EN BANC ORAL ARGUMENT SCHEDULED FOR APRIL 28, 2020

United States Court of Appeals
for the District of Columbia Circuit

No. 19-5331

COMMITTEE ON THE JUDICIARY OF THE HOUSE OF REPRESENTATIVES,

Plaintiff-Appellee,

v.

DONALD F. MCGAHN II,

Defendant-Appellant.

On Rehearing En Banc of Appeal from the United States District Court for the District of Columbia in Action No. 1:19-cv-02379, Honorable Ketanji Brown Jackson

BRIEF OF *AMICI CURIAE* NIXON IMPEACHMENT SCHOLARS IN SUPPORT OF PLAINTIFF-APPELLEE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and *Amici*.

All parties who appeared before the district court appear in Plaintiff-Appellee's brief. The parties appearing in this Court include those listed in Plaintiff-Appellee's brief.

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

Amici 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.

References to the rulings at issue appear in the Brief for Plaintiff-Appellee in this matter.

(C) Related Cases.

This case has not previously been before this Court or any other court. There are no other related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

CIRCUIT RULE 29(d) CERTIFICATE

Undersigned counsel hereby certifies that this brief could not be combined with other amicus briefs supporting affirmance, because its historical content and perspective are sufficiently unique and complex as to make combination with another brief impracticable.

/s/ Michael J. Miarmi
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STATEMENT OF IDENTITY, INTEREST IN THE CASE, AND AUTHORITY TO FILE[1]

Amici are scholars of history, political science, and law, with particular expertise in the Watergate era and the investigation of President Nixon. They submit this brief because they believe that fuller examination of the history and precedent established during the Watergate period — a political and legal watershed that re-defined the contours of executive privilege, congressional oversight, and separation of powers — may assist the Court in assessing its Article III jurisdiction. In highlighting the practical and constitutional implications of the Nixon investigation, *Amici* hope to convey the narrow but indispensable role of the judiciary in delimiting the boundaries of executive privilege and upholding Congress as a co-equal branch of government.

INTRODUCTION

In 1973, President Richard Nixon refused to comply with subpoenas for tapes of Oval Office conversations between him and his aides, precipitating what *The Washington Post* called "a monumental struggle between coordinate branches

[1] The parties have consented to the timely filing of this brief. No party authored this brief in whole or in part; no party contributed financially to the preparation or filing of this brief; and no person—other than the *amici*'s counsel—contributed money that was intended to fund preparing or submitting the brief.

of government."[2] Resolution of those issues would involve an eighteen-month legal and political fight about the boundaries of executive privilege, seminal decisions in this Court and the Supreme Court about the role of coordinate branches in checking assertions of executive power, one of the most famous congressional investigations in American history, and, ultimately, the demise of a president re-elected in a landslide victory only a year and a half before.

Now, nearly five decades later, the country finds itself grappling with the same core issue: how to address a clash of validly exercised subpoena power and executive privilege. *Amici* submit that the answer now remains the same as it was in the Nixon era: if "[i]t is emphatically the province and duty of the judicial department to say what the law is," the courts must step in where the two political branches have been unable to resolve an executive privilege dispute.[3] The principle of separation of powers and historical practice confirm that this suit should proceed to resolution on the merits.

FACTUAL BACKGROUND REGARDING THE NIXON INVESTIGATION

On June 17, 1972, five men indirectly hired by Nixon's campaign were caught attempting to bug the Democratic National Committee headquarters. It was subsequently revealed that the incident was not a one-off incident, but part of a

[2] Susanna McBee, *Court Battle Set as Nixon Defies Subpoenas*, THE WASH. POST (July 27, 1973), https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/072773-1.htm (last visited Apr. 15, 2020).

[3] *U.S. v. Nixon*, 418 U.S. 683, 703 (1974).

"massive campaign of political espionage and sabotage" run by the Nixon reelection campaign and White House.[4] Nixon publicly denied any involvement; privately, he brushed it aside: "[I]t's going to be forgotten," he allegedly remarked three days after the break-in.[5]

For months, it appeared that Nixon would be proven correct. Despite journalists' exposure of incriminating evidence, what would later become a national scandal was initially nothing more than a minor hitch in Nixon's political career.[6] Five months after the break-in, Nixon won re-election by a 23-point margin.[7]

In February 1973, the Senate Select Committee on Presidential Campaign Activities, better known as the Watergate Committee, was established with little fanfare and low expectations to investigate illegal activity connected to the 1972 presidential campaign and election.[8] Testimony at the Watergate hearings, which

[4] Carl Bernstein & Bob Woodward, *FBI Finds Nixon Aides Sabotaged Democrats*, THE WASH. POST (Oct. 10, 1972), https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/101072-1.htm.

