Nos. 19-715, 19-760

In The
Supreme Court of the United States

Donald J. Trump, et al,
Petitioners,

v.

Mazars USA, LLP, et al,
Respondents.

Donald J. Trump, et al.,
Petitioners,

v.

Deutsche Bank AG., et al.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia and Second Circuits

BRIEF OF *AMICUS CURIAE* PROFESSOR W. BURLETTE CARTER ON SUBJECT MATTER JURISDICTION AND IN SUPPORT OF REVERSAL

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THE INTERESTS OF *AMICUS CURIAE*

Amicus Curiae,[1] W. Burlette Carter, is Professor Emerita of Law at the George Washington University Law School in Washington, D.C. ("the University"). She an expert in American legal history. She previously taught Civil Procedure and Evidence. She is the author of *Can a Sitting President Be Federally Prosecuted: The Founders Answer*, 62 Howard L. J. 331 (2019), which explores impeachment history and examines differences between impeachment jurisdiction and ordinary prosecutions.

Amicus files this brief unsolicited, on her own behalf and at her own cost. Any reference to the University is for identification only.

Amicus' interest is in ensuring that the Court bases its decision on accurate historical facts. Moreover, because the procedures under challenge here could be used to affect the rights of ordinary Americans, she desires to ensure that rights preserved to the People, writ large, and procedural protections the Founders intended to secure to the

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[1] All Petitioners and Respondents have either given specific consent to file this brief or filed a blanket consent. No counsel for a party authored this brief in whole or in part; no person or entity, other than *Amicus*, made any monetary contribution intended to fund the preparation or submission of this brief. *Amicus* is not a University employee. Any support she receives is the type the University or its law school regularly provides to all Professors Emeriti.

average person, are not obliterated in a bitter brawl between political partisans.

SUMMARY OF THE ARGUMENT

The Respondent Committees lacked subject matter jurisdiction to issue these subpoenas under both House Rules and the Constitution. Here, Congressional committees seek to investigate specific accusations of criminal misconduct against a particular American citizen. When the subpoenas were issued, the committees had only general oversight authority. That authority was insufficient under House Rules & precedent, the Constitution, the common law, and longstanding constitutional history and tradition. The committees needed specific jurisdiction. Constitutionally speaking, a subject matter jurisdiction defect cannot be cured by legislation purporting to be retroactive, even if Congress can cure it internally.

Under this Court's precedents, enforcing subpoenas issued by tribunals that lack subject matter jurisdiction violates Due Process. Moreover, as to one target, the type of investigation Respondents pursued closely resembled an impeachment investigation. As to others it resembled a law enforcement investigation. The Constitution establishes subject matter jurisdictional and procedural boundaries as to impeachment and law enforcement that committees operating under mere oversight jurisdiction cannot invade or circumvent. Where Congress has a role, and wishes to act through

committees, it must speak specifically to authorize them.

The fact that committees, operating under oversight jurisdiction, can offer a "legislative purpose" for subpoenas to investigate alleged criminal behavior is not surprising but neither is it determinative. Citizens do not surrender their Constitutional rights on the Capitol's doorsteps; nor does the reach of their rights under the Constitution end there. The Court must first find a Congressional grant of jurisdiction to the committees. If it exists, the Court must then weigh the committees' professed legislative needs against possible jeopardy to (1) the rights of the accused and (2) the powers granted to other Branches under the Constitution. These rules apply irrespective of the political party in power.

THE ARGUMENT

I. The Question is Whether the Committees Had Subject Matter Jurisdiction to Issue the Subpoenas

The Respondent Committees sought to use legislative "oversight" powers to investigate or discover criminal accusations against particular persons and entities. This holds true irrespective of the fact that they also had other, more general, goals. Among the targets is a sitting President of the United States, although others are subject to subpoenas.[2]

[2] This brief focuses on the President and ordinary citizens. I will call those subject to the subpoenas collectively the "Trump plaintiffs."

The subpoenas relate, in part, to behavior before that President was elected. The central question is whether the Committees had subject matter jurisdiction when they issued the subpoenas. Enforcing an edict by a tribunal lacking subject matter jurisdiction violates Due Process. *Scott v. McNeal*, 154 U.S. 34, 46 (1894); *Old Wayne Mut. Life Assoc. v. McDonough*, 204 U.S. 8, 15 (1907). Doing so may also affect other constitutional mandates such as the Impeachment Clause, separation of powers and individual rights secured under the First, Fourth and Fifth Amendments.

Although subject matter jurisdiction was not specifically raised below,[3] it may be raised at any time in any proceeding, and the Court must even address it *sua sponte*. *E.g., Fort Bend Cty v. Davis*, 139 S. Ct. 1843 (2019). It is also a "subsidiary question fairly included" in the questions presented. Sup. Ct. R. 14.

Internally, Congress has long recognized the principle that its committees must be given jurisdiction under its rules. *See* 48 *Cong. Rec.* 762 (1912) (arguing over what jurisdictions and powers to give to select committee); 48 *Cong. Rec.* 683 (1912) (whether a committee had jurisdiction over a bill); Asher Hinds, *Precedents of the House of Representatives of the United States* ("*Hinds*") 690 (1907) H. Rule X(1) (matters within the jurisdiction of standing committees to be referred to them); House R. XV(2) (motions to remove a bill from a committee for

[3] Petitioners and the Department of Justice did argue below, that the Congress has no law enforcement authority and that that Constitution requires that a subpoena to the President must be clearly authorized and the legislative purpose clearly delineated.

lack of jurisdiction). A committee may not report a bill if the subject matter has not been referred to it by the House. 4 *Hinds'* § 4355.

II. Revisiting the Facts is Key: The Committees Sought To Investigate or Discover Allegations of Criminal Misconduct Against Specific Persons or Entities

Amicus views the key facts somewhat differently than the courts and parties below. One must revisit them to appreciate the subject matter jurisdiction issues.

