Tax & Financial Records Case

Deutsche Bank-Capital One Case
Key Excerpts from 2020 Supreme Court Opinion

Prepared by Elise Bean
Levin Center at Wayne Law

On July 9, 2020, in a 7-2 decision, the Supreme Court dismissed the argument that presidents are immune to congressional subpoenas and issued a new standard of review for courts evaluating such subpoenas. The Supreme Court vacated the D.C. and Second Circuit opinions in Trump v. Mazars USA and Trump v. Deutsche Bank AG, and remanded both cases to their respective district courts for further proceedings. *Trump v. Mazars USA, LLP*, 591 U.S. __ (2020). Here are key excerpts from the panel's 50-page opinion, including two dissents; each excerpt consists of a direct quotation taken from the text of the opinion or dissent, with no changes in punctuation but with footnotes omitted.

Congress has authority to issue subpoenas
We have held that the House has authority under the Constitution to issue subpoenas to assist it in carrying out its legislative responsibilities.

Novel issue presented
We have never addressed a congressional subpoena for the President's information.

Interbranch issue
Here the President's information is sought not by prosecutors or private parties in connection with a particular judicial proceeding, but by committees of Congress that have set forth broad legislative objectives. Congress and the President—the two political branches established by the Constitution—have an ongoing relationship that the Framers intended to feature both rivalry and reciprocity. … That distinctive aspect necessarily informs our analysis of the question before us.

No executive privilege issue
Petitioners—the President in his personal capacity, along with his children and affiliated businesses—filed two suits challenging the subpoenas. … In both cases, petitioners contended that the subpoenas lacked a legitimate legislative purpose and violated the separation of powers. The President did not, however, resist the subpoenas by arguing that any of the requested records were protected by executive privilege.

Historical precedent
Historically, disputes over congressional demands for presidential documents have not ended up in court. Instead, they have been hashed out in the "hurly-burly, the give-and-take of the political process between the legislative and the executive." … That practice began with George Washington and the early Congress. … Since this was the first such request from Congress, President Washington called a Cabinet meeting, wishing to take care that his response "be rightly conducted" because it could "become a precedent." 1 Writings of Thomas Jefferson 189 (P. Ford ed. 1892). The meeting, attended by the likes of Alexander Hamilton, Thomas Jefferson, Edmund Randolph, and Henry Knox, ended with the Cabinet of "one mind": The House had authority to "institute inquiries" and "call for papers" but the President could "exercise a discretion" over disclosures, "communicat[ing] such papers as the public good would permit" and "refus[ing]" the rest. … [T]he House later narrowed its request and the documents were supplied without recourse to the courts. … Jefferson, once he became President, followed Washington's precedent. … Ever since, congressional demands for the President's information have been resolved by the political branches without involving this Court. The Reagan and Clinton presidencies provide two modern examples[.]

Significant departure from historical practice
Congress and the President maintained this tradition of negotiation and compromise—without the involvement of this Court—until the present dispute. Indeed, from President Washington until now, we have never considered a dispute over a congressional subpoena for the President's records. And, according to the parties, the appellate courts have addressed such a subpoena only once, when a Senate committee subpoenaed President Nixon during the Watergate scandal. See *infra*, at 13 (discussing *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F. 2d 725 (CADC 1974) (en banc)). In that case, the court refused to enforce the subpoena, and the Senate did not seek review by this Court. This dispute therefore represents a significant departure from historical practice.

Justiciable controversy; duty of care
Although the parties agree that this particular controversy is justiciable, we recognize that it is the first of its kind to reach this Court; that disputes of this sort can raise important issues concerning relations between the branches; that related disputes involving congressional efforts to seek official Executive Branch information recur on a regular basis, including in the context of deeply partisan controversy; and that Congress and the Executive have nonetheless managed for over two centuries to resolve such disputes among themselves without the benefit of guidance from us. Such longstanding practice " 'is a consideration of great weight' " in cases concerning "the allocation of power between [the] two elected branches of Government," and it imposes on us a duty of care to ensure that we not

needlessly disturb "the compromises and working arrangements that [those] branches . . . themselves have reached."

