Tax & Financial Records Case

Deutsche Bank-Capital One Case
Key Excerpts from 2019 Appeals Court Opinion

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On May 22, 2019, ruling from the bench, SDNY District Judge Ramos denied President Trump's request for a preliminary injunction to prevent bank compliance with three House subpoenas, and read a 38-page opinion into the hearing record. *Trump v. Deutsche Bank AG*, No. 19 CIV. 3826 (ER), 2019 WL 2204898 (S.D.N.Y. May 22, 2019). On May 24, 2019, President Trump appealed the district court decision. A Second Circuit 3-judge panel, with Judges Hall, Livingston, and Newman, was assigned to Case No. 19-1540.

On Dec. 3, 2019, the Second Circuit affirmed the district court's ruling in substantial part, ordered compliance with the House subpoenas with a few limited exceptions, and remanded the case for further proceedings. *Trump v. Deutsche Bank AG*, 943 F.3d 627 (2d Cir. 2019), *cert. granted*, No. 19-760, 2019 WL 6797733 (U.S. Dec. 13, 2019). A partial concurrence and partial dissent by Judge Livingston would have remanded the case to the district court to develop a more detailed record for further review before ruling on certain issues. Here are key excerpts from the panel's 165-page opinion, including the partial concurrence and partial dissent; each excerpt consists of a direct quotation taken from the text of the opinion, with no changes in punctuation but with footnotes omitted.

Appellate ruling
[The district court ruling is] [a]ffirmed in substantial part and remanded in part. Judge Livingston concurs in part and dissents in part with a separate opinion.

Three subpoenas
The specific issue is the lawfulness of three subpoenas issued by the House Committee on Financial Services and the House Permanent Select Committee on Intelligence …. The subpoenas issued by each of the Committees to Deutsche Bank ("Deutsche Bank Subpoenas") seek identical records of President Donald J. Trump ("Lead Plaintiff"),

members of his family, The Trump Organization, Inc. ("Trump Organization"), and several affiliated entities (collectively, "Plaintiffs" or "Appellants"). The subpoena issued by the Committee on Financial Services to Capital One ("Capital One Subpoena") seeks records of the Trump Organization and several affiliated entities. The Capital One Subpoena does not list the Lead Plaintiff or members of his family by name, but might seek their records in the event they are a principal, director, shareholder, or officer of any of the listed entities.

Prompt compliance with subpoenas
We affirm the Order in substantial part to the extent that it denied a preliminary injunction and order prompt compliance with the subpoenas, except that the case is remanded to a limited extent for implementation of the procedure set forth in this opinion concerning the nondisclosure of sensitive personal information and a limited opportunity for Appellants to object to disclosure of other specific documents within the coverage of those paragraphs of the Deutsche Bank Subpoenas listed in this opinion.

In her partial dissent, Judge Livingston prefers a total remand of the case for "creation of a record that is sufficient more closely to examine the serious questions that the Plaintiffs have raised," … and to "afford the parties an opportunity to negotiate," *id*. at 11. We discuss at pages 69–72 of this opinion not only why such a remand is not warranted but why it would also run counter to the instruction the Supreme Court has given to courts considering attempts to have the Judicial Branch interfere with a lawful exercise of the congressional authority of the Legislative Branch.

Not a dispute between the legislative and executive branches
We emphasize at the outset that the issues raised by this litigation do not concern a dispute between the Legislative and Executive Branches. … Although the challenged subpoenas seek financial records of the person who is the President, no documents are sought reflecting any actions taken by Donald J. Trump acting in his official capacity as President. Indeed, the Complaint explicitly states that "President Trump brings this suit solely in his capacity as a private citizen." " Complaint ¶ 13. Appellants underscore this point by declining in this Court to assert as barriers to compliance with the subpoenas any privilege that might be available to the President in his official capacity, such as executive privilege.

Protection sought would be for any private individual
The protection sought is the protection from compelled disclosure alleged to be beyond the constitutional authority of the Committees, a protection that, if validly asserted, would be available to any private individual.

No dispute on standing
[T]here 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.

Exacting review for abuse of discretion by district court
We review denial of a preliminary injunction for abuse of discretion, *see, e.g., Ragbir v. Homan*, 923 F.3d 53, 62 (2d Cir. 2019), but our review is appropriately more exacting where the action sought to be enjoined concerns the President, even though he is suing in his individual, not official, capacity, in view of "'[t]he high respect that is owed to the office of the Chief Executive'" that "'should inform the conduct of [an] entire proceeding[.]'"

Irreparable harm
The District Court ruled that compliance would cause irreparable harm because "plaintiffs have an interest in keeping their records private from everyone, including congresspersons," and "the committees have not committed one way or the other to keeping plaintiffs' records confidential from the public once received." J. App'x 122–23. We agree.

High degree of deference to actions taken by Congress
The Supreme Court has said that a high degree of deference should be accorded to actions taken solely by Congress, *see United States v. Rumely*, 345 U.S. 41, 46 (1953) (admonishing courts to "tread warily" "[w]henever constitutional limits upon the investigative power of Congress have to be drawn").