[5] Tom van der Voot, *Watergate: The Cover-Up, University of Virginia Miller Center*, https://millercenter.org/the-presidency/educational-resources/watergate/watergate-cover (last visited Apr. 15, 2020).

[6] STANLEY KUTLER, THE WARS OF WATERGATE: THE LAST CRISIS OF RICHARD NIXON 25 (1990).

[7] *Id.*

[8] S. Res. 60, 119 Cong. Rec. 3255, 93rd Cong. § 1(a) (1973).

began in May 1973, turned out to be "explosive" beyond expectation.[9] Most consequentially, testimony revealed the existence of a secret tape-recording system in the President's offices.[10]

Special Prosecutor Archibald Cox immediately requested that Nixon turn over several tapes to the Watergate grand jury, which was considering the criminal charges against Nixon associates before Judge John Sirica of the United States District Court for the District of Columbia.[11] The Watergate Committee also requested certain tapes for its own investigation.[12] In response, President Nixon wrote a letter rebuffing the requests:

> I follow the example of a long line of my predecessors as President of the United States who have consistently adhered to the position that the President is not subject to compulsory process from the Courts.[13]

For the first time in history, in July 1973, the Watergate Committee took the "unprecedented" step of filing suit against the president for release of the requested tapes.[14] While the suit was ultimately unsuccessful on the merits, in this Court's

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[9] James Naughton, *Dean Tells Inquiry That Nixon Took Part In Watergate Cover-Up*, N.Y. TIMES (June 26, 1973), https://www.nytimes.com/1973/06/26/archives/dean-tells-inquiry-that-nixon-took-part-in-watergate-coverup-for.html.

[10] Kutler, *supra* note 5, at 68.

[11] McBee, *supra* note 1.

[12] *Id.*

[13] *Id.*

[14] *See Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 733 (D.C. Cir. 1974) (en banc). This Court's ruling the case, as discussed in Appellee's briefing, provides another basis for affirming the district court judgment.

first and only ruling on the question it did not question the appropriateness of adjudicating the dispute.[15]

For the remainder of 1973, and most of 1974, the battle between investigators and the White House centered on Cox's efforts to subpoena key Oval Office tapes. At Cox's request, Judge Sirica issued a subpoena ordering President Nixon to produce the tapes for *in camera* inspection. Nixon appealed the decision, but lost. Desperate to keep the tapes, Nixon proposed a compromise: he would turn summaries of the tapes over. Cox refused. Within hours, Nixon retaliated by ordering his subordinate to fire Cox, and fired two senior officials who refused Nixon's order to fire Cox.

Although Nixon had succeeded in removing Cox, the "Saturday Night Massacre" devastated what was left of the President's reputation. Shortly thereafter, on October 30, 1973, the House launched an impeachment inquiry. Nixon was forced to turn the subpoenaed tapes over to Cox's successor as Special Prosecutor, Leon Jaworski, who would prove equally determined to subpoena the remaining incriminating Oval Office audiotapes. A summary of those tapes was eventually turned over to the House Judiciary Committee in March 1974, pursuant to a ruling by Judge Sirica.[16]

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[15] *Id.*

[16] Kutler, *supra* note 5, at 120.

In February 1974, the House voted overwhelmingly to launch a formal impeachment inquiry, giving the House Judiciary Committee (HJC) broad constitutional power to investigate the president.[17] The HJC voted to subpoena the Watergate tapes which, notwithstanding the impeachment inquiry, Nixon again refused.[18] He subsequently refused seven additional subpoenas, all the while insisting that he was motivated only by constitutional precedent.[19] A week later, Jaworski obtained a subpoena from Judge Sirica ordering Nixon to release an additional 64 recordings in connection with the case. Shortly before the deadline for production of the materials, on April 29, 1974, Nixon unexpectedly announced that he would turn over to the HJC and make public more than 1,200 pages of edited transcripts of Watergate conversations. Both the HJC and Jaworski agreed that the materials were inadequate,[20] and continued to insist on the actual tapes over Nixon's objections.[21]

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[17] *Id.* at 183.

[18] *Id.* at 221.

[19] Phillip Shabecoff, *President Defies House Subpoena for More Tapes*, N.Y. TIMES (June 11, 1974), https://www.nytimes.com/1974/06/11/archives/president-defies-house-subpoena-for-more-tapes-letter-to-rodino.html.

[20] *Nixon and House Versions of the Tapes Differ Widely*, N.Y. TIMES (June 21, 1974) https://www.nytimes.com/1974/06/21/archives/nixon-and-house-versions-of-the-tapes-differ-widely-discrepancies.html.

