

[ORAL ARGUMENT SCHEDULED FOR JULY 12, 2019]

No. 19-5142

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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DONALD J. TRUMP; THE TRUMP ORGANIZATION, INC.; TRUMP  
ORGANIZATION LLC; THE TRUMP CORPORATION; DJT HOLDINGS LLC;  
THE DONALD J. TRUMP REVOCABLE TRUST;  
AND TRUMP OLD POST OFFICE LLC,

*Plaintiffs–Appellants,*

v.

MAZARS USA, LLP,

*Defendant–Appellee,*

COMMITTEE ON OVERSIGHT AND REFORM OF THE  
U.S. HOUSE OF REPRESENTATIVES,

*Intervenor–Defendant–Appellee.*

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On Appeal from the United States District Court for the  
District of Columbia (No. 19-cv-01136) (Hon. Amit P. Mehta)

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**BRIEF *AMICUS CURIAE* OF CONSTITUTIONAL  
ACCOUNTABILITY CENTER IN SUPPORT OF  
INTERVENOR-DEFENDANT–APPELLEE**

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Elizabeth B. Wydra  
Brienne J. Gorod  
Brian R. Frazelle  
Ashwin P. Phatak  
CONSTITUTIONAL  
ACCOUNTABILITY CENTER  
1200 18th St., NW, Ste. 501  
Washington, DC 20036  
(202) 296-6889  
elizabeth@theusconstitution.org

**STATEMENT REGARDING CONSENT TO FILE  
AND SEPARATE BRIEFING**

Pursuant to D.C. Circuit Rule 29(b), undersigned counsel for *amicus curiae* Constitutional Accountability Center (CAC) represents that counsel for all parties has been sent notice of the filing of this brief and have consented to the filing.<sup>1</sup>

Pursuant to D.C. Circuit Rule 29(d), undersigned counsel for *amicus curiae* certifies that a separate brief is necessary. *Amicus* is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text, history, and values. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to protect the rights, freedoms, and structural safeguards that our nation's charter guarantees. In furtherance of those goals, CAC has studied the rich history of legislative oversight and the critical role that oversight plays in our nation's system of checks-and-balances. CAC is accordingly well situated to discuss the history of congressional oversight and how that history informs the issues in this case.

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<sup>1</sup> Pursuant to Fed. R. App. P. 29(c), *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* states that no party to this brief is a publicly-held corporation, issues stock, or has a parent corporation.

**CERTIFICATE AS TO PARTIES, RULINGS,  
AND RELATED CASES**

I. PARTIES AND AMICI

Except for *amicus* Constitutional Accountability Center and any other *amici* who had not yet entered an appearance in this case as of the filing of Brief for Appellants, all parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Brief for Appellants.

II. RULINGS UNDER REVIEW

Reference to the ruling under review appears in the Brief for Appellants.

III. RELATED CASES

Reference to any related cases pending before this Court appears in the Brief for Appellants.

Dated: July 1, 2019

By: /s/ Elizabeth B. Wydra  
*Counsel for Amicus Curiae*

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## **INTEREST OF *AMICUS CURIAE***

*Amicus* Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution’s text, history, and values. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights, freedoms, and structural safeguards that our nation’s charter guarantees. CAC accordingly has a strong interest in this case and in the scope of Congress’s investigative powers under Article I.

### **INTRODUCTION**

As the Supreme Court has long recognized, “[t]he power of the Congress to conduct investigations is inherent in the legislative process,” and “[t]hat power is broad.” *Watkins v. United States*, 354 U.S. 178, 187 (1957). Indeed, it “is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.” *Barenblatt v. United States*, 360 U.S. 109, 111 (1959). Exercising that power, the House Committee on Oversight and Reform (“Committee”) subpoenaed certain documents from Mazars USA, LLP (“Mazars”) related to President Trump’s and his businesses’ finances from 2011 until the present. The Committee did so after concluding that its review of this information would “inform[] its review of multiple laws and legislative proposals under [its] jurisdiction.” Memorandum from Elijah E. Cummings, Chairman, House Comm. on Oversight & Reform, to

Members of the Comm. on Oversight & Reform 4 (Apr. 12, 2019) (“Cummings Memo”).

Plaintiffs sued to block Mazars from complying with that subpoena, arguing that Congress has no legitimate legislative basis for requesting these documents. But the Oversight Committee’s legitimate legislative basis is plain: information these documents can provide would aid Congress’s determination about whether and how to legislate with respect to disclosure and conflict-of-interest laws. Plaintiffs’ arguments to the contrary are at odds with decades of Supreme Court precedent and would, if accepted, significantly cabin the scope of Congress’s authority to investigate.