Likelihood of success and other standards
We have not previously had occasion to consider whether enforcement of a congressional committee's subpoena qualifies as, or is sufficiently analogous to, "governmental action taken in the public interest pursuant to a statutory or regulatory scheme," *Plaza Health Laboratories*, 878 F.2d at 580, so as to preclude application of the less rigorous serious-questions standard. Facing that issue, we conclude that those seeking to preliminarily enjoin compliance with subpoenas issued by congressional committees exercising, as we conclude in Part II(C), their constitutional and duly authorized power to subpoena documents in aid of both regulatory oversight and consideration of potential legislation must satisfy the more rigorous likelihood-of-success standard. … [W]e will proceed to consider not only whether Appellants have met the governing likelihood-of-success standard but also whether they have satisfied the other requirements in one or more of these three standards: sufficiently serious questions going to the merits of their claims to make them fair ground for litigation, a balance of hardships tipping decidedly in their favor, and the public interest favoring an injunction.

Right to Financial Privacy Act does not apply to Congress
[C]ontextual clues in RFPA indicate that neither Congress nor its committees are an "agency or department of the United States" within the meaning of RFPA, and therefore Congress did not subject itself or its committees to the Act.

Section 6103 applies only to the IRS
We agree with the Ninth Circuit that the plain language of the provision reflects Congress's purpose in enacting section 6103, which "was to curtail loose disclosure practices by the IRS." *Stokwitz*, 831 F.2d at 894. Because there is no claim by Appellants

that Deutsche Bank obtained from the IRS any returns requested by the Committees, neither subsection 6103(f)(3), nor section 6103 as a whole, precludes their production to the Committees.

Gramm-Leach-Bliley Act does not apply to federal subpoenas

Gramm-Leach-Bliley is also no bar to production of tax returns because it explicitly permits disclosure of personal information "to comply with a . . . subpoena . . . by Federal . . . authorities." 15 U.S.C. § 6802(e)(8).

Possible distraction of president is not a consideration here

If any tax returns in the possession of Deutsche Bank were those of the Lead Plaintiff, we would have to consider whether their production to the Committees might encounter the objection that it would distract the Chief Executive in the performance of official duties. That issue need not be resolved, however, because Deutsche Bank informed us … that the only tax returns in its possession within the coverage of the subpoenas are not those of the Lead Plaintiff.

No constitutional privilege bars disclosure of financial records

Appellants' constitutional claim does not assert any constitutionally based privilege that might protect their financial records from production by the Banks to the Committees, such as the privileges secured in the Bill of Rights.

Broad Congressional authority to obtain information

An important line of Supreme Court decisions, usually tracing back to *McGrain v. Daugherty*, 273 U.S. 135 (1927), has recognized a broad power of Congress and its committees to obtain information in aid of its legislative authority under Article I of the Constitution.

Limits on Congressional investigative authority

As the Committees recognize, however, Congress's constitutional power to investigate is not unlimited. The Supreme Court has identified several limitations. One concerns intrusion into the authority of the other branches of the government. … The power to investigate "must not be confused with any of the powers of law enforcement." 349 U.S. at 161. "Nor does it extend to an area in which Congress is forbidden to legislate." *Id.* "Still further limitations on the power to investigate are found in the specific individual guarantees of the Bill of Rights . . . ." *Id.* And, most pertinent to the pending appeal, the power to investigate "cannot be used to inquire into private affairs unrelated to a valid legislative purpose." *Id.*

Inquiry into private affairs permissible with a valid legislative purpose

The principal argument of Appellants is that compliance with the Committees' subpoenas should be preliminarily enjoined because the subpoenas seek information concerning their private affairs. … [A]lthough the Court had made clear before *Barenblatt* that there is "no congressional power to expose for the sake of exposure," *Watkins*, 354 U.S. at 200, it has also stated that inquiry into private affairs is permitted as long as the inquiry

is related "to a valid legislative purpose," *Quinn*, 349 U.S. at 161; *see Barenblatt*, 360 U.S. at 127.

Legislative purpose test

This potential tension between a permissible legislative purpose and an impermissible inquiry for the sake of exposure requires consideration of the role of motive and purpose in assessing the validity of a congressional inquiry. … More than 50 years ago, the Supreme Court candidly recognized the difficulty a court faces in considering how a legislative purpose is to be assessed when a privacy interest is asserted to prevent a legislative inquiry:

> "Accommodation of the congressional need for particular information with the individual and personal interest in privacy is an arduous and delicate task for any court. We do not underestimate the difficulties that would attend such an undertaking." …

The first task for courts undertaking this "accommodation" is identification of the legislative purpose to which a congressional investigation is asserted to be related.

