**EN BANC ORAL ARGUMENT TO BE HELD APRIL 28, 2020**
**ORAL ARGUMENT HELD JANUARY 3, 2020**

**No. 19-5331**

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

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COMMITTEE ON THE JUDICIARY OF THE UNITED STATES HOUSE OF REPRESENTATIVES,

Plaintiff-Appellee

v.

DONALD F. MCGAHN, II,

Defendant-Appellant

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On Appeal from the United States District Court
for the District of Columbia (Judge Ketanji Brown Jackson)

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# BRIEF OF *AMICI CURIAE* THE LUGAR CENTER AND THE LEVIN CENTER AT WAYNE LAW SUPPORTING APPELLEE AND REVERSAL

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April 16, 2020

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

### LIST OF PARTIES AND AMICUS CURIAE

Appellant is Donald F. McGahn, II. Appellee is the Committee on the Judiciary of the United States House of Representatives. The currently known *amici curiae* in support of the Appellee are: Steve Bartlett, U.S. House of Representatives (R-Texas), 1983–1991; Jack Buechner, U.S. House of Representatives (R-Missouri), 1987–1991; Tom Coleman, U.S. House of Representatives (R-Missouri), 1976–1993; George T. Conway, III; Mickey Edwards, U.S. House of Representatives (R-Oklahoma), 1977–1993; Stuart M. Gerson, Esquire, Acting Attorney General of the United States, 1993 Assistant Attorney General, Civil Division, 1989–1993; Gordon J. Humphrey, U.S. Senate (R-New Hampshire), 1979–1990; Bob Inglis, U.S. House of Representatives (R-South Carolina), 1993–1999, 2005 2011; Jim Kolbe, U.S. House of Representatives (R-Arizona), 1985–2007; Steven T. Kuykendall, U.S. House of Representatives (R-California), 1999–2001; Jim Leach, U.S. House of Representatives (R-Iowa), 1977–2007; Mike Parker, U.S. House of Representatives (R-Mississippi), 1989–1999; Thomas Petri, U.S. House of Representatives (R-Wisconsin), 1979–2015; Trevor Potter, Chair, Federal Election Commission, 1994; Reid Ribble, U.S. House of Representatives (R-Wisconsin), 2011–2017; Jonathan C. Rose, Special Assistant to the President, 1971–1973

Assistant Attorney General, Office of Legal Policy, 1981–1984; Paul Rosenzweig, Deputy Assistant Secretary for Policy, Department of Homeland Security, 2005–2008; Peter Smith, U.S. House of Representatives (R-Vermont), 1989–1991; J. W. Verret, Associate Professor of Law, George Mason University Antonin Scalia Law School; and Dick Zimmer, U.S. House of Representatives (R-New Jersey), 1991–1997. James M. Murray filed a motion for leave to participate as *amicus curiae*, which was denied on January 3, 2020.

The *amici curiae* filing this brief are the Lugar Center and the Levin Center at Wayne Law.

## RULINGS UNDER REVIEW

The district court ruling under review has been published as *Committee on Judiciary, U.S. House of Representatives v. McGahn*, 415 F. Supp. 3d 148 (D.D.C. 2019). The Petition for Rehearing seeks review of the panel decision decided on February 28, 2020, which is attached to the Petition for Rehearing at Addendum pages A1–A88.

## RELATED CASES

The Appellee's Petition for Rehearing succinctly lists three cases with similar issues. *See* Pet. for Reh'g En Banc of the Committee on The Judiciary of the U.S House of Representatives, Addendum at A91.

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## INTEREST OF *AMICI CURIAE*[1]

*Amici* are centers established by former United States senators—one Republican, one Democratic—devoted to advancing bipartisan governance and oversight.

The *Lugar Center* was founded by former Senator Richard Lugar, six-term Indiana Republican who chaired the Senate Committee on Foreign Relations and the Committee on Agriculture, Nutrition, and Forestry. The center's mission is to foster informed debate, enhance bipartisan governance, and bridge ideological divides on important issues.