Recognition of Congress’s broad authority to investigate is longstanding. Indeed, the practice of legislative investigations predates the birth of the United States, and that power was exercised by Congress from the beginning of the Republic. As early as 1792, Congress investigated a military defeat by “send[ing] for necessary persons, papers and records” from the Washington Administration, and James Madison and other Framers of the Constitution voted in favor of this inquiry. *McGrain v. Daugherty*, 273 U.S. 135, 161 (1927). That investigation was only the first of many other congressional investigations that have followed in the years since.

Consistent with this long history, the Supreme Court has repeatedly affirmed the existence of Congress’s power to investigate and reiterated that the scope of that

power is co-extensive with the scope of Congress’s power to legislate. As the Court has explained, Congress’s power to investigate is “broad,” encompassing “inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes” and including “surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them.” *Watkins*, 354 U.S. at 187. In discussing the breadth of Congress’s investigatory power, the Court has made clear that the judiciary should not second-guess the legislature’s judgment as to what investigations will facilitate Congress’s exercise of its legislative power. Thus, courts must uphold a congressional request for records so long as it is not “plainly incompetent or irrelevant to any lawful purpose [of Congress] in the discharge of [its] duties.” *McPhaul v. United States*, 364 U.S. 372, 381 (1960) (quoting *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943)).

Applying this deferential standard, the district court correctly held that the Oversight Committee’s request is valid. The Committee’s request for financial documents from Mazars—following allegations that President Trump may have omitted certain information on federal financial disclosures and that he may have certain conflicts of interest—could produce information that would inform Congress’s decision-making about whether to strengthen financial disclosure laws and impose new restrictions on presidential conflicts of interests. In fact, Congress is right now considering numerous pieces of legislation that would do just that. Even though

Congress need not point to proposed legislation to justify an investigation so long as the investigation is consistent with Congress’s “*potential* power to enact and appropriate under the Constitution,” *Barenblatt*, 360 U.S. at 111 (emphasis added), the existence of such proposed legislation underscores the legitimacy of Congress’s request for these documents.

Notwithstanding this, Plaintiffs argue that the Oversight Committee’s investigation can have no legitimate legislative purpose because any law which imposes disclosure or other conflict-of-interest requirements on the President is per se unconstitutional, on the theory that it would impose an unconstitutional eligibility requirement or otherwise interfere with the President’s Article II “take Care” responsibilities, U.S. Const. art. II, § 3. But Plaintiffs offer no case law that comes close to enunciating such a sweeping constraint on Congress’s power. In any event, this Court need not decide the constitutionality of hypothetical legislation to resolve this case. As the Supreme Court has made clear, an investigation exceeds Congress’s powers only when it is “plainly incompetent or irrelevant to any lawful purpose [of Congress] in the discharge of [its] duties.” *McPhaul*, 364 U.S. at 381 (quoting *Endicott Johnson Corp.*, 317 U.S. at 509). Plaintiffs have not made—and cannot make—that showing here. Under longstanding Supreme Court precedent, that fact is sufficient to resolve this case.

## ARGUMENT

### I. LEGISLATIVE INVESTIGATIONS HAVE A LONG HISTORY, BOTH IN THE BRITISH PARLIAMENT AND IN EARLY AMERICAN CONGRESSES.

The practice of legislative oversight predates the birth of the United States, with “roots [that] lie deep in the British Parliament.” James M. Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 Harv. L. Rev. 153, 159 (1926). In the 1680s, for example, the British Parliament investigated issues as diverse as the conduct of the army in “sending Relief” into Ireland during war, “Miscarriage in the Victualing of the Navy,” and the imposition of martial law by a commissioner of the East India Company. *Id.* at 162 (internal citation and quotation marks omitted). These investigations were premised on the idea that Parliament could not properly legislate if it could not gather information relevant to the topics on which it wanted to legislate. Thus, for instance, a February 17, 1728 entry in the *Commons’ Journal* described a parliamentary committee’s investigation of bankruptcy laws as follows:

*Ordered*, That the Committee, appointed to inspect what Laws are expired, or near expiring, and to report their Opinion to the House, which of them are fit to be revived, or continued, and who are instructed to inspect the Laws related to Bankrupts, *and consider what Alterations are proper to be made therein*, have Power to send for Persons, Papers, and Records, with respect to that Instruction.

*Id.* at 163 (emphasis added) (internal citation omitted).

This early British practice of legislative investigation was replicated by American colonial legislatures. “The colonial assemblies, like the House of Commons, very early assumed, usually without question, the right to investigate the conduct of the other departments of the government and also other matters of general concern brought to their attention.” C.S. Potts, *Power of Legislative Bodies To Punish for Contempt*, 74 U. Pa. L. Rev. 691, 708 (1926). For example, in 1722, the Massachusetts House of Representatives declared that it was “not only their Privilege but Duty to demand of any Officer in the pay and service of this Government an account of his Management while in the Public Employ.” *Id.* (internal citation omitted). In exercising that duty, the House called before it two military officers to question them about their “failure to carry out certain offensive operations ordered by the [H]ouse at a previous session,” over the objection of the Governor. *Id.* Similarly, the Pennsylvania Assembly had “a standing committee to audit and settle the accounts of the treasurer and of the collectors of public revenues,” *id.* at 709, which had the “full Power and Authority to send for Persons, Papers and Records by the Sergeant at Arms of this House,” *id.* (internal citation omitted).