Congressional power to investigate
Congress has no enumerated constitutional power to conduct investigations or issue subpoenas, but we have held that each House has power "to secure needed information" in order to legislate. *McGrain v. Daugherty*, 273 U. S. 135, 161 (1927). This "power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." *Id*., at 174. Without information, Congress would be shooting in the dark, unable to legislate "wisely or effectively." *Id*., at 175. The congressional power to obtain information is "broad" and "indispensable." *Watkins v. United States*, 354 U. S. 178, 187, 215 (1957). It encompasses inquiries into the administration of existing laws, studies of proposed laws, and "surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them." *Id*., at 187.

Limits on congressional investigations
Because this power is "justified solely as an adjunct to the legislative process," it is subject to several limitations. *Id.*, at 197. Most importantly, a congressional subpoena is valid only if it is "related to, and in furtherance of, a legitimate task of the Congress." *Id.*, at 187. The subpoena must serve a "valid legislative purpose," *Quinn v. United States*, 349 U.S. 155, 161 (1955); it must "concern[] a subject on which legislation 'could be had,' " *Eastland v. United States Servicemen's Fund*, 421 U. S. 491, 506 (1975) (quoting *McGrain*, 273 U. S., at 177). Furthermore, Congress may not issue a subpoena for the purpose of "law enforcement," because "those powers are assigned under our Constitution to the Executive and the Judiciary." *Quinn*, 349 U. S., at 161. Thus Congress may not use subpoenas to "try" someone "before [a] committee for any crime or wrongdoing." *McGrain*, 273 U. S., at 179. Congress has no " 'general' power to inquire into private affairs and compel disclosures," *id*., at 173–174, and "there is no congressional power to expose for the sake of exposure," *Watkins*, 354 U. S., at 200. "Investigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible." *Id.*, at 187.

Subpoena recipients retain their constitutional rights
[R]ecipients of legislative subpoenas retain their constitutional rights throughout the course of an investigation.

Subpoena recipients retain common law privileges
[R]ecipients have long been understood to retain common law and constitutional privileges with respect to certain materials, such as attorney-client communications and governmental communications protected by executive privilege. See, *e.g.,* Congressional Research Service, *supra*, at 16–18 (attorney-client privilege); *Senate Select Committee*, 498 F. 2d, at 727, 730–731 (executive privilege).

Demanding standards do not apply to these congressional subpoenas
Quoting *Nixon*, the President asserts that the House must establish a "demonstrated, specific need" for the financial information, just as the Watergate special prosecutor was required to do in order to obtain the tapes. 418 U. S., at 713. And drawing on *Senate Select Committee*—

the D. C. Circuit case refusing to enforce the Senate subpoena for the tapes—the President and the Solicitor General argue that the House must show that the financial information is "demonstrably critical" to its legislative purpose. 498 F. 2d, at 731. We disagree that these demanding standards apply here.

Executive privilege protections do not apply to nonprivileged, private information
Unlike the cases before us, *Nixon* and *Senate Select Committee* involved Oval Office communications over which the President asserted executive privilege. That privilege safeguards the public interest in candid, confidential deliberations within the Executive Branch; it is "fundamental to the operation of Government." *Nixon*, 418 U. S., at 708. As a result, information subject to executive privilege deserves "the greatest protection consistent with the fair administration of justice." *Id.*, at 715. We decline to transplant that protection root and branch to cases involving nonprivileged, private information, which by definition does not implicate sensitive Executive Branch deliberations.

Demanding standards would risk seriously impeding Congress
The standards proposed by the President and the Solicitor General—if applied outside the context of privileged information—would risk seriously impeding Congress in carrying out its responsibilities. The President and the Solicitor General would apply the same exacting standards to all subpoenas for the President's information, without recognizing distinctions between privileged and nonprivileged information, between official and personal information, or between various legislative objectives. Such a categorical approach would represent a significant departure from the longstanding way of doing business between the branches, giving short shrift to Congress's important interests in conducting inquiries to obtain the information it needs to legislate effectively. Confounding the legislature in that effort would be contrary to the principle that:

> "It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served." *United States v. Rumely*, 345 U. S. 41, 43 (1953) (internal quotation marks omitted).