The *Levin Center at Wayne Law* was founded and is presently chaired by former Senator Carl Levin, six-term Michigan Democrat who chaired the Senate Armed Services Committee and the Permanent Subcommittee on Investigations of the Committee on Homeland Security and Governmental Affairs. The center's

[1] *Amici curiae* certify that all parties received timely notice of their intent to file this brief, and that all parties have consented to the filing of this brief. In accordance with Federal Rule of Appellate Procedure 29(a)(4)(E), a*mici curiae* state that their counsel authored this brief in whole; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and that no person—other than *amici curiae*, their members or their counsel—contributed money that was intended to fund preparing or submitting the brief.

primary mission is to strengthen bipartisan, fact-based oversight, particularly in Congress.[2]

The two centers collaborate to foster high-quality oversight, including through bipartisan training programs for House and Senate investigators. Their combined interest in this case is (1) preserving the ability of Congress to conduct informed, fact-based oversight of the executive branch; and (2) defending the Framers' system of checks and balances.

## ARGUMENT

### WEIGHING CONSTITUTIONAL COSTS AND BENEFITS SUPPORTS JUDICIAL REVIEW OF INTER-BRANCH SUBPOENA DISPUTES.

The McGahn majority opinion asserts Congress is not powerless to enforce its subpoenas, even if excluded from federal court, because "the Constitution gives Congress a series of political tools to bring the Executive Branch to heel," specifying congressional authority to imprison executive branch officials for contempt, reject nominees, withhold appropriations, derail the President's legislative agenda, and "impeach recalcitrant officers." Op. 13. Congress will be compelled to use those enforcement mechanisms if the D.C. Circuit upholds the McGahn opinion. But limiting Congress to such aggressive tactics would impose

[2] The Levin Center is affiliated with Wayne State University Law School, but this brief does not present the institutional views, if any, of either the university or the law school.

significant costs on the country: increased political tension and governmental dysfunction, a weakened system of checks and balances, and diminished respect for the rule of law.

1. Forcing Congress to revive its use of political tactics to obtain information from the executive branch would not return the country to a better time.[3] Consider the collateral damage if Congress defunded the Executive Office of the President or delayed vital appropriations in the midst of the pandemic. Consider the negative consequences of Congress rejecting confirmation of officials tapped for the COVID-19 response program or detaining such officials until they agreed to testify. Such actions would not only be counterproductive during the current crisis, but could ignite a political firestorm[4] and poison inter-branch cooperation. Even in ordinary circumstances, Congress should not be confined to

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[3] *See* Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. Chi. L. Rev. 1083, 1135–43 (2009) (recounting historical examples of congressional contempt cases, including imprisonment of executive branch officials for defying subpoenas).

[4] *See, e.g.,* Pew Research Ctr., *Partisan Antipathy: More Intense, More Personal*, U.S. Pol. & Pol'y (Oct. 10, 2019), https://www.people-press.org/2019/10/10/partisan-antipathy-more-intense-more-personal/ (poll finding "the level of division and animosity – including negative sentiments among partisans toward the members of the opposing party – has only deepened"); Thomas B. Edsall, *What Motivates Voters More Than Loyalty? Loathing*, N.Y. Times (Mar. 1, 2018), https://www.nytimes.com/2018/03/01/opinion/negative-partisanship-democrats-republicans.html ("The building strength of partisan antipathy . . . has radically altered politics. Anger has become the primary tool for motivating voters.").

aggressive tactics—detaining officials, defunding programs, or sidelining nominees—to acquire information from a witness like Mr. McGahn. Suggesting that such actions provide practical alternatives to orderly judicial resolution of inter-branch subpoena disputes grossly underestimates the political costs.

It is equally puzzling that the judiciary would refuse to resolve inter-branch subpoena disputes unless Congress takes the extraordinary step of detaining an executive branch official—fostering intensified conflict prior to adjudicating the same issues at stake before detention.

The Constitution does not compel this Court to limit Congress to enforcement measures that would spark new levels of political warfare and federal dysfunction, exacerbating the partisanship now dividing the country and hindering effective government.

2. Forcing Congress to use impractical, politically aggressive tactics would also impede oversight by removing incentives to negotiate and stoking inter-branch conflict.

Congress' power to investigate is critical to its constitutionally-assigned functions, including enacting legislation and allocating funds,[5] informing the

[5] *Exxon Corp. v. FTC.*, 589 F.2d 582, 594 (D.C. Cir. 1978) (footnote omitted) ("[T]he investigatory power is one that the courts have long perceived as essential to the successful discharge of the legislative responsibilities of Congress.").

public of government actions,[6] checking executive branch abuses,[7] and conducting impeachments. Courts have long recognized the key role congressional inquiries play in the constitutional system of checks and balances. *See, e.g., Watkins*, 354 U.S. at 194–95 (recognizing "the danger to effective and honest conduct of the Government if the legislature's power to probe corruption in the executive branch were unduly hampered"); *United States v. Rumely*, 345 U.S. 41, 43, 46 (1953) (quoting Woodrow Wilson that "[u]nless Congress . . . use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served" and admonishing courts to "tread warily" "[w]henever constitutional limits upon the investigative power of Congress have to be drawn.").

