ORAL ARGUMENT HELD ON 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)

APPELLANTS' RESPONSE TO AMICUS BRIEF

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SUMMARY OF THE ARGUMENT

This Court asked the United States whether the Committee's subpoena to Mazars for the President's records is valid. The United States responded with a definitive no. Notably, its amicus brief supports Plaintiffs on every disputed legal issue. While the amicus brief comprehensively explains why controlling precedent requires reversal, five points bear emphasis. The United States agrees that this is a case against the President with all the attendant separation-of-powers concerns; that this subpoena falls outside the Committee's statutory jurisdiction, both now and when it was issued; that congressional attempts to legislate the President are constitutionally dubious; that this subpoena appears to impermissibly pursue law enforcement; and that this subpoena is overbroad and impertinent. This Court should reverse.

ARGUMENT

1. The amicus brief confirms that "[t]he separation-of-powers implications of this appeal are profound." Plaintiffs' Opening Brief (Br.) 1; *see* Plaintiffs' Reply Brief (Reply) 7 ("This case triggers the separation-of-powers concerns that make litigation involving the President unique."). As the United States explains, "a congressional subpoena [that] seeks the President's personal records from a third party" implicates all of the "significant separation-of-powers issues" that typically arise when the executive and legislative branches clash. Amicus Brief of the United States (U.S. Br.) 1; *see id.* at 4-8. Thus, cases such as *Unites States v. AT&T* (*AT&T I*), 551 F.2d 384 (D.C. Cir. 1976); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982); *Armstrong v. Bush*, 924 F.2d 282 (D.C. Cir. 1991);

Franklin v. Massachusetts, 505 U.S. 788 (1992); and *Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 542 U.S. 367 (2004), among others, should guide this Court's evaluation of the subpoena's validity.

Contrary to the Committee's suggestion, the fact that it demanded records from a third-party custodian instead of from the executive makes the separation-of-powers implications here *more* pronounced, not less. This is not a case where the Committee must subpoena a neutral third party because it has unique control over documents. The President has access to his financial records. Yet the Committee never subpoenaed him directly or sought the documents through White House counsel. *See* Br. 5-9; Oversight Committee Brief (Cmte. Br.) 8-19; Reply 1-3. The reason why is clear. Anticipating that the President might object to such a demand, the Committee was eager to avoid "the constitutionally mandated negotiation-and-accommodation process that applies to a congressional request for the President's records related to his public office." U.S. Br. 8 (citing *United States v. AT&T* (*AT&T II*), 567 F.2d 121, 130 (D.C. Cir. 1977)). In other words, the Committee wanted to circumvent the President in order to coercively secure his personal records from a neutral third party.

This is deeply problematic. When Congress "seeks information directly from a party," that "party can resist and thereby test the subpoena." *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 501 n.14 (1975). Here, for example, had Congress sought these documents through White House counsel, it is doubtful that this inter-branch dispute would have become a federal case. But when Congress "seeks the same information

from a third person," it knows that "compliance by the third person could frustrate any judicial inquiry." *Id.* This is not to suggest that Congress is universally disabled from issuing third-party subpoenas. But once the Committee demanded the President's records from a "third party which could not be expected to refuse compliance," *id.* at 497-98, it forfeited any claim to the presumption of regularity. There is simply nothing "regular" about the subpoena that the Committee issued to Mazars.

Indeed, Plaintiffs are unaware of *any* congressional committee *ever* issuing a third-party subpoena for a President's records "in aid of legislation." *McGrain v. Daugherty*, 273 U.S. 135, 177 (1927). That is unsurprising. In our tripartite system, one branch cannot circumvent another because it is expedient. *See, e.g.*, *Clinton v. New York*, 524 U.S. 417 (1998); *INS v. Chadha*, 462 U.S. 950 (1983); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). This subpoena is "not the product of the 'finely wrought' procedure that the Framers designed," *Clinton*, 524 U.S. at 440 (quoting *Chadha*, 462 U.S. at 951), and the Committee's prediction that the President would not have acquiesced to it is no excuse for evading the constitutional process. "The Separation of Powers often impairs efficiency, in terms of dispatch and the immediate functioning of government." *AT&T II*, 567 F.2d at 133; *see also Clinton*, 524 U.S. at 449 (Kennedy, J., concurring) ("Failure of political will does not justify unconstitutional remedies."). In this case or in the future, the Supreme Court might need to assess whether a congressional subpoena to a third party for a President's records in and of itself violates the separation of powers. At a minimum, though, the

Committee's decision to take this provocative step casts additional doubt on the notion that its actions are "entitled to deference by the courts." Cmte. Br. 41.