[21] Kutler, *supra* note 5, at 217.

As impeachment proceedings pressed forward, the Supreme Court issued the landmark decision *United States v. Nixon*,[22] unanimously ruling that Nixon must turn over the 64 recordings to Jaworski. The decision effectively marked the end of Nixon's presidency. The tapes that President Nixon fought so hard to shield from disclosure proved to contain evidence of the President's cover-up, substantiating his personal culpability in the Watergate scandal. With impeachment looming,[23] the President resigned his office in disgrace on August 9, 1974.[24]

ARGUMENT

I. Separation of Powers Concerns Support the Committee's Standing.

A. The Availability of Judicial Enforcement Is Necessary to Preserve Congress's Critical Role As a Check Against Executive Overreach or Misconduct.

Article I of the Constitution vests Congress with inherent authority to investigate for the purpose of legislation and to issue subpoenas in the course of

[22] Notably, the Supreme Court in that decision unanimously held that the dispute was justiciable: "The mere assertion of a claim of an 'intra-branch dispute,' without more, has never operated to defeat federal jurisdiction; justiciability does not depend upon such a surface inquiry." 418 U.S. at 690.

[23] On July 30, 1974, the HJC approved three articles of impeachment: obstruction of justice, abuse of power, and contempt of Congress. Kutler, *supra* note 5, at 298.

[24] Overall, 69 people were indicted and 48 people—many top Nixon administration officials—were convicted in connection with Watergate.

such inquiries.[25] Indeed, the Supreme Court has indicated that the "issuance of a subpoena pursuant to an authorized investigation is ... an indispensable ingredient of lawmaking."[26] The ability to serve subpoenas and investigate suspected misconduct also allows the House to keep a watchful eye on the Executive, thereby preserving the "distribution[] of power" at the heart of checks and balances.[27]

The Watergate saga illustrates the critical role of the courts as a "last resort" where Congress's oversight role is threatened by Executive refusal to comply with a subpoena. While the subpoenas at issue were enforced for purposes of a criminal proceeding, the release of the subpoenaed material to the HJC pursuant to Judge Sirica's March 1974 order and additional subpoenaed material pursuant to the order in *United States v. Nixon* enabled the HJC to fulfill its oversight role.

Famously, the tapes released as a result of *United States v. Nixon* exposed the depth of the misconduct that Nixon had categorically denied for eighteen months, and eroded the little support he had remaining in Congress.[28] The release of the tapes—including the so-called "smoking gun" tape, which captured the president ordering the CIA to obstruct an FBI investigation into the burglary—

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[25] *See McGrain v. Daugherty*, 273 U.S. 135, 174 (1927) ("[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.")

[26] *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 (1975).

[27] *The Federalist* No. 51, at 319 (Madison).

[28] R.W. Apple, *Decline in the Senate*, N.Y. Times (Aug. 7, 1974), https://www.nytimes.com/1974/08/07/archives/decline-in-senate-dole-says-president-now-has-no-more-than-20-votes.html.

moved Nixon's impeachment and removal from office from a possibility to a near certainty.[29]

But that outcome was far from inevitable. During the Nixon investigation, as evidence implicating the President mounted, the administration displayed no inclination toward negotiation or accommodation with the Watergate Committee, the HJC, or the Special Prosecutor, absent judicial compulsion. Nixon faced overwhelming public pressure to disclose the tapes, including from his own party. And even when Congress turned to the most powerful tool at its disposal—the initiation of formal impeachment proceedings in May 1974—Nixon's resistance to the subpoenas remained unwavering until compelled by the courts.

Indeed, Nixon did not release a single tape or transcript without an unfavorable court order. The timeline of Nixon's release of evidence is telling: On October 12, 1973, the district court ordered release of certain tapes by October 19; on October 19, Nixon proposed the release of edited summaries. On April 18, 1974, Leon Jaworski served a subpoena on Nixon for 64 tapes with a deadline of May 2, 1974; on April 30, 1974, Nixon released 1,200 pages of edited transcripts rather than release the actual tapes.

Here, credible allegations of abuse of executive authority linger unresolved due to unprecedented stonewalling by the very persons under investigation.

[29] *Id.*

Congress has concluded that absent a full understanding of the facts, it cannot fulfill its constitutional obligation to determine if it must legislate to prevent future corruption. Under these circumstances, this Court must act.

B. The History of Broad Presidential Assertions of Executive Privilege, Most Prominently During the Watergate Investigation, Illustrates that Judicial Action Is Warranted Here.