As a result of the November, 2018 elections, Democrats control the House and its committees. On January 3, 2019, in largely a party-line vote, the House altered its rules. H. Res. 6, 116th Cong. (2019). First, they amended House Rule X(3)(i). That rule, under the heading "Special oversight functions," relates to the special jurisdiction of the Respondent Committee on Oversight and Government Reform (hereinafter "the Oversight Committee" or, in context, "Oversight"). The rule originally read:

> The Committee on Oversight and *Government* Reform shall review and study on *a continuing basis* the operation of *Government activities* at all levels *with a view to determining their economy and efficiency*.

H. Rule X(3)(i), 115th Congress in *Constitution, Jefferson's Manual, and the Rules of the House of Representatives* (2017) (emphasis added)

The amendments struck the words "with a view to

determining their economy and efficiency" and inserted instead the words, "*including the Executive Office of the President*." The Amendment also eliminated the word "Government" from the name of the Committee. The altered rule now reads:

> The *Committee on Oversight and Reform* shall review and study on a continuing basis the operation of Government activities at all levels, *including the Executive Office of the President*.

H. Rule X(3)(i) (Emphasis added).

Oversight has claimed that the change was intended to clarify rather than depart from its practices. *E.g.*, Br. Oversight Comm, 940 F.3d at 710 at 5, n. 4. No legislative information at the time of the amendments suggested otherwise. The courts below also attributed no significance to the changes. In *Mazars* the district court said, "If there is a common thread running through the subjects within the Oversight Committee's jurisdiction, it is the oversight of the operations and administration of the Executive Branch." *Trump v. Comm. on Oversight & Reform*, 380 F. Supp. 3d 76, 83 (2019). The Appeals Court stated "[l]ike previous Congresses" the House had established an Oversight Committee and provided for its jurisdiction. *Trump v. Mazars*, 940 F.3d 710, 714-15 (D.C. Cir. 2019).

Oversight's power under the amendments must be read in tandem with its preexisting power under Rule X, cl. 4 (Additional Functions of Committees). Oversight had the power to investigate any matter that was under the jurisdiction of *another* committee and to share the results with other committees.

Notably, all other other committees retained the *same* oversight jurisdiction they long had. *Compare* H. Rule X(1)(n) (Oversight); H. Rule X(1)(h) (Financial Services); *id.* at X(3)(m) (Intelligence); *id.* at X(11). While Intelligence is a select committee, its jurisdiction did not cover an investigation of criminal accusations. Thus, in this context, its jurisdiction is also properly termed "oversight."

The Oversight Committee took the lead in these investigations. Early on, its Chair expressed an interest in having former Trump attorney and business associate, Michael Cohen testify.[4] In the prior Congress, the 115th, Cohen had perjured himself before the House Permanent Select Committee on Intelligence ("Intelligence Committee" or, in context, "Intelligence") and the Senate Select Committee on Intelligence. These committees were said to be investigating allegations of whether Russians meddled in the 2016 U.S. election. Cohen was subsequently prosecuted for the perjury by Special Counsel Robert Mueller. He pled guilty.[5] His

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[4] Connor O'Brien, *Incoming House Oversight Chair Wants Cohen to Testify in January*, Politico, Dec. 16, 2018, https://www.politico.com/story/2018/12/16/michael-cohen-cummings-oversight-trump-1066780. House Committee on Oversight and Reform, *Hearing With Michael Cohen, Former Attorney to President Trump*, Jan. 8, 2019, https://oversight.house.gov/legislation/hearings/with-michael-cohen-former-attorney-to-president-donald-trump.

[5] *U.S. v. Cohen*, No. 18 Crim. 850 (SDNY), https://www.justice.gov/file/1115596/download (information); Dept. of Justice, https://www.justice.gov/file/1115566/download (plea agreement).

activities with respect to Russia were mentioned in the *Mueller Report*.[6]

On February 26-27, after extensive negotiations with Democrats, Cohen finally "voluntarily" appeared before the Committee on Oversight and Reform in widely-televised hearings.[7] The testimony went beyond the topics of correcting false testimony and Russia. Cohen made specific accusations. They included that he made a payment for Trump during the campaign to enable Trump to silence unfavorable allegations. (The Attorney General had already been informed during a prior Congress of the conclusion of the Director of the Office of Government Ethics that Trump was required to report this payment on election financial statements but did not.)[8] Cohen also

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[6] Special Counsel Robert S. Mueller, III, I *Report on the Investigation into Russian Interference in the 2016 Presidential Election* (Mar. 2019), at 76-79.

[7] Hearing Before the Committee on Oversight and Reform, 116th Cong., 1st Sess., Feb. 27, 2019, Ser. No. 116-03 ("Cohen Oversight Hearing"), https://docs.house.gov/meetings/GO/GO00/20190227/108969/HHRG-116-GO00-20190227-SD003.pdf. *See also* Opening Statement of Chairman Elijah E. Cummings, Feb. 26, 2019, https://docs.house.gov/meetings/GO/GO00/20190227/108969/HHRG-116-GO00-MState-C000984-20190227.pdf.

[8] On May 16, 2018, the Director of the Office of Government Ethics advised the Deputy Attorney General Rod Rosenstein that, in response to a complaint from a group, Citizens for Responsibility and Ethics in Washington, it had investigated a payment Cohen had made for Trump. It concluded that the payment was a loan, was campaign support, and should have been reported as a liability in candidate Trump's public financial disclosure. Letter from David Apol, Acting Director, OGE to Rod Rosenstein, Deputy Attorney General, May 16, 2018, https://www.oge.gov/web/OGE.nsf/0/D323FD5ABB1FD2358525828F005F4888/$FILE/OGE%20Letter%20to%20DOJ%20(posti

claimed that Trump committed various financial crimes unrelated to election and prior to it. He provided the Committee with documents in his custody reflecting Trump's finances and told it that Trump dealt with Respondent Deutsche Bank. *E.g.,* Cohen Oversight Hearing at 10.

