ORAL ARGUMENT SCHEDULED FOR APRIL 28, 2020
No. 19-5331

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

COMMITTEE ON THE JUDICIARY,
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,
Case No. 1:19-cv-2379

BRIEF OF AMICUS CURIAE OF NISKANEN CENTER IN SUPPORT OF PLAINTIFF-APPELLEE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

In accordance with Fed. R. App. P. 28(a)(1), Niskanen Center states that (with the exception of itself) all parties, intervenors, and amici appearing in this Court are listed in the Joint Brief of Petitioners.

RULE 26.1 DISCLOSURE STATEMENT

Amicus curiae Niskanen Center is a 501(c)(3) think tank and advocacy organization; it has no parent company, and no publicly held company has a 10% or greater ownership interest in it.

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The Niskanen Center is a nonprofit, nonpartisan public policy think tank which advocates for the rule of law and free market solutions to promote growth and economic liberty. It is named for William A. Niskanen, who served on the Council of Economic Advisers to President Ronald Reagan and later became chairman of the Board of Directors at the CATO Institute.[1]

SUMMARY OF ARGUMENT

Both the Supreme Court and the D.C. Circuit have stressed the importance and validity of Congress's investigatory power. Each branch of government is coequal and, for decades, Republican and Democratic Congresses alike have invoked Congress's enforcement authority through use of the third branch, the United States judiciary. Though routinely challenged by the Executive as an expansion of Article III, this court has reaffirmed that the Executive remains subject to duly issued Congressional subpoenas.

Furthermore, both this court and the Supreme Court have recognized that Congress's investigatory and oversight authority are imperative to our system of

[1] No counsel for any party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity, other than the amici curiae, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief. All parties have provided blanket consent for the filing of amici curiae briefs in this litigation.

checks and balances. Congress's ability to check on the executive branch is crucial—especially when the public possess a low level of trust in the Government. However, if Congress cannot seek judicial enforcement of its subpoenas, its investigations, and ultimate oversight power, are nothing more than empty threats.

ARGUMENT

I. CONGRESS'S ENFORCEMENT POWER FORMED IN COMMON LAW AND HAS BEEN AFFIRMED BY THE SUPREME COURT.

Congress's enforcement authority is not novel, and it has invoked this power under both Democratic and Republican administrations. This is hardly surprising. As Chief Justice Marshall explained nearly two centuries ago, the "enforcement authority is deeply rooted in the common law tradition." *States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807). Dating back to President Washington's first term, the House Committee was authorized "to call for such persons, papers, and records, as may be necessary to assist their inquiries" after 600 soldiers perished on the Ohio frontier. *See generally* CONGRESS INVESTIGATES: A DOCUMENTED HISTORY 1792–1974 (Arthur M. Schlesinger, Jr. & Roger Bruns eds., 1975). Throughout the nineteenth century, Congress continued to use its investigative power and, in 1880, the Supreme Court first recognized Congress's investigative authority. *See generally Kilbourn v. Thompson*, 103 U.S. 168 (1880).

Kilbourn's holding that Congress could not compel documents from private citizens was ardently rejected in 1927 following Congress's investigation of the

Teapot Dome scandal. *McGrain v. Daugherty*, 273 U.S. 135 (1927). Since *McGrain*, the Supreme Court has recognized that Congress has powers beyond those expressly delegated to it by the Constitution. *Id.* at 173. Rather, congressional power extends beyond the Constitution to any powers necessary and proper to effectuate its clearly delineated constitutional authority. *Id.* Congress, by and through its committees, thus has "the power of inquiry—with process to enforce it." *Id.* at 174.

II. JUDICIAL ENFORCEMENT OF CONGRESSIONAL SUBPOENAS HAS BEEN SUPPORTED BY BOTH POLITICAL PARTIES.

Though the Supreme Court has recognized Congress's inherent investigatory power, it has not ruled on the constitutionality of judicial enforcement of congressional subpoenas of executive branch officials. For over two hundred years, however, federal precedent has contemplated that "even the Executive is bound to comply with duly issued subpoenas." *Committee on Judiciary v. Miers*, 558 F. Supp. 2d 53, 72 (D.D.C. 2008). Indeed, this Circuit has recognized that there is no occasion to "deny that the Congress may have, quite apart from its legislative responsibilities, a general oversight power." *Senate Select Committee v. Nixon*, 498 F.2d 725, 732 (D.C. Cir. 1974).