Can consider variety of evidence to establish legislative purpose

Although we agree that there must be sufficient evidence of legislative authorization and purposes to enable meaningful judicial review, Appellants' arguments that seek to limit evidence we may consider are not persuasive. … As the [Supreme] Court noted, "There are several sources that can outline the 'question under inquiry.'" *Id.* at 209. Among these, the Court mentioned "the remarks of the [committee] chairman or members of the committee, or even the nature of the proceedings themselves." … The [Supreme] Court there made clear that to satisfy the due process objection arising from a contempt imposed for refusing to answer a committee's question insufficiently shown to be related to a valid legislative purpose, the purpose could be identified as late as immediately before the witness was required to answer. … We therefore do not confine our search for the Committees' purposes to the House Rules alone, nor do we exclude Resolution 507 from our inquiry.

Committees have met legislative purpose test

All of the foregoing fully identifies "the interest[s] of the Congress in demanding disclosures," as *Watkins* requires. 354 U.S. at 198. The Committees' interests concern national security and the integrity of elections, and, more specifically, enforcement of anti-money-laundering/counter-financing of terrorism laws, terrorist financing, the movement of illicit funds through the global financial system including the real estate market, the scope of the Russian government's operations to influence the U.S. political process, and whether the Lead Plaintiff was vulnerable to foreign exploitation. *Watkins* also requires that a legislative inquiry must in fact be related to a legislative purpose. *See id.* The Committees have fully satisfied the requirements of *Watkins*.

Not investigating violations of law by president
In the pending appeal, the Committees are not investigating whether the Lead Plaintiff has violated any law. To the extent that the Committees are looking into unlawful activity such as money laundering, their focus is not on any alleged misconduct of the Lead Plaintiff (they have made no allegation of his misconduct); instead, it is on the existence of such activity in the banking industry, the adequacy of regulation by relevant agencies, and the need for legislation.

Public need versus privacy interests
When the [Supreme] Court said that it "cannot simply assume, however, that every congressional investigation is justified by a public need that overbalances any private rights affected," *id*. at 198, the inference is available that courts are to determine whether the importance of the legislative interest outweighs an individual's privacy interests.

Encountering this uncertainty as to the task that *Watkins* has required courts to undertake, we will assume, for the argument, that we should make at least some inquiry as to whether the "public need" to investigate for the valid legislative purposes we have identified "overbalances any private rights affected." That balancing is similar to the comparison of hardships we make in Part IV, one of the factors relevant to two of the preliminary injunction standards. We conclude that, even if *Watkins* requires balancing after valid legislative purposes have been identified, the interests of Congress in pursuing the investigations for which the challenged subpoenas were issued substantially "overbalance" the privacy interests invaded by disclosure of financial documents, including the non-official documents of the Lead Plaintiff.

"[T]he weight to be ascribed to" the public need for the investigations the Committees are pursuing is of the highest order. The legislative purposes of the investigations concern national security and the integrity of elections, as detailed above. By contrast, the privacy interests concern private financial documents related to businesses, possibly enhanced by the risk that disclosure might distract the President in the performance of his official duties.

No district court error in failing to require negotiation
Appellants have not identified a single category of documents sought or even a single document within a category that they might be willing to have the Banks produce if a negotiation had been required. Finally, we note the likely futility of ordering a total remand for negotiation, as Judge Livingston prefers, in view of the fact that the White House has prohibited members of the Administration from even appearing in response to congressional subpoenas and has informed Congress that "President Trump and his Administration cannot participate" in congressional inquiries.

Need for most expeditious treatment by district court
A total remand [to require negotiation or a more detailed record] would simply further delay production of documents in response to subpoenas that were issued seven months ago and would run directly counter to the Supreme Court's instruction that motions to

enjoin a congressional subpoena should "be given the most expeditious treatment by district courts because one branch of Government is being asked to halt the functions of a coordinate branch."

Case study is permissible

In the District Court, the Committees stated, "Because of his prominence, much is already known about Mr. Trump, his family, and his business, and this public record establishes that they serve as a useful case study for the broader problems being examined by the Committee." … Appellants repeatedly point to the phrase "case study" to argue that the Committees are not only focusing on the Lead Plaintiff but also doing so for law enforcement purposes. … However, as long as valid legislative purposes are duly authorized and being pursued by use of the challenged subpoenas, the fact that relevant information obtained also serves as a useful "case study" does not detract from the lawfulness of the subpoenas. Furthermore, congressional examination of whether regulatory agencies are properly monitoring a bank's practices does not convert an inquiry into impermissible law enforcement, and neither committee has made any allegation that the Lead Plaintiff or any of the Appellants has violated the law.

Moreover, when a borrower can obtain loans from only one bank, that bank has already lent the borrower $130 million, and that bank has been fined in connection with a $10 billion money laundering scheme, that situation is appropriate for a case study of such circumstances by a congressional committee authorized to monitor how well banking regulators are discharging their responsibilities and whether new legislation is needed.

