Consovoy McCarthy PLLC

1600 Wilson Boulevard, Suite 700
Arlington, VA 22209
703.243.9423
www.consovoymccarthy.com

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Scott S. Harris
Clerk of the Court
Supreme Court of the United States
One First Street, NW
Washington, DC 20543-0001

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 to brief whether the political question doctrine or related justiciability principles bear on the Court's adjudication of these cases. In Petitioners' view, they do not. As explained below, these cases are justiciable.

To begin, there is no question as to justiciability from the perspective of Article III standing. "To have standing, a plaintiff must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019) (citation and quotations omitted). The disclosure of Petitioners' private records to the Committees is a "'tangible'" injury; that injury is traceable to the subpoenas that the Committees issued; and a ruling by this Court enjoining the enforcement of those subpoenas would redress Petitioners' injury. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016). The President's interest in ensuring the confidentiality of his private papers is no less concrete than Congressman Powell's "obvious and continuing interest in his withheld salary." *Powell v. McCormack*, 395 U.S. 486, 497 (1969). In short, "resistance to [a] subpoena present[s] an obvious controversy in the ordinary sense." *United States v. Nixon*, 418 U.S. 683, 696 (1974).

That Petitioners are not the direct recipients of these subpoenas changes nothing. In *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491 (1975), a Senate subcommittee issued a legislative subpoena to the "bank where USSF then had an account," *id.* at 494. The Court held that the lawsuit had been "properly entertained" even though USSF was not the direct recipient of the subpoena. *Id.* at 501 n.14. When "a subpoena ... seeks information directly ... the party can

resist and thereby test the subpoena." *Id.* But when a subpoena "seeks the same information from a third person ..., unless a court may inquire to determine whether a legitimate legislative purpose is present, compliance by the third person could frustrate any judicial inquiry." *Id.* (citations omitted); *see also id.* at 514 (Marshall, J. concurring in the judgment) (explaining that "a neutral third party could not be expected to resist the subpoena by placing itself in contempt"). Any other outcome would wrongly "immunize [the] subpoena from challenge" based on "the fortuity that documents sought by a congressional subpoena are not in the hands of a party claiming injury from the subpoena." *United States v. AT&T Co.*, 567 F.2d 121, 129 (D.C. Cir. 1977); *see also Bergman v. Senate Special Committee on Aging*, 389 F. Supp. 1127, 1130 (S.D.N.Y. 1975).

Unsurprisingly, then, neither the lower courts nor Respondents contested Petitioners' standing. *See* Appendix to the Petition No. 19-715 ("Pet. App.") 86a-87a (Rao, J., dissenting) ("A subpoena's force extends beyond its recipient, which the majority has implicitly acknowledged by declining to question President Trump's standing to challenge the subpoena's validity."); Joint Appendix ("App.") 191a ("In this case, the inevitable impingement of the same privacy interests that suffice to confer standing to plaintiffs also suffice to demonstrate a likelihood of irreparable harm."); App. 231a ("[W]e note that there is no dispute that Plaintiffs had standing in the District Court to challenge the lawfulness of the Committees' subpoenas by seeking injunctive relief against the Banks as custodians of the documents.").

Nor has the political question doctrine or any other justiciability concern been raised. And for good reason. In the main, "a controversy involves a political question where 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 ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012) (cleaned up). Neither concern is present here.

Resolution of this dispute hasn't been committed to the political branches. In *United States v. Nixon*, the argument was made that, since the litigation over the subpoena for President's Nixon's records was an "'intra-branch dispute,'" it was a "political question." 418 U.S. at 692-93. But the Court disagreed, holding that there was not "a 'textually demonstrable' grant of power under [Article II]" that created "a barrier to justiciability." *Id.* at 693-97. "Whatever the correct answer on the merits," the Court held, "these issues are of a type which are traditionally justiciable." *Id.* at 697 (citation and quotations omitted). Similarly, the Court held that the dispute over a House resolution refusing to seat Adam Clayton Powell was not textually committed to Congress. *See Powell*, 395 U.S. at 518-48. Nothing in Article I, the Court explained, gave "the House judicially unreviewable power to set qualifications for membership and to judge whether prospective members meet those qualifications." *Id.* at 520. If the *Nixon* dispute

was not textually committed to the Executive, and the *Powell* dispute was not textually committed to Congress, then this dispute plainly is not committed to the political branches either.