Since the nineteenth century, political parties across the ideological spectrum have conducted investigations, issued subpoenas, and used Congress's investigative powers to preserve and maintain integrity in our democracy. Though the

Executive—irrespective of political party—has repeatedly challenged Congress's investigative power in order to keep Congress at arm's length, the President ordinarily cooperates with Congressional requests. *See* Stephen W. Stathis, *Executive Cooperation: Presidential Recognition of the Investigative Authority of Congress and the Courts*, 3 J.L. & POL. 183, 188 (1986). As a result, across political parties the executive and legislative branches have maintained the proper balance between Congress' legitimate information interests and the Executive's interests in confidentiality through judicial enforcement.

Committee on Oversight & Government Reform v. Holder presents the paradigmatic example of this necessary constitutional balance. 979 F. Supp. 2d 1 (D.D.C. 2013). *Holder* stems from Operation Fast and Furious in which nearly 2,000 firearms were illegally purchased and later recovered in the United States and Mexico. *Operation Fast and Furious Fast Facts*, CNN (last updated Sept. 13, 2019).[2] The Bureau of Alcohol, Tobacco, and Firearms ("ATF") allowed straw purchasers from cartels to carry the firearms across the Mexican border under an assumption that ATF agents could track the weapons. *Holder*, 979 F. Supp. 2d at 3. The Committee on Oversight and Government Reform, led by Republican Representative Darrell Issa, investigated this decision only after two weapons were

[2] Available at: https://www.cnn.com/2013/08/27/world/americas/operation-fast-and-furious-fast-facts/index.html.

recovered near the location where a Border Patrol Agent was killed and the public was informed of the Operation. *Id.* at 5.

In early 2011, the Department of Justice denied using this law enforcement tactic. *Id.* Then-Attorney General Eric Holder informed the Committee of the Department's earlier inaccuracies, which prompted the Committee to investigate the Department of Justice. *Id.* In March 2011, the Committee issued its first subpoena to the ATF Acting Director for documents related to the Operation and thereafter reviewed thousands of pages of documentation. *Id.* The Committee, finding it needed more information to conclude its investigation, issued the second subpoena—the subpoena at issue in *Holder*—to Attorney General Holder requesting the remaining documents that had not yet been supplied. *Id.* at 6.

The Attorney General complied to an extent by producing documents dated before the Department of Justice's denial of the Operation's tactics, but he failed to produce key documentation dated after the Department's denial. *Id.* The Committee thereafter threatened to hold Attorney General Holder in contempt if he did not produce the requisite documentation. *Id.* In response, President Obama asserted executive privilege over all documents related to the Committee's investigations because "disclosure would reveal the agency's deliberative processes." *Id.* at 4. The Committee then sought judicial enforcement of its subpoena. *Id.*

Relevantly, Attorney General Holder cautioned that if the court had jurisdiction to resolve the dispute, it would expand the power of Article III courts given the interbranch conflict at issue. *Id.* Just five years earlier, however, under a Congress and President of differing political parties, the DC federal District Court aptly concluded that "neither the Constitution nor prudential considerations require judges to stand on the sidelines." *Id; see also Miers*, 558 F. Supp. 2d at 56. The Attorney General lost the justiciability argument as the court correctly noted that no precedent exists which would require dismissal. *Holder*, 979 F. Supp. 2d at 16. Rather, because the executive branch sought a "declaration" of the court related to its assertion of executive privilege, the executive branch inherently invoked the court's jurisdiction. *Id; see also United States v. AT&T*, 551 F.2d 384, 384 (D.C. Cir. 1976); *United States v. House of Representatives*, 556 F. Supp. 150, 150–51 (D.D.C. 1983).