No review of Member motives

To whatever extent the targeting objection is really a claim that part of the motive of some members of the Committees for issuing the three subpoenas was to embarrass the Lead Plaintiff, the Supreme Court has made it clear that in determining the lawfulness of a congressional inquiry, courts "do not look to the motives alleged to have prompted it." … We do not doubt that some members of the Committees, even as they pursued investigations for valid legislative purposes, hoped that the results of their inquiries would embarrass the President. But as long as the valid legislative purposes that the Committees have identified are being pursued and are not artificial pretexts for ill-motivated maneuvers, the Committees have not exceeded their constitutional authority.

Presumption is stated legislative purposes are "real object" of inquiry

The Supreme Court has stated that there is a "presumption" that the stated legislative purposes are the "real object" of the Committees' investigation. *McGrain*, 273 U.S. at 178. We need not rely on that presumption where we have evidence that valid legislative purposes are being pursued and "the purpose[s] asserted [are] supported by references to specific problems which in the past have been or which in the future could be the subjects of appropriate legislation."

Information requests reasonably related to investigation
Appellants object to the extensive time frame covered by the subpoenas, especially the absence of any time limitations on requests relating to account applications and the identity of those holding interests in accounts. Appellants also object to disclosure of financial records in the names of family members, including the Lead Plaintiff's grandchildren. However, such information, including documents dating back to when accounts were opened, is reasonably related to an investigation about money laundering.

Disclosing evidence of crime is permissible
"[A] permissible legislative investigation does not become impermissible because it might reveal evidence of a crime." Br. For Appellants at 22. Any investigation into the effectiveness of the relevant agencies' existing efforts to combat money laundering or the need for new legislation to render such efforts more effective can be expected to discover evidence of crimes, and such discovery would not detract from the legitimacy of the legislative purpose in undertaking the investigation.

Congress' informing function
Appellants fault Judge Ramos, who, they contend, "asserted that Congress has an independent 'informing function' that allows it to . . . 'publicize corruption . . . in agencies of the Government,' even absent a connection to 'contemplated legislation in the form of a bill or statute.'" Br. for Appellants at 23 (quoting District Court opinion, J. App'x 127). Although the phrases quoted from the Court's opinion are accurate, the brief's addition of the words "independent" and "absent a connection" is a mischaracterization of what Judge Ramos said. He was not asserting an independent informing function or investigative power *absent* a connection to a legislative purpose. He was careful to state that Congress's legislative authority "*includes* a more general informing function." J. App'x 127 (emphasis added). This reflected the Supreme Court's statement in *Hutchinson v. Proxmire*, 443 U.S. 111, 132–33 (1979), that "congressional efforts to inform itself through committee hearings are part of the legislative function."

Predominant purpose test
[I]n cautioning that the public's right to be informed about its government "cannot be inflated into a general power to expose," *id*., the Court added in the same sentence, "where the *predominant result* can *only* be an invasion of the private rights of individuals," *id.* (emphases added). The Court also noted that it was "not concerned with the power of the Congress to inquire into and publicize corruption, maladministration or inefficiency in agencies of the Government." *Id.* at 200 n.33. These latter statements make clear that Congress can obtain information in an investigation as long as the information is collected in furtherance of valid legislative purposes. In the pending appeal, the high significance of the valid legislative purposes demonstrates that the "predominant purpose" of the Committees' inquiries cannot be said to be "only" to invade private rights.

Claim is not burdensomeness, but privacy
[T]he Banks have made no claim that compiling the requested documents imposes an excessive burden on them. It is Appellants whose privacy is claimed to be unlawfully impaired by the Banks' compliance with the subpoenas who challenge the breadth of the requests. To consider that challenge we examine the subpoenas in detail.

Sensitive personal information need not be disclosed
These provisions create a risk that some of the checks sought might reveal sensitive personal details having no relationship to the Committees' legislative purposes. For example, if one of the entities decided to pay for medical services rendered to an employee, the check, and any similar document disclosing sensitive personal information unrelated to business transactions, should not be disclosed.

Documents with attenuated relationship to legislative purposes
[T]here might be a few documents within the coverage of the subpoenas that have such an attenuated relationship to the Committees' legislative purposes that they need not be disclosed. We have concluded that the coverage of the following paragraphs of the Deutsche Bank Subpoenas might include some documents warranting exclusion: paragraphs 1(ii), 1(iv), 1(vi)(e), 1(viii), and 8. We reach the same conclusion as to the following paragraphs of the Capital One subpoena: paragraphs 1(iv), 1(v), 1(x), and 1(xi)(d). … Any attempt to identify for exclusion from disclosure documents within the listed paragraphs must be done with awareness that a principal legislative purpose of the Committees is to seek information about the adequacy of banking regulators' steps to prevent money laundering, a practice that typically disguises illegal transactions to appear lawful.

