[EN BANC ORAL ARGUMENT SCHEDULED FOR APRIL 28, 2020]

No. 19-5331

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COMMITTEE ON THE JUDICIARY OF THE UNITED STATES HOUSE OF REPRESENTATIVES,
Plaintiff-Appellee,

v.

DONALD F. MCGAHN, II,
Defendant-Appellant.

On Appeal From the U.S. District Court for the District of Columbia
(No. 19-cv-2379) (Hon. Ketanji Brown Jackson, District Judge)

BRIEF OF FORMER MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE

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CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES PURSUANT TO CIRCUIT RULE 28(a)(1)

A. Parties and Amici. All parties who appeared before the district court appear in Plaintiff-Appellee's panel-stage merits brief. The parties appearing in this Court include those listed in Plaintiff-Appellee's brief.

A full list of *amici curiae* is included as an appendix to this brief.

Amici curiae are not corporate entities for which a corporate disclosure statement is required pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rules 27(a)(4) and 28(a)(1)(A).

B. Rulings Under Review. An accurate reference to the ruling at issue appears in Plaintiff-Appellee's brief.

C. Related Cases. Amici are not aware of any related cases within the meaning of Circuit Rule 28(a)(1)(C).

/s/ John A. Freedman
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STATEMENT OF AUTHORITY TO FILE

Both parties have consented to the filing of this brief.

Pursuant to Circuit Rule 29(d), *amici* certify that a separate brief is necessary to provide the unique perspective of a large, bipartisan group of former Members of Congress having vast collective experience with the congressional subpoena process.

/s/ John A. Freedman
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STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

No party's counsel authored this brief in whole or in part. Nor did any party or party's counsel, or any other person other than *amici curiae*, contribute money that was intended to fund preparing or submitting this brief.

/s/ John A. Freedman
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INTEREST OF AMICI CURIAE

Amici curiae are a large bipartisan group of former Senators and Representatives who have served an aggregate of nearly 1,000 years in Congress. *Amici* disagree on many issues of policy and politics. But all are deeply concerned that the vacated panel decision would have severely hindered Congress's ability to oversee the Executive Branch—oversight that is necessary to the system of checks and balances that protects our rights and liberties. The panel decision invites a seismic shift in the relationship between the Legislative and Executive Branches, and *amici* fear that, if courts are unavailable as a last resort to resolve legal questions in connection with congressional oversight, it will give the Executive carte blanche to ignore legitimate demands for information.

In *amici*'s experience, this country's system of checks and balances serves as a model for democracies (and aspiring democracies) worldwide. Legislative leaders from around the globe routinely inquire how Members of Congress can meaningfully conduct oversight of the Executive Branch if executive officials can refuse to produce information or to answer questions. The answer, at least until recently, has been that the

legislature can compel the production of information when such compulsion becomes necessary. These parliamentarians to whom we have extolled the virtues of our system understand the fragility of democracy. They will be watching this case to see whether the checks and balances that have historically defined our system will be hollowed out into unenforceable aspirations.

Amici urge the full Court to affirm the district court's judgment in order to preserve Congress's constitutional prerogative to effectively check executive overreach and lawbreaking.

STATUTES AND REGULATIONS

All pertinent materials are contained in Plaintiff-Appellee's addendum filed with their panel-stage merits brief.

ARGUMENT

Since the early nineteenth century, the Executive Branch has recognized the constitutional legitimacy of congressional requests for information and has generally cooperated with such requests in good faith, while still preserving its prerogative to assert executive privilege on an item-by-item basis. *See* Stephen W. Stathis, *Executive Cooperation: Presidential Recognition of the Investigative Authority of Congress*

and the Courts, 3 J. L. & Pol. 183, 188 (1986) (citing "hundreds of instances since 1789 when a chief executive has willingly responded to requests for records in the custody of the Executive Branch"). It has done so against the background understanding that, if the recipient outright refuses to honor a legitimate request for information, a court can step in to order compliance.

Things have changed. Seeking to block the testimony of a former White House official, this administration has taken the hardline position that not just Presidents, not just current aides, but *all* current and former high-level presidential aides have "absolute testimonial immunity"—*i.e.*, immunity forbidding even *appearing* for testimony no matter what topics will be probed. Even more extreme, the administration has asserted that no court can adjudicate the lawfulness of that categorical assertion of immunity—a position that threatens to entirely eliminate congressional oversight of the Executive Branch, even outside the context of investigations of presidential misconduct.

The gambit has so far paid off. The panel here, despite at least two judges finding the Executive's blanket assertion of testimonial immuni-

ty unfounded, nonetheless acceded to it by refusing to exercise jurisdiction over this case.

