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May 8, 2020

Scott S. Harris
Clerk
Supreme Court of the United States
One First Street NE
Washington, D.C. 20543

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

Dear Mr. Harris:

This letter responds to the Court's order of April 27, 2020. These cases are justiciable. Indeed, no party or amicus has questioned that the federal courts have an appropriate role in resolving them.

These cases involve challenges by Petitioners—President Trump "solely in his capacity as a private citizen," JA33a, 114a, and related individuals and entities—to duly authorized subpoenas issued by Respondents to third-party banks and an accounting firm in connection with the Committees' ongoing investigations. *See* JA109a-127a (Complaint in *Deutsche Bank*); JA30a-49a (Complaint in *Mazars*); *see generally* Resp. Br. 17-35.

The House Committee on Financial Services issued subpoenas to eleven financial institutions as part of an industry-wide investigation into financial institutions' compliance with banking laws to determine whether current law and banking practices adequately guard against foreign money laundering and high-risk loans. Petitioners challenge subpoenas to Deutsche Bank and Capital One.

The House Permanent Select Committee on Intelligence also issued a subpoena to Deutsche Bank as part of its investigation of foreign influence, including financial leverage, in our domestic political process. That investigation intersects in important respects with the Financial Services Committee's investigation of the banking industry. The subpoenas from these two Committees seek not only Petitioners' records, but also internal records of the subpoena-recipient banks.

The House Committee on Oversight and Reform issued a subpoena to Mazars USA, LLP, as part of an investigation of Executive Branch ethics and conflicts of interest, Presidential financial disclosures, federal-lease management, and possible violations of the Emoluments Clauses to determine the adequacy of existing laws and perform related agency oversight.

In both cases, the district courts declined to enjoin the subpoenas and the courts of appeals affirmed, correctly applying the rules established in this Court's numerous cases involving challenges to Congressional subpoenas. Petitioners' central argument was that the subpoenas had impermissible purposes under this Court's case law. In each case, Respondents argued—and the courts agreed—that the subpoenas, evaluated under that established case law, served legitimate legislative purposes.

The Second Circuit concluded that the subpoenas "easily pass[ed]" this Court's standards for valid Congressional subpoenas and were "reasonably framed to aid the Committees in fulfilling their responsibilities to conduct oversight as to the effectiveness of agencies administering statutes within the Committees' jurisdiction and to obtain information appropriate for consideration of the need for new legislation." JA307a.

The D.C. Circuit rejected Petitioners' argument that the subpoenas had an illegitimate law-enforcement purpose, Pet. App. 32a-40a, could not result in valid legislation, Pet. App. 41a-52a, and did not seek relevant information, Pet. App. 57a-62a. It "conclude[d] that the subpoena issued by the Committee to Mazars is valid and enforceable." Pet. App. 76a.

No one urged the courts below to refrain from resolving the lawsuits that President Trump and related persons and entities had brought. The Committees and President Trump had good reasons for agreeing that the courts should resolve these disputes. Pursuant to this Court's April 27 Order, we now address the factors discussed in this Court's cases applying the political question doctrine and show that they do not apply here.

1. The political question doctrine constitutes a "narrow exception" to the "rule" that "the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 194 (2012) (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821)). "[T]he presence of constitutional issues with significant political overtones does not automatically invoke the political question doctrine." *INS v. Chadha*, 462 U.S. 919, 942-43 (1983). Instead, unless at least one of six established features is "inextricable" from a case, "there should be no dismissal for non-justiciability on the ground of a political question's presence." *Baker v. Carr*, 369 U.S. 186, 217 (1962); *accord U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 456 (1992).

a. We address the six *Baker* factors "in descending order" of their "importance." *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality opinion).[1] None of them is "inextricable" from a decision in these cases. *Baker*, 369 U.S. at 217.

First, no "textually demonstrable constitutional commitment of [an] issue to a coordinate political department" prevents adjudication of these cases. *Baker*, 369 U.S. at 217. These cases ask the Court to rule on Congressional committees' "authority to issue subpoenas," Pet. Br. i—a question that this Court has decided on many prior occasions.[2] As those prior adjudications confirm, the House's power to issue a subpoena "may be examined and determined by this court." *Kilbourn*, 103 U.S. at 199. This Court has never questioned its authority to make such a determination in the 140 years since it decided *Kilbourn*.