… Because the President's approach does not take adequate account of these significant congressional interests, we do not adopt it.

House approach fails to account for significant separation of powers issues
The House's approach fails to take adequate account of the significant separation of powers issues raised by congressional subpoenas for the President's information. Congress and the President have an ongoing institutional relationship as the "opposite and rival" political branches established by the Constitution. The Federalist No. 51, at 349. As a result, congressional subpoenas directed at the President differ markedly from congressional subpoenas we have previously reviewed, *e.g., Barenblatt*, 360 U. S., at 127; *Eastland*, 421 U. S., at 506, and they bear little resemblance to criminal subpoenas issued to the President in the course of a specific investigation, see *Vance, ante*, p. ___; *Nixon*, 418 U. S. 683. Unlike those subpoenas, congressional subpoenas for the President's information unavoidably pit the political branches against one another. Cf. *In re Sealed Case*, 121 F. 3d 729, 753 (CADC

1997) ("The President's ability to withhold information from Congress implicates different constitutional considerations than the President's ability to withhold evidence in judicial proceedings.").

Congressional subpoenas require limits
Without limits on its subpoena powers, Congress could "exert an imperious controul" over the Executive Branch and aggrandize itself at the President's expense, just as the Framers feared. The Federalist No. 71, at 484 (A. Hamilton); see *id*., No. 48, at 332–333 (J. Madison); *Bowsher v. Synar*, 478 U. S. 714, 721–722, 727 (1986). And a limitless subpoena power would transform the "established practice" of the political branches. *Noel Canning*, 573 U.S., at 524 (internal quotation marks omitted). Instead of negotiating over information requests, Congress could simply walk away from the bargaining table and compel compliance in court.

Subpoenas represent a clash between rival branches
We would have to be "blind" not to see what "[a]ll others can see and understand": that the subpoenas do not represent a run-of-the- mill legislative effort but rather a clash between rival branches of government over records of intense political interest for all involved. *Rumely*, 345 U. S., at 44 (quoting *Child Labor Tax Case*, 259 U. S. 20, 37 (1922) (Taft, C. J.)).

Personal papers can implicate interbranch relationship
The President is the only person who alone composes a branch of government. As a result, there is not always a clear line between his personal and official affairs. "The interest of the man" is often "connected with the constitutional rights of the place." The Federalist No. 51, at 349. Given the close connection between the Office of the President and its occupant, congressional demands for the President's papers can implicate the relationship between the branches regardless whether those papers are personal or official. Either way, a demand may aim to harass the President or render him "complaisan[t] to the humors of the Legislature." *Id*., No. 71, at 483. In fact, a subpoena for personal papers may pose a heightened risk of such impermissible purposes, precisely because of the documents' personal nature and their less evident connection to a legislative task. No one can say that the controversy here is less significant to the relationship between the branches simply because it involves personal papers. Quite the opposite.

Separation of powers concerns triggered even if subpoenas issued to third parties
[S]eparation of powers concerns are no less palpable here simply because the subpoenas were issued to third parties. Congressional demands for the President's information present an interbranch conflict no matter where the information is held—it is, after all, the President's information. Were it otherwise, Congress could side-step constitutional requirements any time a President's information is entrusted to a third party—as occurs with rapidly increasing frequency. Cf. *Carpenter v. United States*, 585 U. S. ___, ___, ___ (2018) (slip op., at 15, 17). Indeed, Congress could declare open season on the President's information held by schools, archives, internet service providers, e-mail clients, and financial institutions. The Constitution does not tolerate such ready evasion; it "deals with substance, not shadows." *Cummings v. Missouri*, 4 Wall. 277, 325 (1867).