After the nation’s Founding, early state legislatures also understood themselves to have the power to investigate, and even to enforce subpoenas against witnesses. For example, in 1824, the New York House of Representatives appointed a special committee to investigate corruption at the Chemical Bank and the handling

of its charter. In connection with this investigation, the committee required a witness to appear before the committee and adopted the following resolution when he refused:

*Resolved*, That there was no sufficient ground for his refusal to appear before the committee, and testify; that he was guilty of a misdemeanor and contempt of the House; that the sergeant-at-arms deliver him to the keeper of the jail of the county of Albany; that he be imprisoned until further order of the House, and that the Speaker issue his warrant accordingly.

*Id.* at 718 (internal citation omitted).

The United States Congress also demonstrated early in the Republic's history that it viewed its authority to investigate broadly. As the Supreme Court would later recount, the first Congresses used compulsory process to investigate "suspected corruption or mismanagement of government officials." *Watkins*, 354 U.S. at 192. For instance, the House created a special committee in March 1792 to inquire into a significant military defeat. Records of the debate in the House show that a majority of Members believed that Congress should establish a select committee to investigate this matter itself, rather than direct the President to investigate. For example, Representative Thomas Fitzsimons believed it "out of order to request the President . . . to institute . . . a Court of Inquiry," and instead argued that a committee was better suited "to inquire relative to such objects as came properly under the cognizance of this House, particularly respecting the expenditures of public money." 3 Annals of Cong. 492 (1792). Similarly, Representative Abraham Baldwin "was

convinced the House could not proceed but by a committee of their own,” which “would be able to throw more light on the subject, and then the House would be able to determine how to proceed.” *Id.* Thus, the House rejected a proposal directing the President to carry out the investigation, and instead passed, 44-10, a resolution creating its own investigative committee:

*Resolved*, That a committee be appointed to inquire into the causes of the failure of the late expedition under Major General St. Clair; and that the said committee be empowered to call for such persons, papers, and records, as may be necessary to assist their inquiries.

*Id.* at 493. Notably, “Mr. Madison, who had taken an important part in framing the Constitution only five years before, and four of his associates in that work, were members of the House of Representatives at the time, and all voted [in favor of] the inquiry.” *McGrain*, 273 U.S. at 161 (citing 3 Annals of Cong. 494 (1792)). Historical evidence suggests that President Washington cooperated in full with this investigation.<sup>2</sup>

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<sup>2</sup> President Washington’s Cabinet agreed that the committee was authorized to make such inquiries, and advised the President that he “ought to comply with the requests of Congress although he had the right to refuse to communicate any papers that would tend to injure the public good.” William Patrick Walsh, *The Defeat of Major General Arthur St. Clair, November 4, 1791: A Study of the Nation’s Response 1791-1793* at 58-59 (February 1977) (unpublished Ph.D. dissertation, Loyola University of Chicago), available at [https://ecommons.luc.edu/cgi/viewcontent.cgi?article=2772&context=luc\\_diss](https://ecommons.luc.edu/cgi/viewcontent.cgi?article=2772&context=luc_diss). On April 4, 1792, Congress passed a bill requesting that the President “cause the proper officers” to produce “such papers of a public nature” as may be necessary for the investigation, 3 Annals of Cong. 536 (1792), and the Washington Administration complied, turning over all relevant documents because none were found to prejudice the public good, Walsh, *supra*, at 59



Numerous similar congressional investigations took place over the succeeding years. In 1800, a select committee was formed to investigate the circumstances of the Treasury Secretary's resignation. 10 Annals of Cong. 787-88 (1800). Representative Roger Griswold believed such an investigation was important because if there is an investigation "on the retirement of every Secretary of the Treasury from office" about "his official conduct, it will operate as a general stimulus to the faithful discharge of duty." *Id.* at 788. The committee was directed "to examine into the state of the Treasury, the mode of conducting business therein, the expenditures, of the public money, and to report such facts and statements as will conduce to a full and satisfactory understanding of the state of the Treasury." *Id.* at 796-97.