More fundamentally, the Court has never considered a dispute over the scope of Congress's power to legislate to be textually committed to that branch under Article I. That is because "when an Act of Congress is alleged to conflict with the Constitution, 'it is emphatically the province and duty of the judicial department to say what the law is.'" *Zivotofsky*, 566 U.S. at 196 (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)). "No policy underlying the political question doctrine suggests," therefore, "that Congress or the Executive ... can decide the constitutionality of a statute; that is a decision for the courts." *INS v. Chadha*, 462 U.S. 919, 941-42 (1983); *see also Powell*, 395 U.S. at 549 ("Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility.").

That rule applies with equal force to congressional subpoenas. Deciding whether a legislative subpoena exceeds Congress's authority under Article I, *i.e.*, whether it has a "legitimate legislative purpose," *Eastland*, 421 U.S. at 501 n.14, is no less susceptible to judicial review than is "formal legislation," *see United States v. Rumely*, 345 U.S. 41, 46 (1953). Congress is not "the final judge of its own power and privileges." *Kilbourn v. Thompson*, 103 U.S. 168, 199 (1880). Thus, the Court "has not hesitated" to invalidate congressional subpoenas when "Congress was acting outside its legislative role." *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951). "Assumption of jurisdiction" over this kind of challenge to a congressional subpoena "does no violence to the doctrine of separation of powers, for the matter falls within the responsibility entrusted to the judiciary, however reluctant the latter may be to assume jurisdiction." *Sanders v. McClellan*, 463 F.2d 894, 899 (D.C. Cir. 1972).

Nor is there "a lack of judicially discoverable and manageable standards for resolving the question before the court." *Zivotofsky*, 566 U.S. at 197 (citations and quotations omitted). That barrier to review exists if the Court cannot issue a ruling that is "principled, rational, and based upon reasoned distinctions found in the Constitution or laws." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019) (citation and quotations omitted). That is not a concern here. There are manageable standards for resolving every element of this dispute. They exist for evaluating whether history and tradition support deploying Congress's implied authority to issue subpoenas in aid of legislation in this unprecedented manner. Brief for Petitioners 24-35. They exist for evaluating whether the Committees have exercised responsibilities entrusted to another branch of government. *Id.* at 36-45. They exist for evaluating whether these subpoenas could lead to valid

legislation. *Id.* at 45-52. They exist for evaluating whether the Committees have a heightened need for these records. *Id.* at 52-55. And they exist for evaluating whether the Committees had the statutory authority to issue these subpoenas. *Id*. at 55-65. "Recitation of these arguments—which sound in familiar principles of constitutional interpretation—is enough to establish that this case does not 'turn on standards that defy judicial application' .... This is what courts do." *Zivotofsky*, 566 U.S. at 201 (quoting *Baker v. Carr*, 369 U.S. 186, 211 (1962)); *see also United States v. Munoz-Flores*, 495 U.S. 385, 395-96 (1990).

That this case involves the application of a constitutional test to transient facts does not make the dispute unmanageable. There are myriad decisions that assess whether a congressional committee had a legitimate legislative purpose under an array of circumstances. *See Eastland*, 421 U.S. at 501-11 (collecting cases). "Surely a judicial system capable of determining when punishment is 'cruel and unusual,' when bail is 'excessive,' when searches are 'unreasonable,' and when congressional action is 'necessary and proper' for executing an enumerated power is capable of" deciding whether these subpoenas exceed Congress's legislative power under Article I. *Munoz-Flores*, 495 U.S. at 396 (cleaned up).

Holding otherwise would have sweeping ramifications. It would not only disable the President from challenging congressional subpoenas for his private records. It would mean, contrary to every decision from *Kilbourn* to *Eastland*, that *nobody*—not even ordinary individuals, associations, and businesses—may judicially contest a congressional subpoena. If the legitimate-legislative-purpose test is unmanageable, after all, then the issue is a political question irrespective of the parties' identity. *See Munoz-Flores*, 495 U.S. at 393-94. Abandoning this well-worn judicial inquiry into the legitimacy of congressional subpoenas would overturn 139 years of precedent without any justification for doing so.[1]

At times, the Court also has suggested that the political question doctrine could apply based on "the impossibility of ... undertaking independent resolution without expressing lack of the respect due coordinate branches of government," "the potentiality of embarrassment from multifarious pronouncements by