Interbranch interactions would be transformed by judicial enforcement of standard proposed by the President or Congress

For more than two centuries, the political branches have resolved information disputes using the wide variety of means that the Constitution puts at their disposal. The nature of such interactions would be transformed by judicial enforcement of either of the approaches suggested by the parties, eroding a "[d]eeply embedded traditional way[] of conducting government." *Youngstown Sheet & Tube Co*., 343 U. S., at 610 (Frankfurter, J., concurring).

Courts must use balanced approach, analyzing both significant legislative interests of Congress and unique position of President

A balanced approach is necessary, one that takes a "considerable impression" from "the practice of the government," *McCulloch v. Maryland*, 4 Wheat. 316, 401 (1819); see *Noel Canning*, 573 U. S., at 524–526, and "resist[s]" the "pressure inherent within each of the separate Branches to exceed the outer limits of its power," *INS v. Chadha*, 462 U. S. 919, 951 (1983). We therefore conclude that, in assessing whether a subpoena directed at the President's personal information is "related to, and in furtherance of, a legitimate task of the Congress," *Watkins*, 354 U. S., at 187, courts must perform a careful analysis that takes adequate account of the separation of powers principles at stake, including both the significant legislative interests of Congress and the "unique position" of the President, *Clinton*, 520 U. S., at 698 (internal quotation marks omitted).

Interbranch confrontation to be avoided whenever possible

First, courts should carefully assess whether the asserted legislative purpose warrants the significant step of involving the President and his papers. "'[O]ccasion[s] for constitutional confrontation between the two branches' should be avoided whenever possible." *Cheney v. United States Dist. Court for D. C.*, 542 U. S. 367, 389–390 (2004) (quoting *Nixon*, 418 U. S., at 692).

Other sources that could reasonably provide the information needed

Congress may not rely on the President's information if other sources could reasonably provide Congress the information it needs in light of its particular legislative objective.

Congress may not use president as case study for general legislation

The President's unique constitutional position means that Congress may not look to him as a "case study" for general legislation. Cf. 943 F. 3d, at 662–663, n. 67. Unlike in criminal proceedings, where "[t]he very integrity of the judicial system" would be undermined without "full disclosure of all the facts," *Nixon*, 418 U. S., at 709, efforts to craft legislation involve predictive policy judgments that are "not hamper[ed] . . . in quite the same way" when every scrap of potentially relevant evidence is not available, *Cheney*, 542 U. S., at 384; see *Senate Select Committee*, 498 F. 2d, at 732. While we certainly recognize Congress's important interests in obtaining information through appropriate inquiries, those interests are not sufficiently powerful to justify access to the President's personal papers when other sources could provide Congress the information it needs.

Subpoena no broader than reasonably necessary
Second, to narrow the scope of possible conflict between the branches, courts should insist on a subpoena no broader than reasonably necessary to support Congress's legislative objective. The specificity of the subpoena's request "serves as an important safeguard against unnecessary intrusion into the operation of the Office of the President."

Detailed, substantial evidence on how subpoena advances legislative purpose
Third, courts should be attentive to the nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative purpose. The more detailed and substantial the evidence of Congress's legislative purpose, the better. See *Watkins*, 354 U. S., at 201, 205 (preferring such evidence over "vague" and "loosely worded" evidence of Congress's purpose). That is particularly true when Congress contemplates legislation that raises sensitive constitutional issues, such as legislation concerning the Presidency. In such cases, it is "impossible" to conclude that a subpoena is designed to advance a valid legislative purpose unless Congress adequately identifies its aims and explains why the President's information will advance its consideration of the possible legislation.

Burdens imposed on the President
Fourth, courts should be careful to assess the burdens imposed on the President by a subpoena. We have held that burdens on the President's time and attention stemming from judicial process and litigation, without more, generally do not cross constitutional lines. See *Vance, ante*, at 12–14; *Clinton*, 520 U. S., at 704–705. But burdens imposed by a congressional subpoena should be carefully scrutinized, for they stem from a rival political branch that has an ongoing relationship with the President and incentives to use subpoenas for institutional advantage.

