included a boilerplate assertion that its subpoena also would be useful for "multiple laws and legislative proposals" without providing any indication of what they might be. 19-5142 C.A. App. 107. And the other committees identified generic areas of potential legislation, such as money laundering and foreign influence in campaigns, but did not explain why they needed a decade's worth of extensive financial information from the President to enact such broadly applicable and prospective legislation. See 19A640 Resp. Br. 5, 9. Under those circumstances, the Court should—as it did in *Rumely* and *Watkins*—invalidate the subpoenas without opining on the constitutional limits of the House's implied investigatory authority. Executive and judicial officers do not expect that Congress may obtain their personal records on a general assertion of purpose and a thin showing of need. Before the House asks this Court to

unsettle that expectation, it should demonstrate as a body that it appreciates the magnitude of its request and the constitutional question it presents. See *Tobin* v. *United States*, 306 F.2d 270, 276 (D.C. Cir.), cert. denied, 83 S. Ct. 206 (1962) ("[A] due regard for the responsibility of administering justice prompts us to avoid serious constitutional adjudications until such time as Congress clearly manifests its intention of putting such a decisional burden upon us.").

Sincerely,

Noel J. Francisco
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cc: See Attached Service List

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