Including *Holder*, only five cases have addressed the tension between the executive and legislative branches regarding congressional subpoenas. Andrew McCanse Wright, Constitutional Conflict and Congressional Oversight, 98 MARQ. L. REV. 881, 951 (2014). One of those cases, *Miers*, demonstrates a situation in which a sitting Republican president similarly claimed executive privilege to strike down a subpoena issued to former White House Counsel Harriet Miers. 558 F. Supp. at 55. The court appropriately noted subpoena enforcement is a "basic judicial task."

Id. Though the issue involved separation of powers, it was appropriate for the court to consider given that the subpoena power "derives implicitly from Article I." *Id.* at 64. The Executive yet again lost the justiciability argument as the court found no reason why separation of powers should be "more offended when the Article I branch sues the Article II branch than when the Article II branch sues the Article I branch." *Id.* at 96.

Accordingly, the executive branch, regardless of political party affiliation, has not only recognized Congress's power to issue subpoenas and to seek judicial enforcement when those subpoenas are subsequently ignored; they have also challenged such powers when their party appears to bear such a burden. This power, however, is not partisan nor is the Executive wholly immune from judicial enforcement of validly issued subpoenas. Indeed, Congress and the judiciary are constitutionally required and expected to resolve these disputes. Though there are few instances to date resolving disputes related to these powers, both political parties have supported congressional investigations and have sought judicial enforcement by the courts when subpoenaed individuals fail to comply. The courts, in turn, have routinely recognized the constitutionality of congressional oversight power and judicial enforcement.

A history of congressional subpoenas and judicial enforcement underscores how the *Holder* court correctly recognized that the judiciary plays a essential role to

both fundamentally say what the law is and strike down actions where one branch exceeds the powers delegated to it in the constitution. 979 F. Supp. 2d at 3. To hold otherwise is to grant the Executive an "*unreviewable* right to withhold materials from the legislature," a power that has never been recognized. *Id.* (emphasis added). To ensure the branches continue to negotiate in good faith and to supply not only Congress, but also the public, with requisite information related to potential "'illegal, improper or unethical activities,'" the parties should continue to embrace uniform acceptance of judicial enforcement of duly issued congressional subpoenas. *Nixon*, 498 F.2d at 726.

III. OUR SYSTEM OF CHECKS AND BALANCES WORKS ONLY IF CONGRESS'S OVERSIGHT POWER HAS TEETH.

It is well understood that the ultimate defense against excessive power "in a single Branch" of the Government is "a carefully crafted system of checked and balanced power within each Branch." *Clinton v. Jones*, 520 U.S. 681, 699 (1997). The numerous checks and balances in place, such as Congress's ability "to oversee" the Executive, *INS v. Chadha*, 462 U.S. 919, 955 n.19 (1983), allows each branch to retain "constitutional control over one another." *The Federalist* No. 48 (James Madison). While Congress may exercise this oversight power through legislation, critical oversight is also demonstrated through congressional investigations. *See* 2 The Records of the Federal Convention of 1787, at 206 (Max Farrand ed., 1937)

(asserting Congress should "meet frequently to inspect the Conduct of the public offices.").

Unfortunately, as demonstrated *supra* Section II, the executive branch's voluntary compliance with congressional investigations is quite limited. Thus, when voluntary compliance fails, Congress must be able to seek judicial enforcement of congressional subpoenas. Otherwise, "the [congressional] subpoena becomes a dead letter." Timothy T. Mastrogiacom, *Showdown in the Rose Garden: Congressional Contempt, Executive Privilege, and the Role of Courts*, 99 GEO. L. J. 163, 183 (2009). If Congress cannot enforce its investigations, both its oversight and its implied Article I powers would serve as nothing more than empty threats. *McGrain*, 273 U.S. at 175 (explaining how Congress's powers would be quite limited without "some means of compulsion . . . to obtain what is needed.").

Indeed, while the importance of congressional investigations and Congress's ultimate oversight have been long recognized, the executive branch has displayed resistance towards congressional subpoenas for centuries. *See* WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 297 (1885) ("Quite as important as legislation is vigilant oversight of administration."). Therefore, the concern about Congress's ability to execute oversight is not merely academic. *See generally* Memo. from Theodore B. Olson, Assistant Att'y Gen., to the Att'y Gen. (Dec. 14, 1982) (documenting Executive resistance towards subpoenas in numerous

administrations including the Jefferson, Jackson, Polk, Roosevelt, and Eisenhower administrations).