The history of the Watergate investigation highlights a central flaw in the panel's decision. A ruling by this Court denying judicial review would allow for virtually unchecked power in—and expect an enormous amount of self-restraint from—a single, self-interested person.[30] In so doing, it would eliminate all structural safeguards to the Executive's use of power, appointing him "the judge in [his] own cause."[31] Indeed, in 1956 presidential historian Clinton Rossiter warned:

> Power that can be used decisively can also be abused grossly. No man can hold such a concentration of authority without feeling the urge to push it beyond its usual bounds. We must therefore consider carefully the various safeguards that are counted upon to keep the President's feet in paths of constitutional righteousness.[32]

[30] David A. O'Neil, *The Political Safeguards of Executive Privilege*, 60 VAND. L. REV. 1079, 1109-10 (2007) (whether to assert executive privilege in response to a congressional subpoena is wholly within the President's discretion).

[31] Norman Dorsen & John Shattuck, *Executive Privilege, The Congress, and The Courts*, 35 OHIO ST. L. J. 1, 23 (1974).

[32] CLINTON ROSSITER, THE AMERICAN PRESIDENCY 33-34 (1956).

Nixon, to be sure, was an anomaly: he had a deep "contempt for the law,"[33] and was involved in a "massive campaign of political espionage and sabotage."[34] He lied repeatedly, assuring the public that he was withholding the "privileged" tapes purely as a matter of constitutional principle, when, in fact, they were withheld as a matter of self-preservation.[35] But the improper way in which Nixon wielded presidential power counsels *more* heavily in favor of a nonpolitical check on executive authority. The integrity of our constitutional system depends on its ability to withstand the ugliest impulses of human nature, particularly where, as here, those impulses undermine the constitutionally endowed power of a co-equal branch of government.

This is not a partisan issue; it is an unavoidable consequence of the fact that "the constitutional authority assigned to the Office of the President can be exercised only by the flesh-and-blood human occupying that office."[36] Subsequent presidents, irrespective of party, have done the same. President Bill Clinton was

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[33] Bob Woodward, *Bob Woodward Reviews "The Nixon Defense," by John W. Dean*, THE WASH. POST (July 31, 2014), https://www.washingtonpost.com/opinions/bob-woodward-reviews-the-nixon-defense-by-john-w-dean/2014/07/31/6da6d678-fc83-11e3-932c-0a55b81f48ce_story.html.

[34] Carl Bernstein & Bob Woodward, *FBI Finds Nixon Aides Sabotaged Democrats*, THE WASH. POST (Oct. 10, 1972), https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/101072-1.htm.

[35] Phillip Shabecoff, *President Defies House Subpoena for More Tapes*, N.Y. TIMES (June 11, 1974), https://www.nytimes.com/1974/06/11/archives/president-defies-house-subpoena-for-more-tapes-letter-to-rodino.html.

[36] *Trump v. Mazars USA, LLP*, 940 F.3d 710, 725-26 (D.C. Cir.), *cert. granted*, 140 S. Ct. 660, 205 L. Ed. 2d 418 (2019).

the first president since Nixon to heavily call upon executive privilege and, like Nixon before him, invoked the privilege in an attempt to hide personal wrongdoing, notwithstanding a prior commitment that in "communications relating to investigations of personal wrongdoing by government officials, it is our practice not to assert executive privilege…."[37] In this case, Trump's assertion of "absolute testimonial immunity" is a particularly egregious and transparent attempt to avoid revelation of acts of misconduct. Absent judicial intervention, unbridled claims of executive privilege would be tantamount to executive immunity.

To be sure, under most circumstances it is preferable to have inter-branch constitutional conflicts resolved by the traditional process of political accommodation and compromise. Most policy investigations, for example, even where characterized by heated disagreement, are well-suited for the give-and-take of the accommodation and compromise model. But the logic underlying this process collapses when, *inter alia*, exposure of an Executive's serious misconduct is at issue. In those circumstances, history has shown that the president may be willing to endure the political damage of a protracted executive privilege dispute, and even impeachment, if necessary to guard incriminating information. Indeed, in 1974 Archibald Cox, the first Watergate Special Prosecutor, observed:

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[37] MARK J. ROZELL & CLYDE WILCOX, THE CLINTON SCANDAL AND THE FUTURE OF AMERICAN GOVERNMENT 91 (2000) ("The Clinton administration made extensive use and improper use of executive privilege in the Lewinsky scandal.").