On February 28, 2019 and in March 6, 2019, the Intelligence Committee deposed Cohen behind closed doors.[9] Later, on May 20, the Committee produced redacted transcripts, revealing that Cohen made similar accusations to those made before Oversight.[10] Cohen provided that Committee with evidence that Trump had dealt with Respondents Deutsche Bank and Capital One, as well as other financial institutions. At least in one case he presented documents marked as covered by the attorney client privilege.[11]

On March 20, 2019, Oversight's Chair wrote to Mazars' Chair and CEO requesting the production of

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ng).pdf. *See also Trump v. Mazars*, 740 F.3d at 710. The Department of Justice has long taken the position that a sitting President cannot be prosecuted in common law courts. I agree. Carter, *supra* at p. 1.

[9] The Senate Intelligence Committee also brought Cohen back by subpoena and took closed-door testimony in February, 2019. *See* Maggie Haberman, et al., *Senate Intell. Comm. Subpoenas Trump Attorney Michael Cohen*, *N.Y. Times*, Jan. 24, 2019.

[10] *See* House Permanent Select Committee on Intelligence, *Press Release, Chairman Schiff Statement on Release of Michael Cohen Testimony and Documents*, May 20, 2019, https://intelligence.house.gov/news/documentsingle.aspx?DocumentID=644 (with links to transcripts).

[11] *E.g.,* Cohen Intel. Dep., Pt. 2, March 6, at 61, 246-48 250. Whether Congress is obligated to recognize the privilege is the subject of debate. *E.g.,* D. Jean Veta & Brian D. Smith,

large numbers of documents relating to Trump and other Petitioners. The letter expressly cited Cohen's testimony and the documents he had provided. Letter from Elijah Cummings to Mazars. *See* Elijah Cummings, Chair, Oversight and Reform, to Victor Wahba, Mar. 20, 2019, https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/2019-03-20.EEC%20to%20Wahba-Mazars.pdf. The request sought sought "all" in several categories of documents relevant to Trump's finances back for ten years.

The committees then pursued a coordinated subpoena campaign. On April 15, 2019, the Oversight Committee served a subpoena on Mazars. Like the letter request, the subpoena also applied to sought wide ranging information both prior to and after Trump was elected. On the same day, April 15, Intelligence and Financial Services jointly served subpoenas on several financial institutions including Deutsche Bank and Capital One. They asked for personal financial records relating to the President, family members and related entities from 2010 forward. *See* Declaration of Todd B. Tatelman, executed May 10, 2019, Exhibits A and B, *Trump v.*

Congressional Investigations: Bank of America *and Recent Developments in Attorney-Client Privilege*, Bloomberg Law Reports, Nov. 6, 2010; S. Rep. No. 104-191, at 11 (1995) (asserting committees may make own decisions on privileges because privileges a product of common law). Cohen had been disbarred and had previously been suspended. *Matter of Cohen*, 170 A.D.3d 30 (1st Dept. Feb. 26, 2019) (striking eligibility nunc pro tunc to Nov. 29, 2018). The privilege does not apply when the holder has used an attorney for the purpose of accomplishing a crime or fraud. *E.g., U.S. v. Zolin*. 491 U.S. 554 (1989).

Deutsche Bank, 2019 U.S. LEXIS 86902 (S.D.N.Y. 2019) (No. 1:19-cv-03826). The Court in *Deutsche Bank* has noted that the committees have declined to commit to keeping the records confidential for the long term. *Trump v. Deutsche Bank*, 943 F.3d 627, 637, (2d Cir. 2019); *id.* at 677 (Livingston, J. dissenting).

On or about April 22, 2019, the Trump plaintiffs sued to block the subpoena. Compl., *Trump v. Committee on Oversight & Reform of U.S. House of Representatives*, 380 F. Supp. 3d 76 (D.D.C. 2019) (No. 19-cv-01136). On April 29, 2019, they sued Deutche Bank and Capital One and others to block the subpoenas. Compl., *Trump v. Deutsche Bank*, 2019 U.S. Dist. LEXIS 86902 (S.D.N.Y. 2019) (No. 1:19-cv-03826). In *Deutsche Bank*, the Trump plaintiffs alleged that the House had refused to provide copies of the subpoenas or any information about their contents. *Id.* at ¶44 at 9-10. They claim they first learned about the subpoenas' contents from the financial institutions. *Id.* at ¶¶44-51, at 10-11. On May 10, 2019, the House eventually filed a redacted copy of the subpoenas with the District Court. Services. Tatelman Declaration, *supra* p. 10.

All House committees investigating the White House or Trump apparently took the position that, using whatever jurisdiction they had under H. Res. 6, they could casually sidle over from "oversight" jurisdiction to "impeachment" jurisdiction. On June 6, a House report claimed that pursuant to House Rule X(l), the Committee on the Judiciary *already* had and was using authority to investigate whether the President had committed impeachable offenses. *House Rept. 116-105,116th Cong. 12-13 (2019) (Recommending Attorney General, be found in*

Contempt of Congress for Refusal to Comply With Subpoena (June 6, 2019) https://www.govinfo.gov/content/pkg/CRPT-116hrpt105/pdf/CRPT-116hrpt105.pdf. And on August 26, Judiciary argued in a brief to the D.C. Circuit that it needed enforcement of a subpoena for grand jury 6(e) materials to obtain "information necessary to its consideration of whether to recommend articles of impeachment against the President." *E.g.,* Pltf's Mem. In Support of Prelim. Injunct. Mot. or, in the Alternative, for Expedited Partial Sum. Judg., *Comm. on Judiciary v. McGahn*, 2019 U.S. App. LEXIS 38298 (D.C. Cir. 2019) at 11, 36-37, 40-42.