Nor is there, even arguably, a textual commitment of any issue in the present cases to the Executive Branch. This Court has enforced a subpoena addressed directly to the President by a Special Prosecutor within the Department of Justice. *United States v. Nixon*, 418 U.S. 683 (1974). This Court has allowed even a private citizen to bring a civil suit against a sitting President and seek discovery from him. *Clinton v. Jones*, 520 U.S. 681 (1997). Those cases confirm that the Constitution does not textually confer authority on the President to immunize himself from subpoenas or other legal process to which he objects. Indeed, the Framers made a deliberate decision *not* to confer any such immunity on the President, in marked contrast to the immunities conferred on Members of Congress by the Speech or Debate Clause. Resp. Br. 60-62.

Second, this Court's considerable case law on the validity of legislative subpoenas likewise shows that "judicially discoverable and manageable standards" exist. *Baker*, 369 U.S. at 217. That case law establishes clear rules for assessing Congressional committees' power to issue subpoenas—rules that "control [the] resolution of this case." Pet. App. 20a.

Specifically, this Court has set forth a simple rule that distinguishes *Kilbourn*, the only case in which this Court has held that a Congressional inquiry exceeded its constitutional limits, from all subsequent decisions: Congressional bodies may not, as in *Kilbourn*, issue subpoenas *solely* for a non-legislative purpose, but may issue subpoenas "related to a valid legislative purpose." *Barenblatt*, 360 U.S. at 127. Congressional subpoenas are valid if they "concern[] a subject on which 'legislation could be had.'" *Eastland*, 421 U.S. at 506 (quoting *McGrain*, 273 U.S. at 177); *see also id.* at 504 n.15. *See*

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[1] "[I]t will be the rare case in which *Baker*'s final [three] factors alone render a case nonjusticiable." *Zivotofsky*, 566 U.S. at 207 (Sotomayor, J., concurring).

[2] *E.g.*, *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 506-07 (1975); *Wilkinson v. United States*, 365 U.S. 399, 409-10 (1961); *Barenblatt v. United States*, 360 U.S. 109, 129-30 (1959); *Watkins v. United States*, 354 U.S. 178, 182 (1957); *Sinclair v. United States*, 279 U.S. 263, 290-91 (1929); *McGrain v. Daugherty*, 273 U.S. 135, 154 (1927); *Kilbourn v. Thompson*, 103 U.S. 168, 190-95 (1880).

generally Br. of Former Senior Department of Justice Officials 4-5 (discussing consistent acceptance of this rule by all three branches of government); Br. of Former House General Counsels and Former Congressional Staff 4-5.

The core dispute between Petitioners and Respondents pertains to the validity of the subpoenas, not whether such a determination may be made. Time and again, this Court has addressed the merits of cases in which the purposes of Congressional subpoenas were disputed.[3] The Court can do so because a subpoena's validity does not turn on a prohibited assessment of legislators' subjective purposes but, instead, on an objective test: whether the subpoena "concern[s] a subject on which 'legislation could be had.'" *Eastland*, 421 U.S. at 506 (quoting *McGrain*, 273 U.S. at 177); *see* Resp. Br. 43-44, 51-53. In other words, the inquiry is whether the subpoena "relate[s] to a valid legislative purpose." *Barenblatt*, 360 U.S. at 127.

Resolution of such controversies is "manageable"—as this Court's cases show—because, among other things, the Court will not entertain claims of "dishonest or vindictive motives," *Tenney v. Brandhove*, 341 U.S. 367, 378 (1951); *see also Watkins*, 354 U.S. at 200 ("motives" do "not vitiate an investigation which had been instituted by a House of Congress if that assembly's legislative purpose is being served"), or second-guess the Committees' purposes, *Wilkinson*, 365 U.S. at 412; *see* Resp. Br. 43-44, 51-53; *see also Eastland*, 421 U.S. at 508-11.

Third, deciding these cases does not require "an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217. Evaluating the validity of subpoenas is a quintessential judicial task. *E.g.*, Fed. R. Civ. P. 45(d); Fed. R. Crim. P. 17(c); *Nixon*, 418 U.S. 683; *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974) (en banc). It bears no resemblance to such nonjudicial tasks as the recognition of foreign governments, *see Baker*, 369 U.S. at 212, or determining the best "methods of training, equipping, and controlling military forces," *Gilligan v. Morgan*, 413 U.S. 1, 8 (1973).