Procedure to review and produce documents
To facilitate exclusion of sensitive documents and those few documents that should be excluded from the coverage of the listed paragraphs, we instruct the District Court on remand to implement the following procedure: (1) after each of the Banks has promptly, and in no event beyond 30 days, assembled all documents within the coverage of paragraphs 1(ii), 1(iv), 1(vi)(e), 1(viii), and 8 of the Deutsche Bank Subpoenas and paragraphs 1(iv), 1(v), 1(x), and 1(xi)(d) of the Capital One Subpoena, counsel for Appellants shall have 14 days to identify to the District Court all sensitive documents and any documents (or portions of documents) within the coverage of the listed paragraphs that they contend should be withheld from disclosure, under the limited standard discussed above; (2) counsel for the Committees shall have seven days to object to the nondisclosure of such documents; (3) the District Court shall rule promptly on the Committees' objections; (4) Appellants and the Committees shall have seven days to seek review in this Court of the District Court's ruling with respect to disclosure or nondisclosure of documents pursuant to this procedure. Any appeal of such a ruling will be referred to this panel.

The abbreviated timetable of this procedure is set in recognition of the Supreme Court's instruction that motions to enjoin a congressional subpoena should "be given the most

expeditious treatment by district courts because one branch of Government is being asked to halt the functions of a coordinate branch."

All documents within the coverage of the paragraphs not listed and those documents not excluded pursuant to the procedure outlined above shall be promptly transmitted to the Committees in daily batches as they are assembled, beginning seven days from the date of this opinion.

Not plainly incompetent or irrelevant test
Except as provided above, all three subpoenas seek documents that the Committees are entitled to believe will disclose information pertinent to legitimate topics within the Committees' authorized investigative authority, especially money laundering, inappropriate foreign financial relationships with the named individuals and entities, and Russian operations to influence the U.S. political process. As the Supreme Court has observed, documents subpoenaed by a congressional committee need only be "not plainly incompetent or irrelevant to any lawful purpose [of a committee] in the discharge of its duties." *McPhaul v. United States*, 364 U.S. 372, 381 (1960) (quotation marks and brackets omitted). The documents sought by the three subpoenas easily pass that test.

No separation of powers issues
[T]his case does not concern separation of powers. The Lead Plaintiff is not suing in his official capacity, no action is sought against him in his official capacity, no official documents of the Executive Branch are at issue, Congress has not arrogated to itself any authority of the Executive Branch, and Congress has not sought to limit any authority of the Executive Branch.

No House authorization needed for a specific subpoena
In all of the numerous decisions concerning congressional subpoenas for information from Executive Branch officials, including the President, there is not even a hint, much less a ruling, that the House (or Senate) is required to authorize a specific subpoena issued by one of its committees.

Minimal risk of distraction
[A]ny concern arising from the risk of distraction in the performance of the Lead Plaintiff's official duties is minimal in light of the Supreme Court's decision in *Clinton v. Jones*, and, in any event, far less substantial than the importance of achieving the legislative purposes identified by Congress. In *Jones*, the claimed distraction was that attending a deposition and being subjected to a civil trial would divert some of the President's time from performance of his official duties; in the pending case, there is no claim of any diversion of any time from official duties.

Demonstrably critical test applies only to privileged information
The amicus brief argues that subpoenaed information "not 'demonstrably critical' should be deemed insufficiently pertinent when directed at the President's records." Br. for Amicus United States at 15 (quoting *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (in banc)). The D.C. Circuit used

the phrase "demonstrably critical" as a standard for overcoming a claim of executive privilege. *See Nixon*, 498 F.2d at 727. President Nixon had asserted that tape recordings of his conversations with senior staff "cannot be made public consistent with the confidentiality essential to the functioning of the Office of the President." *Id*. (internal quotation marks omitted). In the pending appeal, no claim of executive privilege has been made, much less a claim that withholding the subpoenaed documents is "essential to the functioning of the Office of the President."

President is unlikely to succeed on the merits
Having considered Appellants' statutory and constitutional claims, we conclude that they have not shown a likelihood of success on any of them. In reaching this conclusion, we recognize that we are essentially ruling on the ultimate merits of Appellants' claims. But, as the Supreme Court has pointed out, "Adjudication of the merits is most appropriate if the injunction rests on a question of law and it is plain that the plaintiff cannot prevail." *MuFnaf v. Geren*, 553 U.S. 674, 691 (2008). That is the situation here.

Public interest outweighs private interest
The public interest in vindicating the Committees' constitutional authority is clear and substantial. It is the interest of two congressional committees, functioning under the authority of a resolution of the House of Representatives authorizing the subpoenas at issue, to obtain information on enforcement of anti-money-laundering/counter-financing of terrorism laws, terrorist financing, the movement of illicit funds through the global financial system including the real estate market, the scope of the Russian government's operations to influence the U.S. political process, and whether the Lead Plaintiff was vulnerable to foreign exploitation. The opposing interests of Appellants, suing only in their private capacity, are primarily their private interests in nondisclosure of financial documents concerning their businesses, rather than intimate details of someone's personal life or information the disclosure of which might, as in *Watkins*, 354 U.S. at 197–99, chill someone's freedom of expression.

We recognize, however, that the privacy interests supporting nondisclosure of documents reflecting financial transactions of the Lead Plaintiff should be accorded more significance than those of an ordinary citizen because the Lead Plaintiff is the President.