Along the way, some Democrats submitted bills to formally impeach the President or to formally begin an impeachment investigation. The leadership sent the bills to committee graveyards, choosing to manage its message as "oversight." [12]

On June 10, the House passed H. Res. 430 authorizing the Judiciary Committee to initiate or

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[12] *See, e.g.,* H. Res. 13, 116th Cong. (2019) (Rep. Sherman; impeaching Trump; referred to Judiciary; H. Res. 257, 116th Cong. (2019) (Rep. Tlaib; directing Judiciary Comm. to inquire); H. Res. 396, 116th Cong. (2019) (Rep. Jackson-Lee; authorizing and directing Judiciary to investigate whether to impeach on a host of issues); H. Res. 498, 116th Cong. (2019) (Rep. Green; impeaching for racism). When challenged, the Speaker and/or Parliamentarian held that a bill would not receive privileged status unless the proponent specifically designated it as privileged under House Rule IX. (As I discuss in part III substantive privilege does not depend on such technicalities.) Rep. Al Green finally met these requirements and pushed his bill forward. Leadership made sure it was tabled. Kyle Cheney, *Al Green to Force Impeachment Vote Against Trump*, Politico, July 15, 2019; *See also* 165 *Cong. Rec.* H5973-74 (July 17, 2019),

intervene in judicial proceedings to enforce certain subpoenas. H. Res. 430, congress.gov., https://www.congress.gov/bill/116th-congress/house-resolution/430.

On July 24, 2019, the House passed H. Res 507, "affirming the validity of subpoenas [already] issued and investigations undertaken by any standing or permanent select committee of the House of Representatives pursuant to authorities delegated by the Constitution and the Rules of the House of Representatives." H. Res. 507, 116th Cong. (2019). This resolution did not, by its terms, give jurisdiction. It only confirmed the jurisdiction that was that already *"delegated by the Constitution and Rules of the House."*

In August, 2019, House Judiciary Chair Jerold Nadler announced, via a television interview, that that the Committee on the Judiciary was already conducting "formal impeachment proceedings" and that the process would end with a vote to bring articles of impeachment to the house floor or vote not." Video Interview, Jerry Nadler, Chair, Committee on Judiciary, with Erin Burnette, *OutFront*, CNN (Aug. 8, 2019), https://www.cnn.com/videos/politics/2019/08/08/jerry-nadler-trump-impeachment-inquiry-ebof-vpx.cnn.

On Sept. 24, Speaker of the House Nancy Pelosi, held a press conference. She stated, *"[T]oday, I am announcing the House of Representatives is moving forward with an official impeachment inquiry.* I am

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(discussion Rep. Green motion as privileged). While taking politically unpopular steps, procedurally, these Representatives were proceeding far more consistently with the Constitution than was leadership and its followers.

directing our six Committees to proceed with their investigations *under that umbrella of impeachment inquiry."* Speaker of the House, *Pelosi Remarks Announcing Impeachment Inquiry*, Sept. 24, 2019, http://www.speaker.gov/newsroom/92419-0 (emphasis supplied) [emphasis added] (last visited 01/29/2020). Respondents are among those six committees. Speaker Pelosi's declaration reaffirmed that leadership had concluded that committees could "flip the switch" from "oversight" to "impeachment" at any time, without seeking additional authority.

In October 3, Minority Leader Kevin McCarthy objected to the House's approach arguing that a full vote was needed for impeachment investigative authority. Letter from Kevin McCarthy, House Minority Leader, to Nancy Pelosi, Speaker of the House, (Oct. 3, 2019), https://republicanleader.house.gov/wp-content/uploads/2019/10/Impeachment-doc.pdf.[13] Speaker Pelosi responded saying that House Rules gave standing committees full authority to so proceed and there was no requirement that the full House vote before conducting an impeachment inquiry." Letter from Nancy Pelosi, Speaker of the House, to Kevin McCarthy, Minority Leader, Oct. 3, 2019, https://www.speaker.gov/sites/speaker.house.gov/files/10.3.19%20McCarthy.pdf.

On Oct. 31, the House attempted to suggest the *preexistence* of impeachment jurisdiction. The resolution directed these committees and three others "to *continue their ongoing investigations as part of the existing House of Representatives inquiry into*

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[13] As indicated in the Trump Plaintiffs' brief, Republicans had regularly complained of Democrat approaches.

whether sufficient grounds exist for the House of Representatives to exercise its Constitutional power to impeach Donald John Trump, President of the United States of America, and for other purposes." H. Res. 660, 116th Cong. (2019) (emphasis supplied). On December 18, the House passed H.R. 755 impeaching the President, while continuing to insist that the committees had the right to "continue" their investigations as "impeachment inquiries."[14]

The question for the Court, then, is whether, prior to H. Res. 660, H. Res. 6 gave the committees subject matter jurisdiction to conduct these investigations into allegations of criminal misconduct. If there was no jurisdiction to hear the testimony of Michael Cohen on subjects of criminal liabilty, then the subpoenas are akin to the proverbial "fruits of a poisonous tree." If Cohen's testimony was acceptable, the Court must still consider whether further investigation by supoenas is supported by House Rules.

III. The Founders Decided *Against* Giving Congress the Broad Power Parliament Had to Investigate an Accused

The Founders looked to the British Parliament in designing Congress. To appreciate the subject matter

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[14] The House later adopted two articles of impeachment against Trump. H. Res. 755, 116th Cong. (2019). Those articles are procedurally valid. An investigation is not a prerequisite to an impeachment. However, this argument arguably affects the status of evidence collected in various committees *before* the House passed H. Res. 660.

jurisdiction defect, one must appreciate the history of how jurisdiction and criminal prosecutions intersected with impeachments.