[1] If there is any basis for criticizing *Eastland*, it is that the decision artificially *narrowed* the scope of judicial review. The Court correctly held that the Speech or Debate Clause does not foreclose a challenge to a congressional subpoena's legitimate legislative purpose. *See Eastland*, 421 U.S. at 501 & n.14. But the Court also held that third-party subpoenas cannot be challenged under the First Amendment or other provisions of the Bill of Rights. *See id*. at 509-10 & n.16. The notion that a civil rights group, for example, cannot bring a First Amendment challenge to a congressional subpoena issued to a third-party custodian for its membership rolls is difficult—if not impossible—to defend. But for this dubious holding, Petitioners would've brought a First Amendment retaliation claim in this case. *See* Reply Brief for Petitioners 8 n.2.

various departments on one question," "the impossibility of deciding" the case "without an initial policy determination of a kind clearly for nonjudicial discretion," or "an unusual need for unquestioning adherence to a political decision already made." *Baker*, 369 U.S. at 217. But it is far from clear that these considerations provide an independent basis for rendering a case nonjusticiable. *See Zivotofsky*, 566 U.S. at 195; *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality opinion); *see also El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 856 (D.C. Cir. 2010) (en banc) (Kavanaugh, J., concurring in the judgment); *Center for Biological Diversity v. Mattis*, 868 F.3d 803, 822 (9th Cir. 2017).

Regardless, deciding this case on the merits would in no way show a lack of respect for the political branches or lead to embarrassment. "[A] determination" as to whether the Committees have exceeded their Article I authority "falls within the traditional role accorded courts to interpret the law." *Powell*, 395 U.S. at 548. If that is "disrespect" for Congress, then "*every* judicial resolution of a constitutional challenge to a congressional enactment would be impermissible." *Munoz-Flores*, 495 U.S. at 390. The Court thus has "repeatedly rejected the view that these thresholds are met whenever a court is called upon to resolve the constitutionality or propriety of the act of another branch of Government." *Zivotofsky*, 566 U.S. at 204 (Sotomayor, J., concurring in part and concurring in the judgment).

Nor does resolution here depend on an initial policy determination. The Court is not asked to decide if issuing these subpoenas is good policy. It is asked to decide if they exceed the Committees' constitutional and statutory authority. *Accord Zivotofsky*, 566 U.S. at 195 (majority opinion). Similarly, nothing about this dispute requires the Court to revisit a political decision—let alone one to which there is an unusual need for adherence. The Court's "cases suggest that such 'unusual need' arises most of the time, if not always, in the area of foreign affairs." *Oneida Cty., N.Y. v. Oneida Indian Nation of New York State,* 470 U.S. 226, 250 (1985).

"It is correct that this controversy may, in a sense, be termed 'political.' But the presence of constitutional issues with significant political overtones does not automatically invoke the political question doctrine." *Chadha*, 462 U.S. at 942-43; *see Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 (1986); *Baker*, 369 U.S. at 217. Federal courts may not "decline to resolve a controversy within their traditional competence and proper jurisdiction simply because," as is the situation here, "the question is difficult, the consequences weighty, or the potential real for conflict with the policy preferences of the political branches." *Zivotofsky*, 566 U.S. at 205 (Sotomayor, J., concurring in part and concurring in the judgment). The losing party naturally will disagree with the decision the Court reaches on the merits; "but courts cannot avoid their responsibility merely

'because the issues have political implications.'" *Id.* at 196 (majority opinion) (quoting *Chadha*, 462 U.S. at 943)); *see also Cohens v. Virginia*, 19 U.S. 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty.").

Mislabeling these disputes as political questions also would be grossly inequitable. From a separation of powers vantagepoint, the political question doctrine is rooted in the understanding that each political branch "has resources available to protect and assert its interests, resources not available to private litigants outside the judicial forum." *Goldwater v. Carter*, 444 U.S. 996, 1004 (1979) (Rehnquist, J., concurring in the judgment). That rationale evaporates, however, when Congress seeks the President's personal records from a third-party custodian. Had the Committees not circumvented the President, he could have declined to comply with the subpoenas, and the dispute could have been resolved by "political struggle and compromise." *Barnes v. Kline*, 759 F.2d 21, 55 (D.C. Cir. 1984) (Bork, J., dissenting), *vacated sub nom. Burke v. Barnes*, 479 U.S. 361 (1987).[2]

But judicial abstention here would not fence off the Court from "a political tug-of-war." *Raines v. Byrd*, 521 U.S. 811, 834 (1997) (Souter, J., concurring in the judgment). It would be writing *every* congressional committee a blank check to subpoena *any* personal records it wants from *any* President *any* time it wishes simply by seeking those records from a custodian with no incentive to draw the ire of Congress. That is constitutionally intolerable. *Cf. Nixon v. Sirica*, 487 F.2d 700, 715 (D.C. Cir. 1973). The members of Congress are not "the constitutional judges of their own powers." The Federalist No. 78, at 524-25 (A. Hamilton) (Jacob E. Cooke ed. 1961). Judicial review is thus the *only* recourse that the President has under these circumstances. *See Eastland*, 421 U.S. at 501 n.14.