Over the years, as the following examples demonstrate, Congress has used its investigative power to counter executive branch mismanagement and misconduct—oversight that was contingent upon access to information. Its investigations have addressed such weighty issues as:

- War profiteering and defense mismanagement undermining U.S. military performance during World War II by the Committee to

[6] *Watkins v. United States,* 354 U.S. 178, 200 n.33 (1957).

[7] *See, e.g., McGrain v. Daugherty*, 273 U.S. 135, 151 (1927) (upholding congressional investigation into "misfeasance and nonfeasance" in Justice Department).

Investigate the National Defense Program. Donald H. Riddle, *The Truman Committee: A Study in Congressional Responsibility* (1964);

- Covert operations and hidden mistreatment of U.S. citizens by the Central Intelligence Agency. Select Comm. to Study Governmental Operations (also known as the Church Committee), *Book I: Foreign and Military Intelligence*, S. Rep. No. 94-755 (1976);
- The 9/11 terrorist attack, including actions taken by the U.S. intelligence community before and afterwards. U.S. House Permanent Select Comm. on Intelligence & U.S. Senate Select Comm. on Intelligence, *Report of the Joint Inquiry into the Terrorist Attacks of September 11, 2001*, S. Rep. No. 107-351, H.R. Rep. No. 107-792 (2002);
- Role of the executive branch in the forced resignations of nine U.S. attorneys. *Comm. on Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008);
- Key causes of the 2008 financial crisis, including the role of federal regulators. Senate Comm. on Homeland Sec. and Governmental Affairs, Permanent Subcomm. on Investigations, *Wall Street and the Financial Crisis: Anatomy of a Financial Collapse*, S. Hrg. 112-675, Vol. 5 (2011);

- Justice Department's concealment of misconduct in Operation Fast and Furious. *Comm. on Oversight & Government Reform v. Holder*, 979 F. Supp. 2d 1 (D.D.C. 2013); and
- Mishandling by the Internal Revenue Service of applications for tax exempt status. *Hearing on Internal Revenue Service Targeting Conservative Groups: Hearing Before the Comm. on Ways & Means U.S. House of Representatives*, 113th Cong. (2013).

In all of those inquiries Congress uncovered facts through either judicially-enforced subpoenas or agreements with the executive branch in the shadow of judicial enforcement. For example, during Senator Levin's 15-year leadership of the Permanent Subcommittee on Investigations—including its financial crisis inquiry, *supra*—the Subcommittee routinely brought up enforcing its information requests during executive branch negotiations, and everyone assumed the courts would hear a dispute. Nonetheless, the Subcommittee never filed suit, instead using potential judicial enforcement as leverage to reach reasonable accommodations with the executive branch.

That accommodations process has since collapsed under the Trump Administration's unprecedented refusal to comply with congressional information requests, even in the impeachment context. *See, e.g*, Letter from Pat A. Cipollone, Counsel to the President, to Hon. Nancy Pelosi, Speaker of the House, et al., at 7

(Oct. 8, 2019); *Testimonial Immunity Before Congress of the Former Counsel to the President*, 43 Op. O.L.C. (May 20, 2019) Office of Legal Counsel, U.S. Department of Justice; Charlie Savage, *Trump Vows Stonewall of 'All' House Subpoenas, Setting Up Fight Over Powers,* N.Y. Times (Apr. 24, 2019), https://www.nytimes.com/2019/04/24/us/politics/donald-trump-subpoenas.html.[8]

Here, the Administration repeatedly rebuffed House Judiciary Committee attempts to negotiate. Suggesting the Trump Administration would have been *more* forthcoming without the threat of judicial enforcement defies logic. A viable accommodations process requires awareness from both branches that judicial enforcement is possible.