More broadly, Plaintiffs have been unable to find *any* subpoena that was directed to a sitting President from a standing committee of Congress. Nor has the Committee. That is why the House General Counsel has acknowledged that this subpoena is unprecedented. O.A. Trans. 90-91. In those rare instances where Congress has sought presidential records in aid of legislation, it did so through a specially-created committee with a specific mandate. When the Senate became interested in President Nixon's tape recordings, for example, it subpoenaed them through a a select committee. *See Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 726 (D.C. Cir. 1974). Likewise, the Senate specially created the Whitewater Committee to investigate issues that involved President Clinton. Creating these committees with a specific and limited mandate from the full body honored the principle that "the long-term staying power of government ... is enhanced by the mutual accommodation required by the Separation of Powers." *AT&T II*, 567 F.2d at 133.

Here, in contrast, the Committee did not subpoena the President directly for his records, bypassed the executive branch entirely, relied on jurisdiction that is "couched in general terms," and then "stretched these general terms in order to justify about as specific an investigation of [the President] as can be envisaged." *Tobin v. United States*, 306 F.2d 270, 275 (D.C. Cir. 1962). And the House's belated attempt to give all standing committees "blank-check authorization of all existing *and future* subpoenas concerning

the President" only makes matters worse. U.S. Br. 3; *see id.* at 15-17. The resolution is anything but a recognition by the House "of its full awareness of what is at stake by unequivocally authorizing an inquiry of dubious limits." *United States v. Rumely*, 345 U.S. 41, 46 (1953).

In all, the lack of any historical support for a legislative subpoena from a standing committee of Congress for the President's records—directed to a third-party custodian no less—raises constitutional red flags. In cases like this one, the Supreme Court places "significant weight upon historical practice." *NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014); *see, e.g.*, *Fitzgerald*, 457 U.S. at 753-54. But, as explained, there is no historical support for Congress having issued a subpoena remotely like this one. The absence of any "practice" of standing congressional committees subpoenaing the records of a sitting President in aid of legislation "tends to negate the existence of the congressional power asserted here." *Printz v. United States*, 521 U.S. 898, 918 (1997); *see, e.g.*, *Tobin*, 306 F.2d at 275.

2. The United States' amicus brief confirms that the Mazars subpoena should be invalidated for lack of statutory jurisdiction. Given the separation-of-powers issues, the House must "(1) clearly authorize the demand for the President's information, and (2) clearly identify the legislative purpose for seeking such information, including by identifying with sufficient particularity the subject matter of potential legislation to which the information sought is pertinent and necessary." U.S. Br. 2. This rule is not only for the President's protection. It keeps the courts from having to "speculate about

hypothetical legislation that the Committee has not identified and then attempt to determine whether the Committee's sweeping subpoena is sufficiently tailored to that hypothetical objective." *Id.* at 20. Yet that is what must happen unless the Court makes "the House—or at the very least the Committee—provide a clearer and more particular statement of the potential legislative measures for which the subpoenaed materials are pertinent and necessary." *Id.* at 22.

For its part, the Committee would have the Court either ignore entirely whether "valid legislation could be had," *McGrain*, 273 U.S. at 171, or permit the Committee's attorneys to do the Committee's job for it. But precedent forecloses both proposals. The subpoena cannot be upheld unless it concerns a subject about which "valid legislation could be enacted." *Id.* at 194; *see also* U.S. Br. 10. And a legitimate basis for the demand had to exist "before the subpoena issued." *Shelton v. United States*, 327 F.2d 601, 607 (D.C. Cir. 1963). Counsel may not engage in "retroactive rationalization" on the Committee's behalf. *Watkins v. United States*, 354 U.S. 178, 204 (1957); *see also* U.S. Br. 12. As a result, the Court either must require more clarity from the Committee about its legislative aims, U.S. Br. 12-13, or explain why its "vague incantations of hypothetical legislative purposes" do not raise *any* constitutional doubts, *id.* at 17. That is the only way the Court can be sure this subpoena does not exceed Congress' authority under Article I of the Constitution. Br. 24-25.

The subpoena cannot meet that standard. The Committee's jurisdiction does not clearly reach the President—not when the subpoena was issued (the relevant time) and

not now. Br. 15-16; Reply 1-8; Appellants' Response to Committee's Rule 28(j) Letter (July 31, 2019). The Chairman's memorandum "does not sufficiently describe the purposes underlying the subpoena." U.S. Br. 21; Br. 34; Reply 15-16. And the vague purposes to which the memorandum alludes raise "serious constitutional issues." U.S. Br. 3; *see also id.* at 15-22; Br. 32-43; Reply 17-20. These serious issues can be avoided only by invalidating the subpoena on statutory grounds.