Amici urge affirmance of the well-reasoned decision of the district court, and they submit this brief to make three points rooted in their experience as former Members of Congress familiar with the processes of oversight and investigation. *First*, Congress's critical constitutional powers of oversight and investigation are viable because the political branches have understood courts to be a last resort to decide questions of law, consistent with the duty of the judiciary "to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). If the judiciary abdicates from this duty, the Executive will have neutralized Congress's ability to oversee executive processes, severely undermining Congress's ability to check the Executive and weakening our system of checks and balances.

Second, the straightforward legal issue presented in this case is fully capable of resolution by a court, as the district court did here. The panel's characterization of this case as an abstract, "intramural" dispute between the branches, with no consequences for individuals, defies reality. This case presents the concrete legal question of whether a former official—now a private citizen—must comply with a subpoena.

Congress can hold a person in contempt for failing to comply with a subpoena and arrest the contemnor until he complies or the term of the House expires. A court in those circumstances would unquestionably have jurisdiction over a habeas corpus petition to determine whether the recipient of a subpoena was justified in his refusal to comply. The panel offered no sound reason why courts in civil enforcement actions—actions more dignified than resorting to contempt, but no less concrete in their stakes—cannot resolve the same legal question between the same parties.

Finally, the implausibility of the immunity claim here underscores the consequences of the panel's ruling. Both the district court and a majority of the panel properly rejected the Executive's unfounded assertion of absolute testimonial immunity. The denial of jurisdiction here would insulate not just constitutional immunity questions, but other entirely unjustified refusals to permit oversight at all.

In short, the panel dismantled a key constitutional check on the Executive Branch—one that historically has served to ensure that the President and other executive officials, high and low, are not above the

law. The district court correctly decided this case, and its judgment should be affirmed by this full Court.

I. The Availability of Judicial Enforcement of Subpoenas Is Necessary To Congress's Ability To Check the Executive Branch

A. Congress's investigative and oversight powers are integral to its constitutional role.

Essential to Congress's legislative and impeachment powers is its authority to sit as "Grand Inquest of the Nation." Raoul Berger, *Congressional Subpoenas to Executive Officials*, 75 Colum. L. Rev. 865, 872 (1975). Indeed, the Supreme Court has long described Congress's "power to investigate [a]s inherent in the power to make laws," as "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.'" *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 (1975). And the "[i]ssuance of subponeas … has long been held to be a legitimate use by Congress of its power to investigate," *id.*; legislative subpoenas are in fact "older than our country itself," *Trump v. Mazars USA, LLP*, 940 F.3d 710, 718 (D.C. Cir. 2019).

Amici speak from firsthand knowledge when we say that both Congress and the Executive have long understood that the courts will

provide a backstop if the Executive unreasonably fails to comply with legitimate demands for information. *See, e.g.*, *Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act*, 10 Op. O.L.C. 68, 83 (1986). As the district court recognized, this assumption has been uniformly confirmed by Congress's longstanding practice of relying on the courts to enforce its subpoenas. *See, e.g.*, *Comm. on Oversight and Gov't Reform v. Holder*, 979 F. Supp. 2d 1 (D.D.C. 2013); *Comm. on Judiciary v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008); *see also United States v. AT&T Co.*, 551 F.2d 384 (D.C. Cir. 1976); *Sen. Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974).

If federal courts close their doors to Congress and decline to resolve disputed issues of law in the face of executive intransigence, it presages the end of Congress's powers of inquiry. "Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed." *Eastland,* 421 U.S. at 505 (quoting *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927)). Without even the potential for judicial enforce-

ment, subpoenas become just that: "mere requests." This administration, and potentially future ones, will treat the panel's decision as an open invitation to refuse to share any information with Congress, even in response to compulsory process. Congress's ability to conduct core legislative functions that depend on the gathering of information—not just oversight, but lawmaking—will be severely hamstrung. And while future administrations may recognize the harm to our system caused by an utter failure to compromise, *amici* fear that the panel decision opened a Pandora's box not so easily closed. When Congress demands evidence of serious wrongdoing, even an Executive with the best of intentions will refuse to comply unless required to do so

It is hard to overstate the consequences of congressional inability to enforce any subpoena issued to a current or former executive official. Congress's ability to exercise most of its constitutional powers depends on its powers of inquiry. "[T]he power of inquiry" along with the "process to enforce it" is an "essential" element of Congress's execution of its constitutional powers. *McGrain*, 273 U.S. at 174. "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." *Mazars*, 940 F.3d at 719. "Without the power to investigate—including … 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." *Quinn v. United States*, 349 U.S. 155, 160-61 (1955). The panel decision will weaken Congress's ability to counterbalance executive power and risks transforming our government from the representative democracy that the founders sought into something more like the monarchy they fought a war to escape. *Cf. United States v. Burr*, 25 F. Cas. 30, 34 (C.C.D. Va. 1807) (Marshall, C.J.) (under the English Constitution, the King could "do no wrong," "no blame [could] be imputed to him," and therefore he could not be served with process).