Furthermore, the Court doesn't "'proceed against the president as against an ordinary individual,'" but instead extends him the "high degree of respect due the President of the United States." *Nixon*, 418 U.S. at 708, 715. This is not out of concern for any "particular President," but for "the Presidency itself." *Trump*

[2] It is likely that civil litigation over the subpoenas would have been foreclosed had the Committees issued them to the President. The Committees would lack Article III standing to bring a civil action contesting noncompliance. *See Committee on Judiciary v. McGahn*, 951 F.3d 510, 516-22 (D.C. Cir. 2020), *vacated and reh'g en banc granted by United States House of Representatives v. Mnuchin*, 2020 WL 1228477 (D.C. Cir. March 13, 2020). And the D.C. Circuit has held that a direct recipient may contest a legislative subpoena only in defense to a criminal prosecution for contempt of Congress. *See Sanders*, 463 F.2d at 899.

v. Hawaii, 138 S. Ct. 2392, 2418 (2018). That is no less true when the President appears in his personal capacity. *See, e.g.*, *Clinton v. Jones*, 520 U.S. 681, 689-90 (1997). Yet deeming this case nonjusticiable would afford the President *fewer* rights than *Eastland* gives ordinary individuals. No decision or neutral principle could justify that dichotomy.

Finally, any suggestion that the inapplicability of the political question doctrine alleviates the serious separation of powers issues that these subpoenas raise would be misplaced. Just as in *Clinton v. Jones*, the President is appearing both as an individual and as the occupant of the office. That is inevitable given the "unique position in the constitutional scheme" that he "occupies." *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982); *see In re Lindsey*, 158 F.3d 1263, 1286 (D.C. Cir. 1998) (Tatel, J., concurring in part and dissenting in part). These cases therefore trigger all of the separation-of-powers concerns that make litigation involving the President unique. *See Clinton*, 520 U.S. at 711-22 (Breyer, J., concurring in the judgment); Pet. App. 86a-88a (Rao, J., dissenting); Pet. App. 215a (Katsas, J., dissenting from denial of rehearing en banc); Pet. App. 218a (Rao, J., dissenting from denial of rehearing en banc); App. 343a (Livingston, J., concurring in part and dissenting in part).

Nor is there anything unusual about separation-of-powers issues being joined through litigation brought by individuals or other private parties. That objection "reduces to the claim that a person suing in his individual capacity has no direct interest in our constitutional system of separation of powers, and thus has no corresponding right to demand that the Judiciary ensure the integrity of that system." *Munoz-Flores*, 495 U.S. at 393. But the objection is meritless; "the Court has repeatedly adjudicated separation-of-powers claims brought by people acting in their individual capacities." *Id.* at 394 (citing *Mistretta v. United States*, 488 U.S. 361 (1989)); *see Bond v. United States*, 564 U.S. 211, 222 (2011) ("The recognition of an injured person's standing to object to a violation of a constitutional principle that allocates power within government is illustrated … by cases in which individuals sustain discrete, justiciable injury from actions that transgress separation-of-powers limitations."). Indeed, such cases are legion. *See, e.g.*, *NLRB v. Noel Canning*, 573 U.S. 513 (2014); *Morrison v. Olson*, 487 U.S. 654 (1988); *Bowsher v. Synar*, 478 U.S. 714 (1986); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425 (1977).

* * *

Just as "a law beyond the power of Congress, for any reason, is no law at all," a subpoena beyond the power of a congressional committee to issue is no subpoena at all. *Bond*, 564 U.S. at 227 (Ginsburg, J., concurring) (citation and quotations omitted); *see also* The Federalist No. 78, at 524 (A. Hamilton) ("No legislative act ... contrary to the Constitution ... can be valid."). The issue here

is whether these subpoenas are beyond the power of these three Committees. Petitioners have Article III standing to litigate that issue, resolution of it does not raise a political question, and no related principle renders it nonjusticiable. The "exceptionally important questions regarding the separation of powers among Congress, the Executive Branch, and the Judiciary" that these cases present should be decided on the merits. Pet. App. 215a (Katsas, J., dissenting from denial of rehearing en banc).

Sincerely,

William S. Consovoy

cc: All counsel of record