A. Parliament's "Impeachment Power" Was the Power to Investigate *Any* Criminal Accusations Against *Any* Individual

Parliament usually operated as a legislative body, leaving law enforcement to the common law courts. However, it could also operate as a judicial body. When it did, it was the highest court in the realm. Carter, *supra* p. 1, at 357. It had the power to hold *any* person of any rank liable for *any* crime, whether or not the crime was against the state.[15] *See* Carter, *supra* p. 1, at 351-52. *This broad power was called its power of "impeachment."* *Id.* The House of Commons had the sole power to issue impeachments. In impeachment proceedings, the Commons acted as the grand Inquest (or Grand Jury) of the nation. 4 William Blackstone, *Commentaries on the Laws of England* ("Blackstone") *259. As Thomas Jefferson observed, "The Commons, as the grand inquest of the nation becomes suitors for penal justice." *Jefferson's Manual* § 602, at 313 (1801). Irrespective of who first made the accusations, the House impeached in the name of the Commons. *Id.*

The House of Lords then held trial. Carter, *supra* p. 1, at 351. The Lords could prescribe any sentence—from acquittal to fines and forfeitures, to execution. *Id.* at 353. However, the Commons had the final say

[15] Parliament also had the power to hear appeals.

on whether the Lord's judgment of conviction and sentencing would be carried out. *Id.*

B. Parliament Used Specific Jurisdiction for "Impeachment" Investigations

If they did not use the Committee of the whole, Parliament gave committees specific jurisdiction for impeachment investigations. E.g., 7 Cobbett's Parl. Hist., 55-56; 63-66 (1715) (Commons votes to refer papers indicating accusations to Committee of Secrecy which returned with report, general impeachment issued, and then same committee given jurisdiction to investigate further and draft articles of impeachment); 8 William Cobbett, *Complete Collection of State Trials and Proceedings for High Treason, and Other Crimes and Misdemeanours: From the Reign of King Richard II to the End of the Reign of King George I*, 805-06 (1735) (impeachment of H. Sacheverell; complaint made before whole Commons; committee appointed to draw up articles of impeachment).[16]

C. Impeachment was a "High Privilege" of the House of Commons

Historically, impeachment was one of the highest privileges the House of Commons had. The right was jealously guarded. Carter, *supra* p. 1, 357-60 (battle over King's efforts to ignore the Commons'

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[16] For discussion of oversight powers in Parliament, *see* p. 23. The Commons would often take a general impeachment to the Lords first, and then return to appoint a committee for the investigations and specific articles.

impeachment and try the accused in common law courts); Thomas Erskine May, *The Constitutional History of England Since the Accession of George III, 1760-1860*, 436-37 (1880) (Commons decides King cannot end impeachment by ending Parliament; inviolable right). The significance of the privilege was underscored by Parliament's view that when an impeachment issued*, all other proceedings in common law courts against the accused on the same subject including grand jury proceedings were stayed.* Carter, *supra* p. 1, at 359 (House of Commons arguing that for King's courts to assume jurisdiction after impeachment invades its privilege). The common law courts always retained authority to decide residual issues, such as whether a privilege existed. *E.g., Stockdale v. Hasnard*, 112 Eng. Rep. 1112, 1115 (1839) (courts of law from earliest time have had power to decide Parliamentary privileges).

D. The Founders Narrowed the Meaning of the Term "Impeachment" for Americans, Limiting it to Civil Officers of the United States

In considering whether impeachment should be included in the Constitution, the Founders rejected the British' approach of giving broad legislative and juridical power to Congress. Instead, they gave specific criminal jurisdiction under Article 2, Sec. 4 which provides that "civil officers of the United States" may be removed by impeachment. It follows then, that private citizens may not be impeached. *The The Federalist* No. 65 (Alexander Hamilton) (noting impeachment concerns itself with abuse or violation of the public trust by public men). An investigation

that resembles an impeachment investigation, but is not called such and has not been authorized, would similarly seem to be improper under the Impeachment Clause.

The Founders also limited the punishment for an impeachment conviction to removal and a permanent ban from holding office. U.S. Const. art. I, §3, cl. 7. The punishment limitation was designed to avoid double jeopardy. In the case of an impeachment conviction, the Founders wanted further prosecution to occur "according to Law" in common law courts. *Id.,* Carter, *supra*, p. 1, at 384-86. This bifurcation of the trial also supports the view that Congress' criminal jurisdiction is limited. It cannot issue the ultimate penalty, but it can, through investigations as to which rules of evidence or confidentiality expectations do not apply, substantially damage a defendants' right to a fair hearing in a subsequent common law proceeding and in the court of public opinion.

E. The Founders Gave the Power to Investigate Specific Accusations of Criminal Misconduct to the Executive Branch and the Power to Resolve Legal Questions to the Judicial Branch

As the Court knows, the Founders also separated the powers of the three branches. They placed responsibility for investigating and prosecuting all other "impeachments" (used in the broad Parliamentary sense, *supra* p. 16) under the Executive branch. U.S. Const., art. II . And they gave the Judicial Branch the power to resolve legal questions that arose under the Constitution and to try

those cases. U.S. Const. art. III; *Marbury v. Madison*, 5 U.S. 137 (1803).

There is evidence that this rejection of Parliament's broad prosecutorial approach was a conscious decision. Prior to the founding the independent states took a variety of approaches to legislative power. Some states gave their legislatures judicial *and* legislative powers; others limited their legislature's powers to investigate criminal cases, except in cases of impeachment. *See* Carter, *supra* p. 1, pp. 377-81. These facts suggest that the federal compromise was to adopt the second approach.

F. The Founders Set Forth Specific Protections for the Criminally Accused

The Founders could look back on a long history of unfair prosecutorial practices under the Crown. Carter, *supra* p. 1, 348-50. They, therefore, set forth specific protections for an accused in their Constitution. For example, the Fifth Amendment secures a privilege against self-incrimination, ensures the right to Grand Jury in capital and infamous crime cases, bans double jeopardy, and guarantees Due Process. U.S. Const. amend. V. The Fourth Amendment has a prohibition against

unreasonable searches and seizures. U.S. Const. amend. IV.

G. The Founders Embraced Impeachment as a "High Privilege" of the House of Representatives

In designing the House of Representatives, the Founders also recognized impeachment as a "high privilege." They provided, "The House of Representatives . . . shall have the sole Power of Impeachment." U.S. Const. art. 1, § 2, cl. 5; *Jefferson's Manual* § 604.