Early congressional committees also began investigations concerning "the enactment of new statutes or the administration of existing laws." *Watkins*, 354 U.S. at 192-93. For instance, in 1827, the House Committee on Manufactures initiated an investigation to consider a revision of the tariff laws, and sought the power to send for persons and papers in aid of that investigation. This proposal generated substantial debate. Although some members of Congress thought "that the only cases in which the House has a right to send for persons and papers, are those of

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(citing Letter from President Washington to Henry Knox (April 4, 1792), *in* XXXII Writings of Washington 15).

impeachment, and of contested elections,” Landis, *supra*, at 178 n.102 (internal citation omitted), other Members believed that where Congress is considering a measure “deeply affecting the interest of every man in the United States,” Congress may “compel the attendance of witnesses who can give . . . practical information upon the subject,” *id.* at 178 n.103 (internal citation omitted). In the end, Congress voted to grant the committee subpoena power. 4 Cong. Deb. 861 (1827).

Some early investigations focused specifically on the President and his Cabinet. For example, in 1832, the House created a committee to discover “whether an attempt was made by the late Secretary of War, John H. Eaton, fraudulently to give to Samuel Houston—a contract—and that the said committee be further instructed *to inquire whether the President of the United States had any knowledge of such attempted fraud*, and whether he disapproved of the same; and that the committee have power to send for persons and papers.” Landis, *supra*, at 179 (quoting H.R. Rep. No. 502, 22d Cong. 1st Sess., Ser. No. 228) (emphasis added). Later, in 1860, Congress created a special committee to determine whether “any person connected with the present Executive Department of this Government,” Cong. Globe, 36th Cong., 1st Sess. 1017-18 (1860), improperly attempted to influence legislation in the House “by any promise, offer, or intimation of employment, patronage, office, favors, or rewards, under the Government, or under any department, officer, or servant thereof, to be conferred or withheld in

consideration of any vote given,” *id.* at 1018. The committee had the “power to send for persons and papers, examine witnesses, and leave to report at any time, by bill or otherwise.” *Id.*

Finally, early Congresses assumed that the individuals who could be held in contempt for refusing to cooperate with investigations were not limited to members of Congress. For example, in 1795, Robert Randall was accused of attempting to bribe three members of the House of Representatives, and was brought before the House, which overwhelmingly approved a resolution finding him guilty of attempting to corrupt the integrity of Members. The resolution ordered Randall to be “brought to the bar, reprimanded by the Speaker, and committed to the custody of the Sergeant-at-Arms until further order of this House.” Potts, *supra*, at 719-20 (internal citation omitted). This case was significant because there was “no division of opinion among the members present, several of whom had been members of the Constitutional Convention, as to the power of the house to punish a non-member for such an offense.” *Id.* at 720.<sup>3</sup>

Similarly, in 1859, a committee created to investigate the raid on Harper’s Ferry attempted to subpoena as a witness Thaddeus Hyatt, and when he refused to

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<sup>3</sup> This congressional power to punish for contempt was approved by an early Supreme Court decision, *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821), in which the Court upheld the Speaker’s warrant for the arrest of an individual who attempted to bribe a Member of the House. *Id.* at 224-35.

appear, the Senate voted on a resolution directing that Hyatt be imprisoned in the House until he was willing to testify. *McGrain*, 273 U.S. at 161-62. The resolution overwhelmingly passed, with numerous Senators speaking in favor of the Senate’s power to subpoena witnesses as part of an investigation. Senator William P. Fessenden noted that the subpoena power “has been exercised by Parliament, and by all legislative bodies down to the present day without dispute,” and that “the power to inquire into subjects upon which [legislatures] are disposed to legislate” should not be “lost” to the Senate. Cong. Globe, 36th Cong., 1st Sess. 1102 (1860). He believed that Congress’s power included the authority “to compel [witnesses] to come before us” where the witness “will not give [information] to us.” *Id.* Likewise, Senator John J. Crittenden argued that the Senate has “the power of instituting an inquiry,” and that it “ha[s] a right, in consequence of it, a necessary incidental power, to summon witnesses, if witnesses are necessary.” *Id.* at 1105.

In short, the power to investigate, and to subpoena relevant witnesses and documents, has been treated as a core congressional power since the early days of the Republic. Since then, Congress has used its subpoena power to investigate a broad range of matters, including the “means used to influence the nomination of candidates for the Senate,” *Reed v. Cty. Comm’rs of Delaware Cty., Pa*, 277 U.S. 376, 386 (1928), alleged “interference with the loyalty, discipline, or morale of the Armed Services,” *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 500 (1975), the

problem of “mob violence and organized crime,” *In re the Application of U.S. Senate Permanent Subcomm. on Investigations*, 655 F.2d 1232, 1233 (D.C. Cir. 1981), and the prevention of “sex trafficking, on the Internet,” *Senate Permanent Subcomm. v. Ferrer*, 199 F. Supp. 3d 125, 128 (D.D.C. 2016), *vacated as moot*, 856 F.3d 1080 (D.C. Cir. 2017). As the next Section discusses, the Supreme Court has repeatedly recognized that this congressional power to investigate is as broad as this history suggests.