The Committees' interests in pursuing their constitutional legislative function is a far more significant public interest than whatever public interest inheres in avoiding the risk of a Chief Executive's distraction arising from disclosure of documents reflecting his private financial transactions.

Stay of seven days
[C]ompliance with the three subpoenas and the procedure to be implemented on remand is stayed for seven days to afford Appellants an opportunity to apply to the Supreme Court or a Justice thereof for an extension of the stay.

Livingston Partial Concurrence and Partial Dissent

Investigative authority derives from responsibility to legislate
When Congress conducts investigations in aid of legislation, its authority derives from its *responsibility to legislate*—to consider the enactment of new laws or the improvement of existing ones for the public good. Congress has no power to expose personal information for the sake of exposure[.]

Subpoenas are deeply troubling
The legislative subpoenas here are deeply troubling. Targeted at the President of the United States but issued to third parties, they seek voluminous financial information not only about the President personally, but his wife, his children, his grandchildren, his business organizations, and his business associates. Collectively, the subpoenas seek personal and business banking records stretching back nearly a decade … and they make no distinction between business and personal affairs, nor consistently between large and small receipts and expenditures. … [N]either House committee seeking this information will commit to treating any portion of it as confidential, irrespective of any public interest in disclosure.

Areas of agreement
The majority and I are in agreement on several points. First, we agree that the Right to Financial Privacy Act ("RFPA"), 12 U.S.C. §§ 3401–3423, does not apply to Congress because, as the majority correctly concludes, Congress is not a "Government authority" within the meaning of that statute. Maj. Op. at 24–33. We likewise agree that 26 U.S.C. § 6103 of the Internal Revenue Code does not pose an obstacle to Deutsche Bank AG's disclosure of tax returns in its possession in response to the Committees' subpoenas. Id. at 34–44. Accordingly, I concur that, as to the statutory arguments presented by the Plaintiffs, they have raised no serious question suggesting that the House subpoenas may not be enforced.

Issue of first impression
[T]he question before us appears not only important (as the majority acknowledges) but of first impression: the parties are unaware of any Congress before this one in which a standing or permanent select committee of the House has issued a third-party subpoena for documents targeting a President's personal information solely on the rationale that this information is "in aid of legislation." … In such a context, "experience admonishes us to tread warily."

More exacting review
I agree with the majority that our review of the denial of a preliminary injunction is "appropriately more exacting where the action sought to be enjoined concerns the President . . . in view of '[t]he high respect that is owed to the office of the Chief Executive[.]'"

Areas of disagreement

We disagree, however, as to the preliminary injunction standard to be applied. In my view, a preliminary injunction may issue in a case of this sort when a movant has demonstrated sufficiently serious questions going to the merits to make them a fair ground for litigation, plus a balance of hardships tipping decidedly in that party's favor, that the public interest favors an injunction, and that the movant, as here, will otherwise suffer irreparable harm.

I respectfully disagree with the majority's determination that the Plaintiffs' constitutional arguments and those raised by the United States as amicus curiae are insubstantial—not sufficiently serious for closer review.

I cannot accept the majority's conclusions that "this case does not concern separation of powers," id. at 89, and that there is "minimal at best" risk of distraction to this and future Presidents from legislative subpoenas of this sort[.]

Nor do I agree with the majority's determination substantially to affirm the judgment and order compliance with these subpoenas. The majority itself recognizes that these broad subpoenas cannot be enforced *precisely* as drafted because they call for the production of material that may either bear "an attenuated relationship" to *any* legislative purpose or that "might [even] reveal sensitive personal details having *no* relationship to the Committees' legislative purposes." Maj. Op. at 84 (emphasis added). The majority remands for a culling process pursuant to which information disclosing, for instance, the payment of medical expenses would be exempt from disclosure. *Id.* The majority's limited culling, however, is tightly restricted to specified categories of information, leaving out almost all "business-related financial documents" from any review by the district court, *id.*, irrespective of any threatened harm from disclosure, and potentially leaving out substantial *personal* information as well. Indeed, given the tight limitations imposed by the majority on the district court's review, even sensitive records reflecting personal matters unrelated to any conceivable legislative purpose could potentially be disclosed.

I agree with the majority that remand is necessary. But we disagree as to the reasons why. I conclude that the present record is insufficient to support the majority's determination that the voluminous records of Plaintiffs sought from Deutsche Bank AG ("Deutsche Bank") and Capital One Financial Corporation ("Capital One") should at this time be produced.

Purpose of remand

I would remand, directing the district court promptly to implement a procedure by which the Plaintiffs may lodge their objections to disclosure with regard to specific portions of the assembled material and so that the Committees can clearly articulate, also with regard to specific categories of information, the legislative purpose that supports disclosure *and* the pertinence of such information to that purpose. The objective of this remand is the creation of a record that is sufficient

more closely to examine the serious questions that the Plaintiffs have raised and to determine where the balance of hardships lies with regard to an injunction in this case, and concerning particular categories of information. … Only on the basis of this fuller record would I determine the question whether a preliminary injunction should have issued, and with regard to what portions of the records sought.