Nearly two hundred years ago, President Monroe refused a subpoena from the House of Representatives. *Id.* at 755–56. During the Teapot Dome Scandal, a key witness ignored a congressional subpoena for their testimony not once, but twice. *See* William P. Marshall, *The Limits on Congress's Authority to Investigate the President*, U. ILL. L. REV. 781, 794 (2004). When a House Committee investigated "Un-American Activities" in 1948, President Truman indicated he would not comply with any subpoenaed request. Memo. from Theodore B. Olson, at 771. *See, e.g.*, *Barenblatt v. United States*, 360 U.S. 109, 117–18 (1959). And when Congress launched an investigation into the Environmental Protection Agency's actions in 1980, then-EPA Administrator Burford acted under the direction of President Raegan and refused to disclose documents subpoenaed by Congress. Todd Garvey, CONG. RESEARCH SERV., RL34097, CONGRESS'S CONTEMPT POWER AND THE ENFORCEMENT OF CONGRESSIONAL SUBPOENAS 35 (2017). Moreover, in the rare circumstances where voluntary compliance does occur, the information handed over "is not always accurate or complete." Joel D. Bush, *Congressional-Executive Access Disputes: Legal Standards and Political Settlements*, 9 J.L. & POL'Y 719, 723 (1993). This problematic cycle illustrates that when voluntary compliance fails, judicial enforcement is necessary.

In fact, a lack of judicial enforcement protecting the separation of powers would have authorized "the President [to] . . . have arbitrarily issued an Executive Order in . . . *Myers* [*v. United States*, 272 U.S. 52 (1926)] . . . , [*McGrain*], or in any other case denying the Congress of the United States information it needed to conduct an investigation of the executive department[,] and the Congress would have no right to question his decision." *See* Congressman Richard M. Nixon, 94 Cong. Rec. 4783 (1948). But by allowing Congress to seek judicial enforcement of congressional subpoenas in court, Congress can continue effectively to execute oversight on the Executive. These investigations serve as a valuable tool for uncovering the executive branch's corruption and wrongdoing. *See* Donald C. Smaltz, *The Independent Counsel: A View from Inside*, 86 GEO. L.J. 2307, 2323-24 (Jul. 1998). Most importantly, the investigations "deter Presidential abuses of office, as well as to make credible the threat of impeachment." *Nixon v. Fitzgerald*, 457 U.S. 731, 757 (1982).

Thus, where congressional subpoenas seeking voluntary compliance are routinely met with resistance, and where arbitrary power is a constant threat, Congress's ability to seek judicial enforcement of its subpoenas is vital. Without the teeth of judicial enforcement, Congress's constitutionally vested oversight powers would be "seriously handicapped," if not futile in their entirety. *Quinn v. United States*, 349 U.S. 155, 161 (1955). Consequently, there would be nothing to

"preclude the [Executive's] exercise of arbitrary power." *Myers*, 272 U.S. at 293 (Brandeis, J., dissenting). In order for our system of checks and balances to survive, Congress's investigations must possess teeth.

IV. CONGRESSIONAL SUBPOENAS ARE VITAL TO PROMOTING TRANSPARENCY AND INCREASING PUBLIC TRUST IN GOVERNMENTAL INSTITUTIONS.

Congressional investigations are also critical because they provide transparency and enhance the public's trust in the Government. This is imperative during periods where the public's faith in its leaders is waning. When the public's confidence in the Government is deteriorating, and Congress cannot obtain voluntary compliance with its investigations, courts must enforce compliance with congressional subpoenas to restore the public's trust. Andrew McCanse Wright, *Constitutional Conflict and Congressional Oversight*, 98 MARQ. L. REV. 881, 915-16 (2014). Without judicial enforcement of congressional subpoenas, the public's concern that the Government is acting without any repercussion is affirmed.