## **II. THE SUPREME COURT HAS CONSISTENTLY AFFIRMED THAT CONGRESS’S POWER TO INVESTIGATE IS COEXTENSIVE WITH ITS POWER TO LEGISLATE.**

Consistent with this long history, the Supreme Court has recognized that Congress’s power to investigate is inherent in its power to legislate—and that this power is broad. In *McGrain v. Daugherty*, the Court considered whether the Senate, in the course of an investigation regarding the Department of Justice, could compel a witness—in that case, the Attorney General’s brother—to appear before a Senate committee to give testimony. 273 U.S. at 150-52. The Court held that “the Senate—or the House of Representatives, both being on the same plane in this regard—has power, through its own process, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution.” *Id.* at 154. As the

Court explained, the power to compel witnesses to testify is an essential aspect of the power to legislate:

A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it.

*Id.* at 175.

Applying these principles, the Court then asked whether the particular subpoena at issue was designed “to obtain information in aid of the legislative function.” *Id.* at 176. The Court concluded that it was: “the subject to be investigated was the administration of the Department of Justice—whether its functions were being properly discharged or were being neglected or misdirected . . . .” *Id.* at 177. As the Court explained: “Plainly the subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit,” *id.*, especially in view of the fact that the powers of the Department of Justice and the Attorney General were subject to legislation. *Id.* at 178.

Two years later, the Court reiterated that “the power of inquiry is an essential and appropriate auxiliary to the legislative function.” *Sinclair v. United States*, 279 U.S. 263, 291 (1929). It thus affirmed an individual’s conviction for contempt of Congress under 2 U.S.C. § 192, which provides for the criminal punishment of

witnesses who refuse to answer questions or provide documents pertinent to a congressional investigation. Rejecting the defendant’s claim that the investigation at issue was not related to legislation, the Court stated that because Congress can legislate “respecting the naval oil reserves” and “other public lands and property of the United States,” a Senate committee “undoubtedly” had the power “to investigate and report what had been and was being done by executive departments under the Leasing Act, the Naval Oil Reserve Act, and the President’s order in respect of the reserves and to make any other inquiry concerning the public domain.” *Id.* at 294.

The Court again outlined a broad view of Congress’s power to investigate in its 1955 decision in another case involving 2 U.S.C. § 192. As in *McGrain*, the Court in *Quinn v. United States*, 349 U.S. 155 (1955), described the breadth of Congress’s investigatory powers:

There can be no doubt as to the power of Congress, by itself or through its committees, to investigate matters and conditions relating to contemplated legislation. This power, deeply rooted in American and English institutions, is indeed co-extensive with the power to legislate. Without the power to investigate—including of course the authority to compel testimony, either through its own processes or through judicial trial—Congress could be seriously handicapped in its efforts to exercise its constitutional function wisely and effectively.

*Id.* at 160-61. Similarly, in *Watkins v. United States*, the Court made clear yet again that “an investigation is part of lawmaking,” 354 U.S. at 197, and once more described the congressional investigatory power expansively:

The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.

*Id.* at 187. And again, in *Eastland v. U.S. Servicemen’s Fund*, the Court recognized that “the power to investigate is inherent in the power to make laws,” and that the “[i]ssuance of subpoenas . . . has long been held to be a legitimate use by Congress of its power to investigate.” 421 U.S. at 504. Indeed, the Court ruled, the “power of inquiry” is such “an integral part of the legislative process” that the Speech or Debate Clause provides complete immunity for Congressmembers’ decision to issue a subpoena. *Id.* at 505, 507. “The issuance of a subpoena pursuant to an authorized investigation,” as the Court explained, is “an indispensable ingredient of lawmaking.” *Id.* at 505.

Finally, the Court relied on “Congress’ broad investigative power” in upholding a statute that required the preservation of presidential materials from the Nixon Administration. Among the “substantial public interests that led Congress to seek to preserve [these] materials” was “Congress’ need to understand how [our] political processes had in fact operated” during “the events leading to [Nixon]’s resignation . . . in order to gauge the necessity for remedial legislation.” *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 453 (1977).



In sum, because the scope of its investigatory power is “co-extensive with the power to legislate,” *Quinn*, 349 U.S. at 160, “[t]he power of inquiry has been employed by Congress throughout our history, over the whole range of the national interests concerning which Congress might legislate or decide upon due investigation not to legislate,” *Barenblatt*, 360 U.S. at 111. The subpoena at issue here is plainly a valid exercise of that power, as the next Section discusses.