House Rules and precedent also recognize privileges. Whenever a question of privilege is called for it must be taken up by the House, although it may be postponed by a vote of the House." 3 Hinds', § 2535. Rule IX defines privileged matters as, *inter alia*, "those affecting the rights of the House collectively . . . ." H. Rule IX. By precedent, the Speaker "should submit to the House whatever relates to the privileges of the House or a Member." 3 Hinds' § 2536. In short, the privilege of impeachment belongs to the House as a whole; no committee can usurp it.[17]

Of course, these subpoenas relate, at least in part to allegations of criminal misconduct *prior to* Trump's assuming the presidency. In 1973, the House Judiciary Committee declined an investigation request by Vice President Spiro Agnew opining that the House no power to investigate allegations of misbehavior occurring wholly prior to taking office.

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[17] Privilege" also has an *ordinal* meaning: bills to impeach have priority over other bills. H. Rule IX.*See discussion at 17n.*

Jefferson's Manual, § 603 (1801). *See also* Communication from the Vice President of the United States, 119 Cong. Rec., pt. 24, at 31368 (1973); 3 Lewis Deschler, *Deschler's Precedents of the U.S. House of Representatives* ("*Deschler's*") § 5.14 at 2034-36 (1976). Agnew was following the failed example of John C. Calhoun. *Hinds'* §1736, at 97-99. In the 1860s. Judiciary also determined there was no precedent for investigating Speaker Schuyler Colfax, regarding actions prior to his term as Speaker of the House. 3 Hinds' § 2510.

H. Citizens Retain Their Constitutional Rights to Object to Congressional Investigations and to Request Judicial Redress

Where a committee has no subject matter jurisdiction, it has no right to compel a response. In other cases, however, where the resistance is based upon an individual right, the target must assert the constitutional right to demonstrate that s/he relies upon it. *Hutchinson*, 369 U.S. at 599. Under the First Amendment, every accused person, irrespective of rank, retains a constitutional right to petition the judiciary for redress of grievances. U.S. Const. amend. I. But there is no obligation to beat the Committee to the courthouse door.

IV. The House Rules Do Not Authorize General "Oversight" Investigations of an Accused or These Subpoenas

A. The Text of the Rules Do Not Provide Jurisdiction

The text of the standard oversight rules do not authorize the investigations of allegations of criminal misconduct proposed here. Neither does the amended Rule X(3)(i) discussed *supra* p. 6. It refers to oversight over the "Executive Office of the President." The rules did not authorize the taking of the Cohen testimony; they do not authorize the subpoenas to follow up on it.

B. Traditional Notions of "Oversight" Do Not Support Jurisdiction

The Oversight Committee has said the rule X(3)(i) was only an amendment to "ma[k]e clearer . . . that the Committee has jurisdiction over the White House." Br. Oversight Comm, 940 F.3d at 710 at 5, n. 4. It has further said that its name change (dropping "Government") was "in recognition that the Committee 'has been conducting, and will continue to conduct, oversight of both governmental and private sector entities and individuals.'" *Id.* The source it cited for support was the oversight plan it wrote, never approved by Congress, and created after the rules were amended. *Id.* citing H. Rep.. No. 116-40 at 156 (2019).

In fact, Congressional standing committees have *never* done what occurred here. There is no tradition of using general "oversight" to investigate suspicions

of specific individuals' criminal activities. Yet, the Court should accept as true Oversight's statement that the whole House, when it voted, intended nothing new when it approved of H.R. 6. *Gojack v. U.S.*, 384 U.S. 702 (1966). That position confirms that Congress as a whole did not mean to extend standing committee jurisdiction.

1. Historically "Oversight Jurisdiction" Has Meant Jurisdiction to Investigate Matters of General Applicability

That language which directed Oversight to study and review government on a continuing basis—"with a view to determining their economy and efficiency"—had been used by Congress to describe work of the Oversight Committee and its predecessors since the 1946 Legislative Reorganization Act. *See, e.g.,* George B. Galloway, *History of the House of Representatives* 187-88 (1962) (re predecessor Committee on Expenditures in the Government Department); *Jefferson's Manual*, 392 (Wm. Brown ed. 1975) (re predecessor, Committee on Government Operations); *E.g.,* 93 *Cong. Rec.* 4457 (1947) (committee presenting activities "prepared in accordance with duties assigned under" that language). *See also* Leg. Reorg. Act of 1946, P.L. No. 601, 60 Stat. 812, ch. 753 (1946), https://www.loc.gov/law/help/statutes-at-large/79th-congress/session-2/c79s2ch753.pdf. As applied to the Committee of Oversight and [Government] Reform, has been in place since at least 1995. H. Rule X(2)(b)(2).

Parliament did not use the term "oversight" with respect to committees as we do today, but it did have

committees with general oversight powers. In 1704, we find a member speaking of a committee on elections. *See* 6 William Cobbett, *Parliamentary History of England: From the Earliest Period to the Year 1803 (*"X *Cobbett Parl. Hist.*"), 243 (1702-1714). Later, we see reference to the committees of Supply and Ways and Means. 15 *Cobbett Parl. Hist.,* at 781 (1763-1765).

When existing committees or the committee of the whole did not suffice, Parliament gave specific jurisdiction to committees to conduct the "enquiries." 19 *Cobbett Parl. Hist.*, at 1176-1199 (1777-1778) (committee of whole discussing motion to for "enquiry" into American matters and actions of General Burgoyne); 17 *Cobbett Parl. Hist.,* 905-06 (1771-1774) (referencing House of Commons appointment of committees to examine into the state and condition of the East India Company).[18]

2. Prior to the Constitution, the Independent States Conceived the Role of Standing Committees as Involving Matters of General Applicability

The early states had standing committees both before the Constitution and afterward. Harlow has traced committee growth from 1776 to1790. Ralph V. Harlow, *The History of Legislative Methods in the Period Before 1825*, 61-78 (1917); *id.* at 259 In the Appendix, he lists Standing Committees by state between 1770 and 1789. New York had committees on

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[18] While a privately run company, the East India Company operated under a Royal charter.