From the outset of the Republic, the Supreme Court has recognized that Congress has inherent power to handle persons in contempt. In *Anderson v. Dunn*, 19 U.S. 204 (1821), the Court upheld the House's power to imprison the contemnor until he removes the contempt or the term of the House expires. *Id.* at 230-31. The contemnor, of course, has a right to seek habeas corpus review in court, and the court is required to determine if the basis for contempt was justified. *See McGrain*, 273

U.S. at 154. This inherent remedy is still available to the House, but it is far preferable for many public policy reasons, not the least being the safety of individuals and the avoidance of the possibility of violence, for the courts to address the issue through the civil process of declaratory and injunctive relief.

B. Non-judicial enforcement methods do not adequately safeguard Congress's oversight powers.

The panel sought to minimize the impact of its decision by suggesting that Congress has other political mechanisms for encouraging compliance with a subpoena. But as the dissent explained, these other mechanisms are frequently (if not always) unworkable. Dissent 17. The Executive Branch itself, through its Office of Legal Counsel, has recognized that court enforcement is Congress's only realistic method for ensuring compliance with subpoenas. *Id.* at 17-18. In fact, many of the panel's proffered enforcement mechanisms depend on the very congressional investigative powers that the panel decision so squarely undermines. The panel decision contemplates impeachments without compulsory process, and refusals to appropriate funds for an Executive Branch whose inner operations are opaque to Congress. Even if these alternative mechanisms were realistic prior to the panel's decision—which

amici strongly doubt—they are not if Congress is stripped of the power to enforce its demands for information.

It would make a "mockery" of the House's impeachment power for the House to have the power to impeach but not "the power to obtain the evidence and proofs on which their impeachment was based." Cong. Globe, 27th Cong., 2d Sess. 580 (1842) (statement of John Quincy Adams). And, like the impeachment power, the power of the purse depends in part on Congress's power of inquiry. Legal restrictions that Congress places on the President's ability to spend money are of little value if Congress has no power to investigate whether the President abides by those restrictions.

As a practical matter, the only effective way to use the power of the purse to elicit information guarded by the Executive would be for Congress to categorically refuse all appropriations until the Executive turned over the requested information. But *amici*'s service convinces them that the threat of withholding all funds across-the-board will be far too blunt, and too detrimental to our nation, to justify wielding in service of an oversight dispute. It is asking too much to demand that

Congress endanger the American people to oversee the Executive Branch.

Moreover, Congress can only exercise the appropriations tool periodically, in conjunction with the appropriations process. And in at least some instances in which Congress could theoretically use its power to shut down the government to exert leverage, political realities like pandemics and financial meltdowns—times, incidentally, at which there is usually the *greatest* need for effective congressional oversight—will make Congress's power to shut down the government practically impossible to exercise. More important, Congress shouldn't have to endanger the United States' credit rating, retirees' social-security checks, and food-stamp recipients' dinners to obtain information that since the founding has been recognized as essential to "effective and honest" government. *Watkins v. United States*, 354 U.S. 178, 194-95 (1957).

II. The Panel Had No Basis For Refusing To Adjudicate the Merits of The Executive's Claim

The panel offered no sound justification for taking the critically important mechanism of judicial enforcement off the table. In this case, a straightforward and concededly "narrow" legal question (Op. 11) divides the parties: Do former high-level White House officials have abso-

lute testimonial immunity from congressional subpoenas? That is a question for a court to resolve, and to resolve in the negative, as the district court here did.

Consistently since the Founding, the Supreme Court has insisted that federal courts have "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) (quoting *Cohens v. Virginia*, 19 U.S. 264, 404 (1821)). "The judiciary cannot, as the legislature may, avoid a measure"—even one it "would gladly avoid"—because it "approaches the confines of the constitution." *Cohens*, 19 U.S. at 404. "[I]t is emphatically the duty of the [courts] to say what the law is." *Marbury*, 5 U.S. at 138.