### **III. THE OVERSIGHT COMMITTEE’S REQUEST FOR DOCUMENTS IN THIS CASE FALLS WELL WITHIN CONGRESS’S INVESTIGATORY POWERS.**

As described above, Congress’s power to investigate is “broad,” encompassing “inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes.” *Watkins*, 354 U.S. at 187. This Court therefore must uphold the congressional request for records in this case so long as it is not “plainly incompetent or irrelevant to any lawful purpose [of Congress] in the discharge of [its] duties.” *McPhaul*, 364 U.S. at 381 (quoting *Endicott Johnson Corp.*, 317 U.S. at 509).

The Oversight Committee’s investigation—and the related subpoena that gives rise to this case—plainly satisfy this test. After hearing substantial evidence that President Trump may not have complied with certain financial disclosure requirements, and that he may have conflicts of interest that could affect his ability to make impartial decisions as President, Dkt. No. 20, at 7-8, the Committee

subpoenaed Mazars for “financial records and other documents relating to President Trump personally as well as various associated businesses and entities dating back to 2011,” J.A. 270. In his memorandum to the Committee, Chairman Cummings explained that the Committee was subpoenaing documents to investigate, among other things, “whether [President Trump] has undisclosed conflicts of interest that may impair his ability to make impartial policy decisions” and “whether he has accurately reported his finances to the Office of Government Ethics and other federal entities.” *Id.* at 279 (quoting Cummings’ Memo).<sup>4</sup>

These subjects of investigation easily fall within Congress’s power to legislate—they are inquiries into the “administration of existing laws as well as proposed or possibly needed statutes,” *Watkins*, 354 U.S. at 187. The Supreme Court has explained that Congress’s investigatory power includes “surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them,” including defects like “corruption, inefficiency or waste.” *Id.* Congress’s investigation into the President’s compliance with disclosure requirements in the Ethics in Government Act of 1978 relates to the administration of that statute, as well as to Congress’s deliberations about whether the statute should be

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<sup>4</sup> Chairman Cummings also cited two additional reasons for the subpoenas: to determine whether the President “engaged in illegal conduct” and “whether he is complying with the Emoluments Clause of the Constitution.” J.A. 279 (quoting Cummings Memo). Although these grounds are also sufficient to justify Congress’s investigation and this subpoena, *amicus* focuses on the grounds identified above.

strengthened. As the district court recognized, “the discovery of additional disclosure violations by the President could influence whether Congress strengthens public reporting requirements or enhances penalties for non-compliance.” J.A. 290.

Moreover, Congress’s consideration of the President’s potential conflicts of interest relates to Congress’s power to pass legislation that addresses those conflicts. Again, as the district court explained, “[o]btaining records to shed light on whether the President has undisclosed conflicts of interest is therefore entirely consistent with potential legislation in an area where Congress already has acted and made policy judgments.” *Id.* at 291.

Importantly, Congress need not point to any proposed legislation to justify an investigation. “The very nature of the investigative function—like any research—is that it takes the searchers up some ‘blind alleys’ and into nonproductive enterprises. To be a valid legislative inquiry there need be no predictable end result.” *Eastland*, 421 U.S. at 509. Congress’s investigatory power “is as penetrating and far-reaching as the *potential* power to enact and appropriate under the Constitution.” *Barenblatt*, 360 U.S. at 111 (emphasis added).

Nonetheless, the existence here of specific pieces of legislation that Congress is considering underscores the validity of this investigation. For instance, H.R. 1 would require the President to file a new financial disclosure report within 30 days of taking office and would prohibit the President from contracting with the United

States government. *See* Press Release, House Comm. on Oversight & Reform, Chairman Cummings Issues Statement on H.R. 1 (Jan. 4, 2019), <https://tinyurl.com/CummingsHR1PressRelease>. Moreover, the bill would require the President to “divest of all financial interests that pose a conflict of interest” by converting those interests to cash or placing them in a blind trust, or disclosing information about them. H.R. 1, 116th Cong., tit. VIII, § 8012 (2019). The House is also considering a bill to strengthen the Office of Government Ethics. *See* H.R. 745, 116th Cong. (2019).

Plaintiffs insist that this Court should disregard these plainly valid legislative purposes because “courts must discern for themselves what the Committee’s *actual* purpose is through the available evidence.” Appellants’ Br. 29. And here, they say, Congress’s actual purpose is “law enforcement.” *Id.* at 43. This argument contravenes longstanding Supreme Court precedent, which “make[s] clear that in determining the legitimacy of a congressional act [courts] do not look to the motives alleged to have prompted it.” *Eastland*, 421 U.S. at 508. Said another way, “[s]o 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. This Court is “bound to presume that the action of the legislative body was with a legitimate object, if it is capable of being so construed.” *McGrain*, 273 U.S. at 178 (quoting *People ex rel. McDonald v. Keeler*, 99 N.Y. 463,

487 (1885)); *see Watkins*, 354 U.S. at 200 (“the motives of committee members . . . alone would not vitiate an investigation which had been instituted by a House of Congress if that assembly’s legislative purpose is being served”).