Fourth, the Court can resolve this case "without expressing [any] lack of the respect due coordinate branches of government." *Baker*, 369 U.S. at 217. It does no disrespect to the Executive Branch to adjudicate a lawsuit, such as these cases, *brought by* the Chief Executive (even if "solely in his capacity as a private citizen," JA33a, 114a). Furthermore, this Court has reviewed (and upheld) the issuance of subpoenas or other compulsory process to which Presidents have objected. *See Clinton*, 520 U.S. 681 (civil summons); *Nixon*, 418 U.S. 683 (criminal subpoena); *cf. Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425 (1977) (upholding against separation-of-powers challenge statute

[3] *E.g.*, *McGrain*, 273 U.S. at 177-79; *Sinclair*, 279 U.S. at 295; *Watkins*, 354 U.S. at 199-200; *Barenblatt*, 360 U.S. at 132; *Wilkinson*, 365 U.S. at 411-12.

instructing Administrator of the General Services Administration to take custody of Presidential records).

Moreover, the circumstances of those earlier cases more directly implicated the President's office than these cases do—for example, they challenged actions by the President in an official capacity or subjected the President to civil suit for damages and potential discovery issued at the request of a single private citizen. Yet this Court each time ruled against the President on the merits of his immunity defense, not on nonjusticiability grounds.

Although it does not go to the justiciability of these cases, it would evince a "lack of the respect due coordinate branches of government," *Baker*, 369 U.S. at 217, if this Court were required (as Petitioners contend) to determine a subpoena's "primary purpose" or "real object," Pet. Br. 41; Reply Br. 15. That principle provides important context for the scope of the Court's inquiry and is why—as discussed above—this Court has consistently refused to second-guess Congressional motives.

"So long as Congress acts in pursuance of its constitutional power, the *Judiciary lacks authority* to intervene on the basis of the motives which spurred the exercise of that power." *Barenblatt*, 360 U.S. at 132 (emphasis added). It is, in fact, "not consonant with our scheme of government for a court to inquire into the motives of legislators." *Tenney*, 341 U.S. at 377. "In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed." *Id.* at 378. But, this Court has said, "[c]ourts are not the place for such controversies." *Id.*

Even if Petitioners urge a nonjusticiable inquiry on the Court, these cases remain justiciable. The respect owed a coordinate branch may "relate to the merits of the controversy rather than to [the courts'] power to resolve it." *Montana*, 503 U.S. at 459. Thus, just as it has done over and over when faced with such nonjusticiable contentions, the Court should rule on the merits in these cases without "accept[ing] [Petitioners'] contention[s]" about legislative motive. *Barenblatt*, 360 U.S. at 132.[4]

Fifth, there is no "unusual need for unquestioning adherence to a political decision already made." *Baker*, 369 U.S. at 217. That factor may be relevant in such situations as when the President has "called out the militia," *Luther v. Borden*, 48 U.S. (7 How.) 1, 43 (1849), or terminated a treaty, *Goldwater v. Carter*, 444 U.S. 996, 1002 (1979) (plurality opinion); *see also Terlinden v. Ames*, 184 U.S. 270, 285 (1902). Although the "wisdom of congressional approach or methodology is not open to judicial veto,"

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[4] *See, e.g.*, *McGrain*, 273 U.S. at 177-79; *Sinclair*, 279 U.S. at 295; *Tenney*, 341 U.S. at 377-78; *Watkins*, 354 U.S. at 199-200; *Wilkinson*, 365 U.S. at 411-12; *Eastland*, 421 U.S. at 508. This approach is consistent with the one courts take in dealing with other nonjusticiable inquiries: courts, for example, will not refrain from applying a statute just because some party seeking to escape its application raises the nonjusticiable issue of whether an enrolled bill "complied with all requisite formalities." *Baker*, 369 U.S. at 214 (citing *Field v. Clark*, 143 U.S. 649 (1892)).

Eastland, 421 U.S. at 509, the Committees do not dispute that their authority to issue the subpoenas "may be examined and determined by this court." *Kilbourn*, 103 U.S. at 199.

Finally, no "potentiality of embarrassment from multifarious pronouncements by various departments on one question" would result from deciding these cases. *Baker*, 369 U.S. at 217. To the contrary, this Court's decision would *resolve* such multifarious pronouncements. *Compare* Resp. Br. (asserting that the subpoenas are lawful), *with* DOJ Br. (asserting that they are not). As this Court has observed, "not every matter touching on politics is a political question." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 229 (1986). "Resolution of litigation challenging the constitutional authority of one of the three branches cannot be evaded by courts because the issues have political implications[.]" *Chadha*, 462 U.S. at 943 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).

b. Even if one believes that "the political-question doctrine 'derives in large part from prudential concerns,'" *Zivotofsky*, 566 U.S. at 212 (Breyer, J. dissenting) (quoting *Walter Nixon v. United States*, 506 U.S. 224, 253 (1993) (Souter, J., concurring in judgment)), such considerations still cut in favor of resolving these cases under the applicable, well-settled rules.