Other considerations
Other considerations may be pertinent as well; one case every two centuries does not afford enough experience for an exhaustive list.

Duty to cooperate with Congress
When Congress seeks information "needed for intelligent legislative action," it "unquestionably" remains "the duty of *all* citizens to cooperate." *Watkins*, 354 U. S., at 187 (emphasis added). Congressional subpoenas for information from the President, however, implicate special concerns regarding the separation of powers. The courts below did not take adequate account of those concerns.

Judgments below vacated and cases remanded
The judgments of the Courts of Appeals for the D. C. Circuit and the Second Circuit are vacated, and the cases are remanded for further proceedings consistent with this opinion.

Thomas Dissent

No authority to issue legislative subpoenas of private, nonofficial documents
I would hold that Congress has no power to issue a legislative subpoena for private, nonofficial documents—whether they belong to the President or not. Congress may be able

to obtain these documents as part of an investigation of the President, but to do so, it must proceed under the impeachment power.

Implied legislative powers are very limited
"The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 1 Cranch 137, 176 (1803). … Congress may exercise only those powers given by the people of the States through the Constitution. … The scope of these implied powers is very limited. The Constitution does not sweep in powers "of inferior importance, merely because they are inferior." *McCulloch v. Maryland*, 4 Wheat. 316, 408 (1819). … In sum, while the Committees' theory of an implied power is not categorically wrong, that power must be necessarily implied from an enumerated power.

No implied power to subpoena private, nonofficial documents
At the time of the founding, the power to subpoena private, nonofficial documents was not included by necessary implication in any of Congress' legislative powers. This understanding persisted for decades and is consistent with the Court's first decision addressing legislative subpoenas, *Kilbourn v. Thompson*, 103 U. S. 168 (1881).

McGrain was wrongly decided
The test that this Court created in *McGrain v. Daugherty*, 273 U. S. 135 (1927), and the majority's variation on that standard today, are without support as applied to private, nonofficial documents. [Footnote 1: I express no opinion about the constitutionality of legislative subpoenas for other kinds of evidence.]

Congress has less authority than the British Parliament
The Constitution expressly denies to Congress some of the powers that Parliament exercised. … And in a system in which Congress is not supreme, the individual protections in the Bill of Rights, such as the prohibition on unreasonable searches and seizures, meaningfully constrain Congress' power to compel documents from private citizens. … *Kilbourn*—this Court's first decision on the constitutionality of legislative subpoenas—emphasized that Parliament had more powers than Congress. There, the congressional respondents relied on Parliament's investigatory power to support a legislative subpoena for testimony and documents. The Court rejected the analogy because the judicial powers of the House of Commons—the lower house of Parliament—exceeded the judicial functions of the House of Representatives. *Kilbourn, supra*, at 189. At bottom, *Kilbourn* recognized that legislative supremacy was decisively rejected in the framing and ratification of our Constitution, which casts doubt on the Committees' claim that they have power to issue legislative subpoenas to private parties.

No 18th century or early Congressional precedent
The subpoenas in these cases also cannot be justified based on the practices of 18th-century American legislatures. … [N]one of the examples from 18th-century colonial and state history support a power to issue a legislative subpoena for private, nonofficial documents. Given that Congress has no exact precursor in England or colonial America, founding-era congressional practice is especially informative about the scope of implied legislative

powers. Thus, it is highly probative that no founding-era Congress issued a subpoena for private, nonofficial documents.