The Supreme Court has ruled "the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties." *Clinton v. Jones*, 520 U.S. 681, 701 (1997). The Trump Administration is currently impairing congressional oversight by withholding information. In response, Congress will either have to forego important information or use costly

[8] In her dissent, Judge Rogers observed: "For the first time in our history, the President has met the House's attempt to perform its constitutional responsibility with sweeping categorical resistance, instructing all members of the Executive Branch not to cooperate with the House's impeachment inquiry. . . . McGahn's Department of Justice . . . counsel acknowledged that he was unaware of any instance in history in which the President instructed the Executive Branch 'not to cooperate in any form or fashion' with a Congressional inquiry. Oral Arg. Tr. at 21." Op. 60–61 (Rogers, J., dissenting).

tactics that intensify political acrimony and dysfunction, unless this Court reaffirms judicial review.

3. Exercising jurisdiction over inter-branch subpoena disputes would impose minimal costs on the judiciary. Contrary to claims in the majority opinion, adjudicating those disputes would not overburden the courts either by encouraging a flood of new cases or requiring the judiciary to "micromanage" inter-branch subpoena disputes or "elaborate a common law of congressional investigations." Op. 11–13.

a. After courts resolved subpoena disputes in *McGrain*, *Miers*, and *Holder*, Congress did not rush to court to enforce additional executive branch subpoenas. Due to the time and complexities involved, Congress does not often pursue court enforcement of its subpoenas, as demonstrated by Senator Levin's record and the overall paucity of cases. This Court should acknowledge Congress' restraint as a basis for reaffirming congressional access to the courts, rather than cite the absence of cases as a rationale for denying access altogether. *Cf. Clinton*, 520 U.S. at 702 (noting prior dearth of private suits against the president to discredit future "deluge" of cases).

b. The judiciary's expertise in handling subpoenas and its historical deference to congressional information requests also indicate minimal costs from adjudicating inter-branch disputes.

Courts routinely resolve subpoena disputes using a well-developed body of law. Reviewing congressional subpoenas imposes an even lighter burden than other subpoena disputes due to separation of powers constraints.

In *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503 (1975), the Supreme Court held that congressional oversight investigations "fall within the 'legitimate legislative sphere'" of congressional activity and are protected by the Speech or Debate Clause from interference by the executive and judicial branches. The Court stated: "[W]e have long held that, when it applies, the Clause provides protection against civil as well as criminal actions, and against actions brought by private individuals as well as those initiated by the Executive Branch." 421 U.S. 502–03.

To accommodate separation of powers, the Supreme Court has instructed courts to show significant deference to congressional information requests. In *Eastland*, the Court held that the "wisdom of congressional approach or methodology is not open to judicial veto." *Id.* at 509. The Court also famously cautioned against restricting congressional information requests, since "[t]he very nature of the investigative function . . . takes the searchers up some 'blind alleys' and into nonproductive enterprises." *Id.* In a criminal contempt case, the Court sustained congressional requests for records "not plainly incompetent or irrelevant to any lawful purpose" and "reasonably relevant to the inquiry." *McPhaul v.*

*United States*, 364 U.S. 372, 381–82 (1960) (citation omitted) (internal quotations omitted).

District courts in this Circuit have not only used the *McPhaul* standard in their opinions, *see, e.g., Senate Select Comm. on Ethics v. Packwood*, 845 F. Supp. 17 (D.D.C.) (enforcing Senate committee subpoena), emergency motion for stay pending appeal denied per curiam, Order No. 94-5023 (D.C. Cir. Feb. 18, 1994), application for stay denied, 510 U.S. 1319 (1994) (Rehnquist, C.J.), they have held that a congressional subpoena "is to be enforced 'unless the district court determines that there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the . . . investigation.'" *Id.* *See also Bean LLC v. John Doe Bank*, 291 F. Supp. 3d 34, 44 (D.C.C. 2018) ("[T]his Court will not—and indeed, may not—engage in a line-by-line review of the Committee's requests. *Cf. McSurely v. McClellan*, 521 F.2d 1024, 1041 (D.C. Cir. 1975) ('There is no requirement that every piece of information gathered in [a congressional] investigation be justified before the judiciary.').").

These deferential standards not only respect separation of powers, but also avoid "micromanage[ment]" of congressional inquiries and excessive "[j]udicial entanglement in the branches' political affairs" that concerned the McGahn panel. Op. 11–13.

In addition to imposing minimal costs on the judiciary, exercising jurisdiction over inter-branch disputes would advance the branch's core Article III duty to say what the law is. *Marbury v. Madison*, 5 U.S. 137 (1803).