Separation of powers concerns

The majority suggests that these subpoenas do not implicate separation of powers because, *inter alia*, President Trump is not suing in his official capacity. Maj. Op. at 70. I disagree. As in *Rumely*, "we would have to be that 'blind' Court . . . that does not see what '(a)ll others can see and understand,'" not to recognize that these subpoenas target the President in seeking personal and business financial records of not only the President himself, but his three oldest children and members of their immediate family, plus the records of the Trump Organization and a litany of organizations with which the President is affiliated. … To be sure, Presidents are not immune from legislative subpoenas. But as I explain below, this dragnet around the President implicates separation-of-powers concerns for this and future Presidents, supporting a remand as to all the Plaintiffs here.

Ill-conceived Congressional inquiries

Ill-conceived inquiries by congressional committees "can lead to ruthless exposure of private lives in order to gather data" that is unrelated and unhelpful to the performance of legislative tasks. *Watkins*, 354 U.S. at 205. And the "arduous and delicate task" of courts seeking to accommodate "the congressional need for particular information" with the individual's "personal interest in privacy," *id*. at 198, does not grow easier when Congress seeks a President's personal information. Indeed, given the "unique constitutional position of the President" in our scheme of government, see *Franklin v. Massachusetts*, 505 U.S. 788, 800 (1992), and the grave importance of diligent and fearless discharge of the President's public duties, our task grows more difficult.

Standing committees versus select committees or impeachment inquiry

Here, the parties have not identified, and my own search has failed to unearth, *any* previous example, in any previous Congress, of a standing or permanent select committee of the House of Representatives or the Senate using compulsory process to obtain documents containing a President's personal information from a third party in aid of legislation. Trump Br. at 14; Tr. of Oral Arg. at 34:24–35:4. Historical practice instead suggests that, on the few past occasions on which a President's personal documents have been subpoenaed from third parties, such requests have emanated either from a special committee established and authorized to pursue a specific, limited investigation or from a committee proceeding under the impeachment power.

Distinguishable from Vance grand jury subpoena

This Court's recent decision in *Trump v. Vance*, 941 F.3d 631 (2d. Cir. 2019), is not to the contrary. The Vance panel explicitly relied on the "long-settled" amenability of presidents to judicial process, and in particular to subpoenas issued as part of a criminal prosecution, to inform its holding that the state grand jury subpoena to a third-party custodian of the President's tax returns at issue in that case was lawful. See *id*. at 640 (discussing the historical practice of ordering presidents to comply with grand jury subpoenas). Here, there is no such longstanding practice, and the subpoenas in question were not issued by a grand jury as part of a criminal investigation.

Potential for distraction

The second flaw in the majority's analysis lies in its assumption that third-party subpoenas of this sort pose, at best, "minimal" risk of distraction to this and future Presidents. Maj. Op. at 90. Contrary to the majority's suggestion, it is not at all difficult to conceive how standing committees exercising the authority to issue third-party subpoenas in aid of legislation might significantly burden presidents with myriad inquiries into their business, personal, and family affairs. … And the risk of undue distraction from ill-conceived inquiries might be particularly acute today, in an era in which (as the Supreme Court and individual Justices have repeatedly acknowledged) digital technologies have lodged an increasingly large fraction of even our most intimate information in third-party hands.

No Presidential immunity to subpoenas

To be clear, this is not to suggest that a President is immune from legislative subpoenas into personal matters—not at all. But as the D.C. Circuit recognized in *Trump v. Mazars* (while concluding that the House Committee on Oversight and Reform possessed authority to issue a legislative subpoena to President Trump's accounting firm), "separation-of-powers concerns still linger in the air" with regard to such subpoenas.

Separation of powers considerations

[C]ourts must not only undertake the "arduous and delicate task" of "[a]ccommodat[ing] . . . the congressional need for particular information with the individual and personal interest in privacy," Maj. Op. at 51 (quoting *Watkins*, 354 U.S. at 198). They must also take on the equally sensitive task of ensuring that Congress, in seeking the President's personal information in aid of legislation, has employed "procedures which prevent the separation of power from responsibility," *Watkins*, 354 U.S. at 215 (discussing such procedures in the context of a threat to individual rights from congressional investigations), and which ensure due consideration to the separation-of-powers concerns that the Supreme Court identified and deemed essential for *judicial* respect in *Jones*.

Case study involving the President
This Committee seeks a universe of financial records sufficient to reconstruct over a decade of the President's business and personal affairs, not in connection with the consideration of legislation involving the Chief Executive, but because the President, his family, and his businesses present a "*useful case study*," according to the Committee, for an inquiry into the lending practices of *institutions such as Deutsche Bank and Capital One.* … But the rationale proffered for these subpoenas of the House Financial Services Committee falls far short of demonstrating a clear reason why a congressional investigation aimed generally at closing regulatory loopholes in the banking system need focus on over a decade of financial information regarding this President, his family, and his business affairs. Nor does the proffered rationale reveal how the broad purposes pursued by the Committee are consistent with the granular detail that these subpoenas seek. … [T]he regular issuance of third-party legislative subpoenas by single committees of one House of Congress targeting a President's personal information would be something new, potentially impairing public perceptions of the legislative branch by fueling perceptions that standing committees are engaged, not in legislating, but in opposition research. More relevant here, such investigative practices by Congress, undertaken "more casually and less responsibly" than is the constitutional ideal, see *Rumely*, 345 U.S. at 46, pose a *serious* threat to "presidential autonomy and independence[.]"