Plaintiffs discount this clear Supreme Court guidance because, they say, “[t]he difference between ‘purpose’ and ‘motive’ is important,” Appellants’ Br. 29, and the question in this case is “whether the Committee—based on what it is doing and what it has stated publicly—is inappropriately engaging in law enforcement instead of legislating,” *id.* at 30. But, as discussed earlier, there is ample evidence that the Committee is engaging in this investigation to facilitate its exercise of its legislative power, *see supra* at 18-20, and there is no evidence suggesting that it is gathering evidence to support any law enforcement action against the President. Indeed, the Department of Justice will not bring any law enforcement action against the President because governing Department of Justice guidance prevents it. *See A Sitting President’s Amenability to Indictment and Criminal Prosecution*, 24 Op. O.L.C. 222 (Oct. 16, 2000).

To be sure, this investigation may have the potential to uncover violations of law, and some members of Congress may have an interest in knowing whether the President has violated the law, Appellants’ Br. 7-8, but that does not mean the investigation therefore lacks a legitimate legislative purpose. To the contrary, it is possible that the President has violated the law *and* that Congress may wish to

legislate on topics related to the President’s conflicts of interest and financial disclosures. As Plaintiffs themselves acknowledge, “a permissible legislative investigation’ does not become impermissible merely because it might ‘expose law violations.’” Appellants’ Br. 33 (internal citations omitted). Indeed, as the Supreme Court has explained, although Congress “is without authority to compel disclosures for the purpose of aiding the prosecution of pending suits,” its authority “to require pertinent disclosures in aid of its own constitutional power is not abridged because the information sought to be elicited may also be of use in such suits.” *Sinclair*, 279 U.S. at 295.

This Court has made the same point: “the presumption should be indulged that the object of the inquiry was to aid [Congress] in legislating, . . . even though the investigation might possibly disclose crime or wrongdoing” on the part of an executive branch official. *Townsend v. United States*, 95 F.2d 352, 355 (D.C. Cir. 1938); *see McGrain*, 273 U.S. at 179-80 (“Nor do we think it a valid objection to the investigation that it might possibly disclose crime or wrongdoing on [an executive branch official’s] part.”); *Hutcheson v. United States*, 369 U.S. 599, 618 (1962) (“[S]urely a congressional committee which is engaged in a legitimate legislative investigation

need not grind to a halt . . . when crime or wrongdoing is disclosed.” (internal citations omitted)).<sup>5</sup>

Plaintiffs note that “[t]he subpoena is . . . laser-focused on the businesses and finances of one person,” which they say is “the hallmark of executive and judicial power, not legislating.” Appellants’ Br. 35. But the President of the United States is no ordinary person. It makes perfect sense that Congress would investigate the President’s finances when it seeks to craft financial-disclosure and conflict-of-interest laws that would affect him and other Executive Branch officials. And the Committee’s request for *this* President’s financial information was based on the undisputed fact that “the President did not initially identify as liabilities on his public disclosure forms the payments that [his former attorney] Michael Cohen made to alleged mistresses during the presidential campaign,” facts that formed the basis of Cohen’s guilty plea for campaign finance violations. J.A. 303. Thus, the Committee

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<sup>5</sup> Plaintiffs cite *United States v. Icardi*, 140 F. Supp. 383 (D.D.C. 1956), in support of their argument that Congress cannot engage in law enforcement, *see* Appellants’ Br. 35, but that court rested its conclusion that a congressional subcommittee was “functioning . . . as a committing magistrate” in large part on a committee report that “state[d] there [wa]s ‘probable cause’ for charging [one of the witnesses] with murder and embezzlement,” *Icardi*, 140 F. Supp. at 387; *see id.* at 388 (noting the “invalidity of the subcommittee’s adjudication of the crime contained in the report’s Statement of Facts”). Significantly, the court in *Icardi* noted that the portion of the investigation with a “bona fide legislative function” *was* permissible. *Id.* at 387-88.

had good reason to believe that the President may have failed to comply with the Ethics in Government Act, a law it could strengthen.

In the face of all this contrary precedent, Plaintiffs make one final argument: they say that *every* potential piece of legislation that could arise from the Oversight Committee’s investigation—whether already proposed or purely hypothetical—would be unconstitutional as applied to the President, and therefore there can be no legitimate legislative purpose for the Committee’s investigation. Their theory is apparently that any statutory limit on the President’s conflicts of interest and any disclosure requirement imposed on the President would amount to a prerequisite to holding the Office of President that would violate Article II, § 1, cl. 1—which delineates the qualifications for that office—or would otherwise interfere with the President’s ability to “take Care that the Laws be faithfully executed,” U.S. Const. art. II, § 3. *See* Appellants’ Br. 37-40, 43-44.