Privileges and Elections, Grievances, Courts of Justice and Trade. For Massachusetts, we see Finance, Encouragement of Arts, Agriculture and Manufacturing, Incorporation of Towns and Town Affairs, Accounts, New Trials, Abatement of Taxes etc. *Id.* As Harlow notes, the goal of committees was to establish more efficient ways of transacting business in legislatures. *Id.* at 67. *Accord* 1 Lauros G. McConachie, *Congressional Committees: A Study of the Origin and Development of Our National and Local Legislative Methods* 123-150 (1898) (general review of role of early committees in Congress). These functions are confirmed in other sources. 4 *Hinds'*, § 4081, *et seq.,* at 690-849 (History and Jurisdiction of the Standing Committees). In short, these committees focused on matters of general applicability.

3. Congress Has Never a Standing Committee on Impeachment Nor One Devoted to Investigations of Specific Criminal Misconduct Against Accused Persons

In 1831, ex-President, then Representative, John Adams made clear that he understood the role of standing committees as investigating matters of general applicability. Although he was speaking of impeachment, the lesson he offers on standing committee jurisdiction is helpful.

Congress was considering how to investigate charges of misconduct by the Commissioner of Public Lands. While recognizing that Congress *could* confer an impeachment matter to a standing committee, Adams argued for appointment of a select Committee.

First, he observed there had never been a standing committee with general impeachment jurisdiction—and he hoped there never would be.

> This House had not and he hoped there never would be occasion for a standing committee of impeachment. When a charge was made on this floor against a public officer, it was due to him to his friends and to the country that it be referred to a committee who are exclusively charged with the investigation. A select committee would therefore be most proper in this case.

Gales & Seaton's Register of Debates in Congress: Comprising the Leading Debates, at 2198-99 (1831) ("Gales & Seaton).

Second, Adams said that a case involving an accusation against a public officer would "prima facie" lead to an expectation of impeachment.

> Mr. ADAMS said he hoped the investigation would be sent to a select committee. The resolution contained a matter of charge against a public officer. *Prima facie* it would lead to an expectation of an impeachment.

Id.

He then made a third observation about standing committees and particularly, the Judiciary Committee. He said Judiciary was not charged with supervision of the public offices. He called for a special committee because of the "character of the officer in

question and the House" and urged a solemn and effectual investigation.

> It was alike due to the character of the officer in question and the House to investigate the matter solemnly and effectually. He thought the Committee on Private Land Claims had nothing whatever to do with this matter. If any of the standing committees of the House had any thing to do with such an inquiry it might be supposed to be that of the judiciary *but that committee was not charged with the supervision of the public offices*.

Id. at 2199 (emphasis supplied). Adams's comments confirm that standing committees, including the Judiciary Committee, were not understood as having the authority to investigate specific charges of misconduct. Judiciary's rules have not changed so much as to do away with the need for specific jurisdiction. *See* discussion *supra* p. 13.

The district court in *Mazars* relied upon the investigation of James Buchanan as precedent. 380 F. Supp. 3d at 76. But that committee had specific jurisdiction. 29 *Cong. Globe* 1017-20 (Mar. 1860).

In the impeachment case of Secretary of War William Belknap, a standing committee *did* handle the investigation, at least at first. But arguably, it had specific authority to do so.

On January 14, 1876, the whole House voted to give several existing standing committees a special charge to investigate the handling of monies in the departments they oversaw including "*to examine into the pay and emoluments of all officers* under the laws

of the United States" and to determine if increases or reductions were needed." It provided, "*said committees are authorized to send for persons and papers and may report by bill or otherwise."* 4 *Cong. Rec.* 414 (1876) (emphasis supplied). This jurisdiction was, thus, a specific authorization, and in stating "by otherwise" gave some leeway in how to report.

In the course of its investigation, one committee, the Committee on Expenditures in the War Department ("CEWD"), discovered allegations that the Secretary of War, and others had converted public funds to private use. Note that the Committee discovered the fraud not by targeting Belknap initially, but in the course of generally reviewing the Department's work. While the Committee could have returned to Congress for impeachment powers, instead, it determined that the language requiring it to report *"by bill or otherwise"* gave it authority to investigate and to report by articles of impeachment. Perhaps key here is that Democrats controlled the House while Republicans controlled the Executive Branch and the Senate.

Belknap voluntarily testified before the Committee. Seeing the handwriting on the wall, he resigned before House could vote. Moreover, the Committee found its power insufficient when its key witness fled. There is much more to this complex story. But in short, the Committee still offered a resolution that Belknap be immediately generally impeached at the bar of the Senate and that the evidence it had collected be sent to Judiciary for the drafting of specific articles. 4 Cong. Rec. iii (1876). The House adopted the resolutions. *Id.*. Judiciary later returned, stating that it needed additional

investigative and subpoena authority. The House granted it. *Id.*

Certainly, it is possible for a committee to start with a general inquiry and discover specific allegations of misconduct. But the obligation then is to seek jurisdiction. In 1817, Congress instructed the Judiciary Committee to inquire into the potential misuse of funds in the New York federal district courts. 31 *Annals of Cong*. 495 (Dec. 1817). Judiciary returned with a resolution that a committee be appointed to inquire into the conduct of Judges William P. Van Ness (S.D.N.Y.) and to report by resolution or otherwise. The resolution was amended to add Judges William Stephens (GA) and Mathias Tallmadge (N.D.N.Y.) 32 *Annals of Congress* 1715, (1818).

There is no argument that the committees here were conducting preliminary impeachment investigations. There is no such thing as a preliminary impeachment investigation within general oversight jurisdiction because by its nature, that oversight relates to matters of general applicability. Hinds' Precedents § 2494 mentions the case of Judge P. K. Lawrence as involving a "preliminary" investigation. But the facts are that a complaint was received in the House from the clerk of Lawrence's court. Debate ensued over which committee, a select committee or Judiciary, should review it. A select committee was chosen. *See* 7 Cong. Globe104. Later the same committee returned for and was given subpoena power. *See also Cong. Journal*, 25th Cong., 332. 7 Cong. Globe 137 (1839). Still later that committee recommended impeachment. 7 Cong.