Subpoenas for private documents were controversial during 19th century

Congress began issuing them by the end of the 1830s. However, the practice remained controversial in Congress and this Court throughout the first century of the Republic. … [T]hrough 1827, the idea that Congress had the implied power to issue subpoenas for private documents was considered "novel," "extraordinary," and "unnecessary." … An 1859 Senate investigation, which the Court of Appeals cited as precedent, underscores that legislative subpoenas to private parties were a 19th-century innovation. Following abolitionist John Brown's raid at Harper's Ferry, Senate Democrats opened an investigation apparently designed to embarrass opponents of slavery. As part of the investigation, they called private individuals to testify. Senator Charles Sumner, a leading opponent of slavery, railed against the proceedings …. For Sumner, as for Adams, the power to issue legislative subpoenas to private parties was a "dangerous absurdity" with no basis in the text or history of the Constitution. *Ibid.* When this Court first addressed a legislative subpoena, it refused to uphold it. After casting doubt on legislative subpoenas generally, the Court in *Kilbourn v. Thompson*, 103 U. S. 168, held that the subpoena at issue was unlawful because it sought to investigate private conduct. … Even though the Court decided *Kilbourn* narrowly, it clearly entertained substantial doubts about the constitutionality of legislative subpoenas for private documents.

McGrain case lacks any foundation in text or history

Nearly half a century later, in *McGrain v. Daugherty*, the Court reached the question reserved in *Kilbourn*—whether Congress has the power to issue legislative subpoenas. It rejected *Kilbourn*'s reasoning and upheld the power to issue legislative subpoenas as long as they were relevant to a legislative power. Although *McGrain* involved oral testimony, the Court has since extended this test to subpoenas for private documents. … The opinion in *McGrain* lacks any foundation in text or history with respect to subpoenas for private, nonofficial documents. It fails to recognize that Congress, unlike Parliament, is not supreme. It does not cite any specific precedent for issuing legislative subpoenas for private documents from 18th-century colonial or state practice. And it identifies no founding-era legislative subpoenas for private documents. Since *McGrain*, the Court has pared back Congress' authority to compel testimony and documents. … Rather than continue our trend of trying to compensate for *McGrain*, I would simply decline to apply it in these cases because it is readily apparent that the Committees have no constitutional authority to subpoena private, nonofficial documents.

To investigate alleged presidential wrongdoing, Congress must use impeachment

If the Committees wish to investigate alleged wrongdoing by the President and obtain documents from him, the Constitution provides Congress with a special mechanism for doing so: impeachment.

Separation of powers creates a system of checks and balances

It is often acknowledged, "if only half-heartedly honored," that one of the motivating principles of our Constitution is the separation of powers. *Association of American Rail-*

roads, 575 U. S., at 74 (THOMAS, J., concurring in judgment). The Framers recognized that there are three forms of governmental power: legislative, executive and judicial. The Framers also created three branches: Congress, the President, and the Judiciary. The three powers largely align with the three branches. To a limited extent, however, the Constitution contains "a partial intermixture of those departments for special purposes." The Federalist No. 66, p. 401 (C. Rossiter ed. 1961) (A. Hamilton). One of those special purposes is the system of checks and balances, and impeachment is one of those checks.

Impeachment is a check on presidential abuses

The Constitution grants the House "the sole Power of Impeachment," Art. I, §2, cl. 5, and it specifies that the President may be impeached for "Treason, Bribery, or other high Crimes and Misdemeanors," Art. II, §4. The founding generation understood impeachment as a check on Presidential abuses. In response to charges that impeachment "confounds legislative and judiciary authorities in the same body," Alexander Hamilton called it "an essential check in the hands of [Congress] upon the encroachments of the executive." The Federalist No. 66, at 401–402. And, in the Virginia ratifying convention, James Madison identified impeachment as a check on Presidential abuse of the treaty power.

Impeachment includes the power to demand documents

The power to impeach includes a power to investigate and demand documents. Impeachments in the States often involved an investigation. … [T]he founding generation repeatedly referred to impeachment as an "inquest." … Even as it questioned the power to issue legislative subpoenas, the Court in *Kilbourn* acknowledged the ability to "compel the attendance of witnesses, and their answer to proper questions" when "the question of . . . impeachment is before either body acting in its appropriate sphere on that subject." … I express no view today on the boundaries of the power to demand documents in connection with impeachment proceedings. But the power of impeachment provides the House with authority to investigate and hold accountable Presidents who commit high crimes or misdemeanors. That is the proper path by which the Committees should pursue their demands.