The panel ignored these principles by inventing a barrier to jurisdiction previously unknown to American law and divorced from the facts of this case. Its premise was that this case involves a mere "intramural disagreement about the 'operations of government'" that asks for "amorphous general supervision of the operations of government." Op. 8. The Committee asked for no such thing; this dispute between a branch of government and a private citizen is far from intramural. But,

regardless, the panel's characterization misses a key feature of congressional subpoenas and their enforceability.

Although the parties here have debated the practical ability of Congress to hold an Executive Branch official in contempt, *see* Op. 31; Dissent 12-14, all seem to accept that, if Congress *did* use its inherent contempt power to sanction noncompliance with its subpoena, courts would surely have jurisdiction to resolve whether he was immune from that subpoena. Indeed, as the panel majority conceded, cases arising out of contempt proceedings "directly implicate the 'rights of individuals,' *Marbury*, 5 U.S. at 170, and thus fall within the heartland of federal jurisdiction." Op. 22. If a noncompliant party can be *jailed*, surely courts have the power, and indeed the obligation, to adjudicate enforcement actions that determine the party's legal rights in a posture that could avoid the need for contempt proceedings.

The Committee's power to penalize noncompliance with its subpoenas brings this case worlds away from *Raines v. Byrd*, 521 U.S. 811 (1997), on which the panel placed significant weight. The individual legislators in *Raines* had no possible way to take coercive action against the defendant Executive Branch officials; as individual Members, they

had no power to represent the interests of the legislature as a body *at all*. *Id.* at 829. The Committee here, by contrast, is "an institutional plaintiff asserting an institutional injury," as authorized by the institution, *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2664 (2015)—a power that the institution has authority to enforce using coercive sanctions like arrest and detainment. Hence, the dispute has immediate, concrete consequences for "the rights of individuals" and indeed for an individual "beyond the federal government," as Mr. McGahn is no longer a government official. If left standing, the panel decision only encourages the parties to escalate their concrete dispute to the level of a constitutional crisis.

III. The Panel Decision Countenances Absolute Immunity for Former White House Aides With No Basis in Law

The consequences of the panel's refusal to hear this case come into even sharper focus given the one-sided nature of the underlying dispute. The President has claimed absolute, categorical authority to prevent any person who has ever served as a senior-level presidential aide from appearing to testify or produce documents in response to any legislative subpoena. The district court, in a thorough decision applying

well-established precedent, properly rejected that categorical claim as "a fiction" based on "aspirational assertions." JA949, JA963.

As the district court explained, executive officials, unlike legislative aides, cannot claim immunity under the Speech or Debate Clause, and therefore must seek to justify immunity using the Constitution's implicit postulates. The Supreme Court has expressly rejected even the sitting President's claim to absolute immunity from judicial process. JA950-51; *see United States v. Nixon*, 418 U.S. 683 (1974); *Clinton v. Jones*, 520 U.S. 681 (1997). Those decisions leave no room for an argument that *former aides*, now private citizens, can disregard legislative subpoenas. JA950-51. A former aide, like any other citizen, is of course "free to assert any legally applicable privilege in response to the questions asked." JA964. But he cannot simply "ignore or defy congressional compulsory process, by order of the President or otherwise." *Id.*

A majority of the panel in fact *agreed* that McGahn's assertion of absolute testimonial immunity" was "a step too far … under Supreme Court precedent." Concurring Op. 1. Yet, the panel forever shielded that "shaky" assertion, *id.* at 20, by disavowing jurisdiction. If the panel de-

cision were upheld, there would be no limit to the ways in which future officials, including former ones, would seek to nullify subpoenas.

Of course, whether a court has jurisdiction is a separate question from whether the party invoking jurisdiction has a strong case on the merits. But the straightforwardness of the legal question here and the patent overbreadth of the Executive's position undercut the panel's stated reasons for refusing to decide this case. *Cf. Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 236 (1984) (authorizing abstention on "difficult and unsettled questions"). Whether "separation-of-powers principles and historical practice" (Op. 19) might counsel against jurisdiction in a genuine interbranch standoff involving a difficult and unsettled question of constitutional law, those considerations deserve no weight in a case between the legislature and a private citizen that is governed by binding precedent about executive-branch immunities.

CONCLUSION

The en banc Court, having vacated the panel decision, should affirm the judgment of the district court.

Dated: April 16, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 3,239 words, excluding the parts exempted by Fed. R. App. P. 32(f) and Cir. R. 32(e)(1). I further certify that this 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 the brief was prepared in 14-point Century Schoolbook font using Microsoft Word.

/s/ John A. Freedman
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CERTIFICATE OF SERVICE

I hereby certify, pursuant to Fed. R. App. P. 25(d) and Cir. R. 25, that on April 16, 2020, the foregoing brief was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

/s/ John A. Freedman
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