3. The United States' amicus brief further details why attempts by Congress to legislatively regulate "the President's personal financial affairs" is constitutionally problematic. U.S. Br. 6. While the Court can invalidate the subpoena without reaching these issues, it cannot uphold the subpoena without deciding them. Br. 20-25; Reply 17-18. And however the Court rules, its reasoning will logically extend to "the conflict-of-interest and financial-disclosure practices of the Justices too." Br. 1. This is not a farfetched scenario. Congress has expressed renewed interest in creating "a code of conduct for Supreme Court Justices," as well as investigating the "adequacy of the Justices' financial disclosures, and the circumstances in which Justices or judges might disqualify themselves from cases." Press Release, Nadler and Johnson Request Justice Kavanaugh's White House Records (Aug. 6, 2019), bit.ly/2Z9HBTQ. The Court should not be forced "to answer broad questions of civil law"—like the power of Congress to legislate the financial affairs of the President and the Justices—in a setting that is "not particularly conducive to the giving of any satisfactory answer, no matter

what the answer should prove to be." *Tobin*, 306 F.3d at 274, 276. Again, however, the only way to avoid the issue is to invalidate the subpoena on statutory grounds.

4. The United States agrees with Plaintiffs that the "Chairman's memorandum ... and subpoena ... bear some of the hallmarks of [a law-enforcement] investigation." U.S. Br. 17-18. This is crucial. It should matter that the Department of Justice—whose views the Court solicited—believes that this investigation resembles law enforcement. The Department is "the Nation's chief law enforcement" agency. *Mitchell v. Forsyth*, 472 U.S. 511, 520 (1985). Although "not controlling," its views on this subject "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). If anyone knows what is and isn't law enforcement, it's the Department of Justice.

5. Finally, the amicus brief persuasively explains why the "subpoena is the definition of overbroad." Br. 13. Like the parties, the United States agrees that courts in this kind of case "must decide whether the information sought is 'pertinent' to the legitimate legislative purpose." U.S. Br. 10. And that pertinency standard must be "more searching … when Congress seeks information from the President," since courts cannot presume that such requests are constitutional or in pursuit of valid legislation. *Id.* at 10-11.

Like Plaintiffs, moreover, the United States identifies many reasons why this subpoena lacks pertinency. *See* Br. 13, 42-43; Reply 16-17. The subpoena "seeks eight years of financial records, including years before the President's term began." U.S. Br.

18. The subpoena's scope and the Committee's statements make it "implausible" to think that the subpoena is an effort to *consent* to foreign emoluments. *Id.* at 20. Its "sweeping" request for all agreements, communications, memoranda, notes, and the like is tailored to only one goal: illegal law enforcement. *Id.* at 18-20. And it remains "entirely unclear why the vast array of financial records the Committee's subpoena requests would be material to Congress's consideration of H.R. 1" or the other "scattershot collection of legislative proposals" that the Committee cites. *Id.* at 22. Accordingly, the Committee has not established that "the subpoenaed materials are pertinent and necessary" to its unprecedented investigation of the President. U.S. Br. 22.

The Committee's supposed interest in the accuracy of the President's financial disclosures illustrates the point. The Committee has only ever expressed an interest in the disclosures that the President made as a *government official* (not as a mere candidate or in any other capacity): Chairman Cummings wrote the White House counsel only about the President's 2017 and 2018 forms, *see* Cmte. Br. 12-13 & n.8; the Committee's brief cites only the provisions of the Ethics in Government Act that apply to officials, *id.* at 8, 11, 31 (citing 5 U.S.C. app. 4 §101(a), not §101(c)); the Federal Election Commission, not the Office of Government Ethics, has jurisdiction over candidates, 5 U.S.C. app. 4 §103(e); and the relevant provision of H.R. 1 would reform only the President's *post*-election disclosure requirements, H.R. 1 §8012. But if the Committee wants to investigate whether the President somehow misreported his finances in 2017,

2018, or 2019, "it is not apparent why detailed information about the President's finances from years before he became even a Presidential candidate would be reasonably relevant and necessary to such an investigation." U.S. Br. 21. The Committee's blunderbuss request for myriad information dating back to 2011 is a far cry from the kind of reasonably tailored demand that could satisfy the pertinency standard—especially because the target is the sitting President of the United States. *Id.* at 11-12.

CONCLUSION

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

Dated: August 20, 2019

Respectfully submitted,

s/ William S. Consovoy

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CERTIFICATE OF COMPLIANCE

This brief complies with the Court's Order of August 16, 2019, because it contains 2,473 words. 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: August 20, 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: August 20, 2019 *s/ William S. Consovoy*