There have been numerous periods throughout history where the public's trust in the Government reached a record low. *Public Trust in Government: 1958–2019*, PEW RES. CTR. (April 11, 2019).[3] Perhaps not coincidentally, Congress launched critical investigations into the Executive's decisions during each of those time-frames. *See, e.g.*, Todd Garvey, CONG. RESEARCH SERV., RL34097, CONGRESS'S

[3] Available at: https://www.people-press.org/2019/04/11/public-trust-in-government-1958-2019/.

CONTEMPT POWER AND THE ENFORCEMENT OF CONGRESSIONAL SUBPOENAS 2, 30–38 (2017). While the public's faith in the Government was sharply declining between 1973–74, Congress was launching an investigation into the Executive to expose the corruption of the Watergate Scandal, and thereby reassuring the public that the Executive's actions were not without consequence. *See* Daniel Bush, *The Complete Watergate Timeline (it Took Longer Than You Realize)*, PBS (May 30, 2017, 4:12 PM).[4] *See Public Trust in Government: 1958–2019*, PEW RES. CTR. (documenting low trust in Government between 1973-74). Decades later, the trust in the Obama Administration began to deteriorate around the same time Congress launched its investigation into former Attorney General Eric Holder. At the conclusion of the investigation, the trust in the Government returned. *See Public Trust in Government: 1958–2019*, PEW RES. CTR. (recording low trust in Government between 2010–11); *see also Operation Fast and Furious Facts*, CNN (last updated Sept. 13, 2019).

Thus, congressional investigations are critical not only to Congress in "enacting laws" and "monitoring the administration of programs," but also in "informing the public," and protecting "institutional integrity, reputation, and privileges." Theodora Galacatos, *The United States Department of Justice*

[4] Available at: https://www.pbs.org/newshour/politics/complete-watergate-timeline-took-longer-realize.

Environmental Crimes Section: A Case Study of Inter- and Intrabranch Conflict Over Congressional Oversight and the Exercise of Prosecutorial Discretion, 64 FORDHAM L. REV. 587, 604 (1995). As the Supreme Court explained, Congress's investigations shine a light on departments within the Federal Government, and "expose corruption, inefficiency or waste." *Watkins v. United States*, 354 U.S. 178, 187 (1957).

Congressional investigations are expansive; they reveal to the public numerous, otherwise unknown, wasteful or corrupt programs within the Government. Congressional investigations touch various matters, including political obstruction, mishandling of federal funds, policy failure, security concerns, sexual misconduct, and criminal actions. *See* H.R. REP. NO. 110-930 (2009) (documenting over 200 oversight hearings during the 2007–2008 session and highlighting critical investigations examining "government contracting; the activities of Blackwater and other private security contractors; the politicization of science in federal agencies; White House mismanagement of federal records" and more). Throughout the current session alone, Congress has already conducted nearly 300 hearings and issued almost 650 letters seeking evidence. Molly E. Reynolds & Jackson Gode, *Tracking House oversight in the Trump Era*, BROOKINGS (March

2020).[5] Thus, at times when the public's trust in the Government is declining, only complete, transparent information established through these investigations and congressional subpoenas can restore that trust. But without judicial enforcement of congressional subpoenas, transparent information may never be obtained.

CONCLUSION

Congress's power to issue and enforce subpoenas, for the purpose of gathering evidence and performing legislative functions, is a crucial element of our democracy that parties across the political aisle have supported. Amicus curiae urge this Court to affirm the holding below.

Respectfully submitted,

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[5] Available at: https://www.brookings.edu/interactives/tracking-house-oversight-in-the-trump-era/.

CERTIFICATE OF COMPLIANCE

This brief complies with this Court's March 13, 2020 Order and contains 3,118 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f). This brief also complies with the typeface and typestyle requirements of Fed. R. App. P. 32(a)(5)-(6) because this brief has been prepared in a proportionally spaced font—Times New Roman—in 14-point font.

Dated: April 16, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2020, I electronically filed the foregoing Brief Amicus Curiae of Niskanen Center in Support of Plaintiff-Appellee with the Clerk of the Court by using the appellate CM/ECF System and served copies of the foregoing via the Court's EM/ECF system on all ECF-registered counsel.

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