This argument is as astounding as it is wrong. As an initial matter, the Supreme Court has made clear that Congress may investigate so long as the investigation is not “*plainly incompetent or irrelevant to any lawful purpose.*” *McPhaul*, 364 U.S. at 381 (internal citation and quotations omitted) (emphasis added). Here, laws governing the President’s disclosures and conflicts of interest, like the Ethics in Government Act of 1978, have been on the books for decades. Congressional investigation into whether to amend those laws, or to pass new laws imposing other ethical



constraints on the President, can hardly be “plainly incompetent or irrelevant to any lawful purpose.” And given this long history of ethics legislation, it would be remarkable for this Court to rule that any such hypothetical legislation is unconstitutional before it is even passed, let alone applied to the President.<sup>6</sup>

On top of that, there is no basis for Plaintiffs’ radical assertion that Congress cannot apply *any* ethics legislation to the President. Indeed, Plaintiffs cite no Supreme Court or D.C. Circuit case that comes close to supporting their sweeping constitutional rule that would exempt the President from all disclosure and conflict-of-interest laws. *See* Appellants’ Br. 38-39. That is because no such case exists.<sup>7</sup>

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<sup>6</sup> Plaintiffs note that in *Tobin v. United States*, 306 F.2d 270 (D.C. Cir. 1962), this Court stated that if Congress initiates an investigation, “a challenge of the congressional power . . . would of course present constitutional issues which we should have to meet and decide.” Appellants’ Br. 22 (quoting *Tobin*, 306 F. 2d at 276 (emphasis omitted)). As an initial matter, that passing dicta should be read simply to require courts to decide whether the investigation satisfies the test set out in *McPhaul*—that Congress may investigate so long as the investigation is not “*plainly incompetent or irrelevant* to any lawful purpose.” *McPhaul*, 364 U.S. at 381 (internal citation and quotation marks omitted) (emphasis added). To the extent that the D.C. Circuit was suggesting otherwise, that language cannot trump the Supreme Court’s decision in *McPhaul*. In other words, although a court must decide whether Congress has a legitimate legislative basis for its investigations, Supreme Court precedent requires courts to grant Congress a substantial amount of deference in making that determination.

<sup>7</sup> The Supreme Court cases that Plaintiffs *do* cite do not articulate such a rule. For instance, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), held that states cannot limit the number of terms that a Member can serve. *Id.* at 782-83. And *Powell v. McCormack*, 395 U.S. 486 (1969), held that Congress cannot exclude a Member who was duly elected and met the Constitution’s eligibility requirements. *Id.* at 489. Neither case says anything about whether Congress may impose conflict-

Rather, the *only* source that Plaintiffs cite for this proposition is a letter from then–Deputy Attorney General Laurence H. Silberman to an Assistant to the President in 1974 which suggests—in passing—that there *might* be constitutional questions that arise when applying *some* conflict-of-interest laws to the President. *See* Letter from Laurence H. Silberman, Deputy Att’y Gen. to Richard T. Burrell 2 (Aug. 28, 1974), [bit.ly/31k3rql](https://bit.ly/31k3rql) (“[s]ome doubt exists as to the constitutionality of applying [18 U.S.C. § 208(a)] to the President”). And even this letter—again, Plaintiffs’ only support—does not stand for the proposition that *all* laws requiring presidents to disclose finances or conflicts, set up a blind trust, or otherwise arrange their financial holdings in a certain way upon taking office are unconstitutional.

\* \* \*

In sum, Plaintiffs’ arguments, if accepted, would drastically cabin the scope of Congress’s power to investigate. Such a result would be at odds with our nation’s rich history of congressional investigations and with decades of Supreme Court precedent affirming that Congress possesses broad constitutional power to investigate. This Court should reject Plaintiffs’ arguments and affirm the judgment of the district court.

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of-interest restrictions or disclosure requirements on members of Congress, let alone the President.

## CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

/s/ Elizabeth B. Wydra

Elizabeth B. Wydra

Brianne J. Gorod

Brian R. Frazelle

Ashwin P. Phatak

CONSTITUTIONAL

ACCOUNTABILITY CENTER

1200 18th St., NW, Ste. 501

Washington, DC 20036

(202) 296-6889

[elizabeth@theusconstitution.org](mailto:elizabeth@theusconstitution.org)

*Counsel for Amicus Curiae*

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 6,486 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that the attached brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font.

Executed this 1st day of July, 2019.

/s/ Elizabeth B. Wydra  
Elizabeth B. Wydra

## **CERTIFICATE OF SERVICE**

I hereby certify that on this 1st day of July, 2019, I electronically filed the foregoing document using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: July 1, 2019

/s/ Elizabeth B. Wydra  
Elizabeth B. Wydra