Impeachment power differs from legislative or contempt powers

Insisting that the House proceed through its impeachment power is not a mere formality. Unlike contempt, which is governed by the rules of each chamber, impeachment and removal constitutionally requires a majority vote by the House and a two-thirds vote by the Senate. Art. I, §2, cl. 5; §3, cl. 6. In addition, Congress has long thought it necessary to provide certain procedural safeguards to officials facing impeachment and removal. See, e.g., 3 Annals of Cong. 903 (1793) (Rep. W. Smith). Finally, initiating impeachment proceedings signals to the public the gravity of seeking the removal of a constitutional officer at the head of a coordinate branch. 940 F. 3d 710, 776 (CADC 2019) (Rao, J., dissenting).

Four-factor test is better than nothing

Congress' legislative powers do not authorize it to engage in a nationwide inquisition with whatever resources it chooses to appropriate for itself. The majority's solution— a nonexhaustive four-factor test of uncertain origin—is better than nothing. But the power that Congress seeks to exercise here has even less basis in the Constitution than the majority

supposes. I would reverse in full because the power to subpoena private, nonofficial documents is not a necessary implication of Congress' legislative powers. If Congress wishes to obtain these documents, it should proceed through the impeachment power. Accordingly, I respectfully dissent.

Alito Dissent

Congressional subpoenas of presidential personal documents are inherently suspicious
JUSTICE THOMAS makes a valuable argument about the constitutionality of congressional subpoenas for a President's personal documents. In these cases, however, I would assume for the sake of argument that such subpoenas are not categorically barred. Nevertheless, legislative subpoenas for a President's personal documents are inherently suspicious. Such documents are seldom of any special value in considering potential legislation, and subpoenas for such documents can easily be used for improper non-legislative purposes. Accordingly, courts must be very sensitive to separation of powers issues when they are asked to approve the enforcement of such subpoenas.

Congressional subpoenas of third parties may pull in the Judiciary
If Congress attempts to obtain such documents by subpoenaing a President directly, those two heavyweight institutions can use their considerable weapons to settle the matter. … But when Congress issues such a subpoena to a third party, Congress must surely appreciate that the Judiciary may be pulled into the dispute, and Congress should not expect that the courts will allow the subpoena to be enforced without seriously examining its legitimacy.

Disturbing evidence of an improper law enforcement purpose
Whenever such a subpoena comes before a court, Congress should be required to make more than a perfunctory showing that it is seeking the documents for a legitimate legislative purpose and not for the purpose of exposing supposed Presidential wrongdoing. … [T]hey claim that the subpoenas were issued to gather information that is relevant to legislative issues, but there is disturbing evidence of an improper law enforcement purpose. See 940 F. 3d 710, 767–771 (CADC 2019) (Rao, J., dissenting). In addition, the sheer volume of documents sought calls out for explanation. See 943 F. 3d 627, 676–681 (CA2 2019) (Livingston, J., concurring in part and dissenting in part).

Remand should require House to provide more information on legislation
The Court recognizes that the decisions below did not give adequate consideration to separation of powers concerns. Therefore, after setting out a non-exhaustive list of considerations for the lower courts to take into account, *ante*, at 18–20, the Court vacates the judgments of the Courts of Appeals and sends the cases back for reconsideration. I agree that the lower courts erred and that these cases must be remanded, but I do not think that the considerations outlined by the Court can be properly satisfied unless the House is required to show more than it has put forward to date.
Specifically, the House should provide a description of the type of legislation being considered, and while great specificity is not necessary, the description should be sufficient to permit a court to assess whether the particular records sought are of any special importance. The House should also spell out its constitutional authority to enact the type of

legislation that it is contemplating, and it should justify the scope of the subpoenas in relation to the articulated legislative needs. In addition, it should explain why the subpoenaed information, as opposed to information available from other sources, is needed. Unless the House is required to make a showing along these lines, I would hold that enforcement of the subpoenas cannot be ordered. Because I find the terms of the Court's remand inadequate, I must respectfully dissent.