The Committees need to be able to enforce their subpoenas. In *Eastland*, 421 U.S. at 511, this Court lamented the delay caused by litigation over a subpoena. Accordingly, it is in the Committees' interest for this Court to reach the merits now, rather than to let doubts as to the subpoenas' validity linger (potentially for resolution in some later proceeding).

It is also in the interest of the Executive Branch for this Court to reach the merits here. The courts should be available to provide the Executive Branch safeguards, should it ever need them. *See, e.g.*, *United States v. Am. Tel. & Tel. Co.*, 567 F.2d 121, 131 (D.C. Cir. 1977) (considering Executive's lawsuit to enjoin compliance with a Congressional subpoena for documents whose disclosure might "cause grave injury to the national security").

Third-party subpoena recipients would also benefit from judicial resolution of the Executive's and Congress's competing assertions about the subpoenas' validity. Without such resolution, the recipients face what Petitioners have called "an unfair choice: ignore the subpoena and risk contempt of Congress"—which may entail criminal sanction, *see* 2 U.S.C. § 192, or other coercive measures, *see McGrain*, 273 U.S. at 153-54—"or comply with the subpoena and risk liability to [Petitioners] if the subpoena is invalid or unenforceable." JA46a.

Both horns of that dilemma imply some eventual judicial determination as to the subpoenas' validity—whether in a criminal contempt prosecution, a habeas proceeding,

or a civil damages lawsuit. There is no point in exposing third parties to this risk or subjecting this aspect of "the political life of the country to months, or perhaps years, of chaos," *Walter Nixon*, 506 U.S. at 236, particularly if judicial resolution will quite likely take place down the road anyhow. "The political question doctrine, a tool for maintenance of governmental order, [should] not be so applied as to promote only disorder." *Baker*, 369 U.S. at 215.

c. Petitioners' and the Solicitor General's repeated trumpeting of the "implied" nature of the Congressional subpoena power makes no difference to the justiciability (or any other) analysis. *See* Pet. Br. 24-27, 32-34; Reply Br. 4-6; DOJ Br. 10, 11, 13, 17, 19. This Court has been reviewing challenges to particular exercises of Congress's investigative power since the 19th century and has stressed the importance of the Congressional power of inquiry, never suggesting that it should be narrowly construed. To the contrary, this Court's cases are replete with affirmations of the breadth of that power. *See* Resp. Br. 42. *Cf. Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821) (concerning Congress's inherent power to imprison a non-Member for attempted bribery).

Many of the most important and well-established powers assigned to each Branch by the Constitution, including the very power Petitioners invoke here—judicial review—are not made specific in the Constitution's text. *See Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1492-93, 1498-99 (2019) ("There are many other constitutional doctrines that are not spelled out in the Constitution but are nevertheless implicit in its structure and supported by historical practice—including, for example, judicial review[.]"); *see also McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) ("[W]e must never forget, that it is a *constitution* we are expounding.").

Nevertheless, the fact that the Congressional subpoena power is derived from well-settled English and colonial practice, endorsed by the Framers and by this Court, does help to demonstrate why the Court has always assumed that it can and should assess the validity of Congressional subpoenas, using appropriately deferential rules of decision. As this Court has held, history makes amply clear that the legislative powers "herein granted" by Article I "include" the power to investigate. *McGrain*, 273 U.S. at 175.

2. A decision by this Court holding that a subpoena controversy involving Congressional committees and the President is not subject to judicial resolution would be a mistake. But, if this Court has concerns about deciding the merits of this particular dispute, there is a way out, short of a major pronouncement on justiciability: the Court could dismiss the writs as improvidently granted, leaving in place the judgments of the courts of appeals.

As Respondents pointed out in the brief in opposition to the certiorari petition in No. 19-715 and in the opposition to the stay motion in No. 19-760, these cases at their core present only fact-bound disputes about the conformity of particular

subpoenas with this Court's well-settled case law governing Congressional subpoenas. Briefing on the merits now confirms that the Executive Branch's only institutional concern is the "risk[]," DOJ Br. 25, that Congress might one day issue harassing subpoenas. The Solicitor General does not claim that the feared risk has materialized. If such a risk is a real concern, then this Court can address it if it ever actually arises.

* * * * *

No aspect of "the political question doctrine or related justiciability principles," Apr. 27 Order, precludes the Court from reaching the merits of the questions on which it granted certiorari. Unless the Court chooses to dismiss the writs as improvidently granted, it should affirm the judgments below.

Sincerely,

/s/ Douglas N. Letter
Douglas N. Letter
General Counsel

cc: Counsel on attached service list

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