Motive versus legislative purpose
The majority is correct, moreover, that once presented with adequate evidence of legislative authorization and purposes, it is not the province of courts to inquire into legislators' motives, *see* Maj. Op. at 50–51, and that "motives alone would not vitiate an investigation which had been instituted by a House of Congress if that assembly's legislative purpose is being served." *Watkins*, 354 U.S. at 200. At the same time, as the majority also affirms, the record must provide "sufficient evidence of legislative authorization and purposes to enable meaningful judicial review."

Questions about authorization of subpoenas
As to both the House Financial Services and Intelligence Committee subpoenas, there is an open question as to whether these subpoenas have been authorized by the House of Representatives in a manner permitting this Court to determine whether they are "in furtherance of . . . a legitimate task of the Congress." … House Resolution 507 falls far short of a specific "authorizing resolution" issued to make clear that a designated committee is to undertake an investigation on a particular subject within its domain.

Broadly worded authorizing resolution may provide too much latitude
To be sure, *McGrain* found sufficient a resolution that did not "in terms avow that it [was] intended to be in aid of legislation," on the theory that "the subject-matter was such that [a] presumption should be indulged" that legislating "was the real object." 273 U.S. at 177–78. But in a context like this, presenting serious

constitutional concerns, courts "have adopted the policy of construing . . . resolutions . . . narrowly, in order to obviate the necessity of passing on serious constitutional questions." *Tobin*, 306 F.2d at 274–75. And this resolution on its face discusses none of the subpoenas here, nor even the work of the committees from which they issued. Instead, House Resolution 507 authorizes *any* subpoena, by any standing or permanent select committee, already issued *or in the future to be issued*, so long as it concerns the President, his family, or his business entities and organizations[.] … By purporting to authorize third-party subpoenas for any and all past and future investigations into the President's personal and official business, Resolution 507 would appear to run directly into the primary concern in *Watkins* that "[b]roadly drafted and loosely worded" resolutions can "leave tremendous latitude to the discretion of investigators," 354 U.S. at 201, and thus permit committees "in essence, to define [their] own authority," *id.* at 205.

Resolution 507 itself, given its retrospective and prospective nature, and its purported authorization of any and all third-party committee subpoenas seeking not only official, but personal information about the President, his family, and his businesses, presents a serious question as to whether the House has discharged its "responsibility . . . in the first instance, to insure that compulsory process is used only in furtherance of a legislative purpose."

Preliminary injunction standard applied

I conclude we are bound to (and should) undertake our usual approach: namely, to consider the Plaintiffs' showing as to the merits, balance of hardships (merged here with the public interest inquiry, *see Nken v. Holder*, 556 U.S. 418, 435 (2009)), and irreparable harm and determine whether an injunction is warranted under either the likelihood of success or serious questions standard. As set forth already, moreover, these subpoenas do, in fact, present serious questions implicating not only the investigative authority of these two House committees, but the separation of powers between Congress and the Presidency.

Assessing balance of hardships

Having determined that Plaintiffs have raised serious questions as to the merits, in the usual case, the next step would be to assess the balance of hardships. … [I] would instead remand in full, directing that the district court assist in the development of the record regarding the legislative purposes, pertinence, privacy, and separation-of-powers issues at stake in this case. … A fuller record would permit a more informed calculus regarding balance of hardships and would further clarify the stakes as to the serious questions that the Plaintiffs have already raised.

Ethics disclosures v. subpoenas

The majority argues that any hardship from business disclosures is offset in this case by the fact that Presidents already "expose for public scrutiny a considerable amount of personal financial information pursuant to the financial

disclosure requirement of the Ethics in Government Act[.] … In making disclosures pursuant to this Act, a President complies with a statute that presumptively reflects a democratically enacted consensus regarding the financial disclosures that a Chief Executive should be required to make. These House subpoenas, by contrast, require "considerably more financial information," as the majority concedes, but themselves raise substantial questions as to whether they are supported by "sufficient evidence of legislative authorization and purposes to enable meaningful judicial review." Maj. Op. at 55, 102. And as Judge Katsas suggested in dissent from the denial of rehearing in banc in *Mazars*, the scope of required disclosure "is determined . . . by the whim of Congress—the President's constitutional rival for political power—or even, as in this case, by one committee of one House of Congress."

Adequate record

I would withhold decision as to balance of hardships and remand to permit the district court and the parties the opportunity to provide this Court with an adequate record regarding the legislative purpose, pertinence, privacy and separation of powers issues in this case.