> Secrecy, if sanctified by a plausible claim of constitutional privilege, is the easiest solution to a variety of problems. The claim of privilege is a useful way of hiding inefficiency, maladministration, breach of trust or corruption, and also a variety of potentially controversial executive practices not authorized by Congress.[38]

Here, Congress's power to investigate reaches its zenith. The Committee is investigating serious allegations about executive interference into a federal investigation for improper purposes. Yet critical pieces of what happened are still unknown. Congress can obtain these missing facts only from executive officials who may be implicated in or privy to the misconduct alleged—the very officials subpoenaed, who—under President Trump's assertion of executive privilege—have been able to resist calls to testify.

The Executive Branch claims for itself a sweeping, unchecked power to have the final say on the legitimacy of its own refusal to comply with congressional legal process. To acquiesce in that unbounded vision "would elevate and fortify the executive branch at the expense of the other institutions that are supposed to be its equal."[39]

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[38] Archibald Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1386 (1974)

[39] *Comm. on Oversight & Gov't Reform v. Holder*, 979 F. Supp. 2d 1, 12 (D.D.C. 2013).

II. Impeachment Is Not an Adequate Alternative to Judicial Enforcement of Subpoenas.

The lessons of Watergate also belie the panel's suggestion that Congress should look to impeachment as an alternative to judicial enforcement when confronted with an unwarranted assertion of executive privilege.

First, the power of impeachment depends on Congress's ability to investigate. As John Quincy Adams explained, 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."[40]

That principle was borne out more than a century later. As Nixon stonewalled the HJC impeachment investigation for months, Jaworski recalled that due to the lack of evidence the Committee was having "real difficulty doing its work. Way behind. It hadn't gotten off the ground."[41] On March 18, 1973, Judge Sirica ruled that grand jury materials subpoenaed by the Special Prosecutor could be turned over to the House with certain safeguards in place.[42] The decision changed the course of the previously stalled impeachment proceedings. Representative Barbara Jordan later remarked: "We were empowered to act, but we

[40] Cong. Globe, 27th Cong., 2d Sess. 580 (1842).

[41] FRANK O. BOWMAN III, HIGH CRIMES AND MISDEMEANORS: A HISTORY OF IMPEACHMENT FOR THE AGE OF TRUMP 203 (2019).

[42] These safeguards were implemented in light of Federal Rule of Criminal Procedure 6(e), which provides for the secrecy of grand jury proceedings.

were never going to . . . . Without Jaworski, we would have never got to the matter, not even to the beginnings of impeachment."[43] While the manner in which the HJC obtained the information it needed to fulfill its constitutional obligation, through criminal justice system, was different from the circumstances of this case, the fundamental lesson remains: it is nearly impossible for Congress to meaningful address executive misconduct without access to information collected pursuant to the subpoena power.

As a more foundational matter, though, impeachment is an "extraordinary" remedy that "should be invoked only under dire circumstances."[44] While executive stonewalling places the foundations of our democracy under stress, the solution to every executive-branch official who refuses to comply with a subpoena—of which there have been many throughout history—cannot and should not be a method that exacts such "tremendous political costs on Congress and the political system overall."[45]

Finally, the facts before the Court perfectly illustrate why impeachment is not an adequate alternative to judicial review. President Trump was impeached, in

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[43] Bowman, *supra* note 42, at 203.

[44] LAURENCE TRIBE & JOSHUA MATZ, TO END A PRESIDENCY: THE POWER OF IMPEACHMENT 178 (2018).

[45] Andrew McCanse Wright, *Constitutional Conflict and Congressional Oversight*, 98 MARQ. L. REV. 881, 941 (2014); *Cf. Nat'l Treasury Emp. Union v. Nixon*, 492 F.2d 587, 615 (D.C. Cir. 1974) ("[T]he Constitution should not be construed so as to paint this nation into a corner which leaves available only the use of the impeachment process to enforce the performance of a perfunctory duty by the President").

part, for obstruction based on his directions to executive officials like McGahn not to comply with House subpoenas.[46] Impeachment proceedings have now concluded, and Congress still does not have the information it was seeking, despite invoking "the most powerful tool of self-help at Congress's disposal."[47] Impeachment is not an adequate remedy to enforce the President's compliance with congressional subpoenas; judicial resolution is necessary.

CONCLUSION

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

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[46] H. Res. 755, 116th Cong. (2019).

[47] Wright, *supra* note 47, at 958.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 3,243 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)(6) because it was prepared using Microsoft Word 2010 in Times New Roman 14-point font, a proportionally spaced typeface.

/s/ Michael J. Miarmi
Michael J. Miarmi

CERTIFICATE OF SERVICE

I certify that on April 16, 2020, the foregoing was electronically filed through this Court's CM/ECF system, which will send a notice of filing to all registered users.

/s/ Michael J. Miarmi
Michael J. Miarmi