Globe 187. By preliminary, *Hinds'* appears to mean before subpoena power.

C. Federal Judges are Not an Exception to the Rule Requiring Specific Jurisdiction

The handling of federal judges in the 1980s has been discussed in media as an exception. It is not. In 1980, Congress adopted a completely different process for judges in the Judicial Councils Reform and Judicial Conduct and Disability Act (Public Law 96-458, hereinafter, the "Act"), a specific statute. It authorized the judiciary to receive and investigate complaints and the Chief Justice to report recommendations. The current law is 28 U.S.C. §§351-364. In addition, this Court has ensured that Due Process Rights are respected through the *Federal Rules for Judicial Conduct and Judicial Disability Proceedings* (2019). But the cases still had impeachment-related resolutions that were sent to Judiciary and provided the authority for the investigations.

Under the statute, the Speaker, has treated the Chief Justice's missive as an *executive communication* which may be forwarded to a committee under House Rule XII. *See.* H. Rule XII*; see e.g.,* 132 *Cong. Rec.* 16316 (1986) (matter of Judge Harry E. Claiborne). This approach has been challenged, but it is not comparable to these cases.[19]

Although there is no room to cite all the citations here, I have examined the vast majority of the judicial

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[19] In 1987, in the matter of Judge Alcee Hastings, Rep. Sensenbrenner objected to the case being referred to Judiciary

cases before the 1980 Act. I have yet to see one that proceeded as these did, with a standing committee exercising vast jurisdiction to investigate criminal matters against specific individuals, while having only general authority. Nor have I seen any case in which such committees have purported to have the power to switch to impeachment at whim.

D. Specific Jurisdiction Has Been the Norm for Investigations of Criminal Accusations Against Individuals *Not* Subject to Impeachment

Most of the cases cited by Respondents to support or rebut Congress' right to investigate did *not* involve the investigation of specific accusations of criminal behavior against a specific individual. Thus, we can easily dispense with them as not applicable. The central issue in *Kilbourne v. Thompson*, 103 U.S. 168 (1880); *U.S. v. Rumley*, 345 U.S. 41 (1953); *Watkins v. U.S.*, 354 U.S. 178 (1957); *Barenblatt v. U.S.*, 360 U.S. 109 (1959); *Hutchinson v. U.S.*, 369 U.S. 599 (1962). In every one of these cases, a specific resolution was also introduced to authorize the investigation at hand.

Hutchinson did involve criminal behavior. The Senate gave a select committee specific authority to investigate criminal behavior in unions *after* an

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without a full Congress' vote and without the records having been shared with Congress. He argued that since Congress passed the Act, it should vote on how to handle the accusations otherwise, he said, they could be covered up. *See 133 Cong. Rec.* 6514 (1987). The precedent has remained in place.

alleged scheme to defraud had been incidentally discovered by a subcommittee of a standing committee during regular oversight. *Id.* at 600-601 citing S. Res. 74, 85th Cong., 1st Sess. (1957). [20] The authorizations to these committees fail that specificity test.

And finally, the same is true of the testimony of Sydney Blumenthal in the Benghazi hearings. Memo from Elijah Cummings to Members of the Comm. on Oversight and Reform, April 12, 2019, at 3 (suggesting case as precedent for obtaining private information).[21] The Committee was a select committee, Blumenthal was not personally accused of wrongdoing, the requests did not relate to such accusations—they were about his past salaries.

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[20] The committee was established in 1957 "'to conduct an investigation and study of the extent to which criminal and other improper practices or activities are, or have been, engaged in in the field of labor-management relations groups or organizations of employees or employers to the detriment of the interests of the public, employers or employees, and to determine whether any changes are required in the laws of the United States in order to protect such interests against the occurrence of such practices or activities.'" *Hutchinson*, 369 U.S. at 600-601. The alleged scheme was revealed to the Senate in testimony by one other than the accused before a Subcommittee of the Senate standing Committee on Public Works. *Id.* at 603.

[21] *See also* Deposition of Sidney Blumenthal, Select Comm. on Benghazi, Interviews with Witnesses, Vol. 4 of 11, 11th Cong., June 16, 2015 at 1021, https://www.govinfo.gov/content/pkg/CHRG-114hhrg22298/pdf/CHRG-114hhrg22298.pdf. At *id.*, p. 1043-48, Blumenthal was asked his salaries while working at the Clinton Foundation and as well as in other jobs.

E. Nonjurisdictional Action Cannot Be a Basis for Jurisdiction and Committees Cannot Expand Jurisdiction Given

This Court has required a "clear indication that Congress wanted a provision to be treated as having jurisdictional attributes." *See Musacchio v. U.S.*, 136 S. Ct. 709 (2016). The mere granting of general subpoena power cannot give jurisdiction. H. Rule XI(2)(m)(l) gives committees subpoena power "[f]or the purpose of carrying out any of its functions and duties under this rule and Rule X." If there is no jurisdiction over a subject, no subpoena can issue on that subject. Committee oversight plans not adopted by Congress cannot create jurisdiction. *See* discussion at p. Procedural shortcuts to express a bill to a committee with legislative jurisdiction also do not create jurisdiction to investigate allegations of individual criminal misconduct.

V. Congress Cannot Retroactively Establish Subject Matter Jurisdiction Under the Constitution

Internally, Congress has the power to retroactively approve jurisdiction that a committee erroneously assumed. However, it cannot retroactively create subject matter jurisdiction in order to ratify constitutionally void acts or violate the privileges of House members. Thus, House Resolutions 507, 660 and 755 do not resolve the

Constitutional defect. *See* discussion *supra* at pp. 13, 15.

CONCLUSION

The committees had no subject matter jurisdiction to issue the subpoenas. The judgments of the U.S. Court of Appeals for the District of Columbia and the U.S. Court of Appeals for the Second Circuit should both be *reversed*.

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Respectfully Submitted,

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