4. Reaffirming Congress' right to orderly judicial review of information requests to the executive branch would produce multiple national benefits.

Benefits to the country include defusing raw political clashes between the branches, encouraging inter-branch accommodation due to the judiciary's ability to "intervene[] with neutral authority," *United States v. Brewster*, 408 U.S. 501, 523 (1972), and furthering stability and order under rule of law. Preserving judicial review would enable Congress to continue to select less aggressive enforcement mechanisms. Judicial review would also reaffirm the bedrock principle that no one is above the law—including an executive with antipathy for Congress—and reassure the public that the system of checks and balances still functions.[9]

Good government requires good oversight, and good oversight is impossible without good information. Judicial action ensuring Congress can obtain the

[9] *See, e.g.,* Susan Page & Sarah Elbeshbishi, *Most Americans want Trump to comply with House subpoenas*, USA Today (June 16, 2019, 5:07 PM), https://www.usatoday.com/story/news/politics/2019/06/16/poll-most-want-trump-comply-congressional-subpoenas/1471553001/; *Poll: 74 percent of Americans say former Trump officials should obey congressional subpoenas*, The Hill (June 5, 2019), https://thehill.com/hilltv/what-americas-thinking/447113-poll-americans-overwhelmingly-think-former-trump-officials ("Republicans, by a margin of 61 to 31 percent," said former officials should testify when asked.).

information needed to carry out its constitutionally-assigned functions is essential to a sustainable democracy.

5. Finally, the majority opinion's facile claim that 28 U.S.C. § 1365 signals congressional agreement that courts lack jurisdiction over inter-branch subpoena disputes misreads the statute. Op. 18–19.

Textually, § 1365, which first appeared in the Ethics in Government Act of 1978, Pub. L. No. 95-521, § 705(f), 92 Stat. 1824 (1978), grants the D.C. District Court jurisdiction over Senate enforcement of its subpoenas. On its face the provision does not apply to a subpoena issued by the House. Should the statute somehow be read as ambiguous, the 1978 conference report clarifies that it applies to the Senate alone and does not bind the House.[10]

[10] *Conference Report on the Ethics Act of 1978*, S. Doc. No. 95-217, at 80 (1978) ("The managers on the part of the House recede and concur in an amendment of the Senate which establishes an Office of Senate Legal Counsel and confers jurisdiction on the courts to enforce Senate subpoenas.").

The legislative history also contradicts the proposition that, by including an executive branch exception in § 1365, the Senate had agreed to exclude such claims from federal courts. The Senate committee report on the Senate's predecessor to the 1978 Ethics Act states the opposite: "This exception in the statute is not intended to be a Congressional finding that the Federal courts do not now have the authority to hear a civil action to enforce a subpoena against an officer or employee of the Federal Government." Senate Comm. on Governmental Affairs, *Committee Report on the Public Officials Integrity Act of 1977*, S. Rep. 95-170, at 91–92 (1977).

Although § 1365 has no application here, the majority opinion claims that legislative history related to a 1996 law amending § 1365 indicates that Congress agrees courts should not have jurisdiction over inter-branch subpoena disputes. Op. 19. The main purpose of that 1996 law, authored by then Republican Senator Arlen Specter and Democratic Senator Carl Levin, was to clarify a statute prohibiting false statements to Congress. False Statements Accountability Act of 1996, Pub. L. No. 104–292, 110 Stat. 3459 (1996). The 1996 law also amended § 1365's original exemption from judicial enforcement of Senate subpoenas involving official actions of executive branch officials, narrowing that exception to officials asserting a "governmental privilege." *Id.* The majority maintains that statements by Senators Specter and Levin supporting the amendment and acknowledging the executive branch exception establish congressional support for excluding all civil inter-branch subpoena disputes from court.

In fact, Senator Levin believed then (and now) that the statutory exception was tolerable, because § 1365 was not the exclusive path for Senate access to the courts. Long-standing precedents authorize the judiciary to resolve disputes over congressional subpoenas aimed at the executive branch. *See, e.g., McGrain*, 273 U.S. 135 (1927) (upholding a Senate subpoena seeking information about a core executive official, the Attorney General, engaged in a core executive function, prosecutorial decision-making); *United States v. AT&T*, 567 F.2d 121 (D.C. Cir.

1977) (upholding a House subpoena of Justice Department documents); *Ashland Oil v. FTC*, 548 F.2d 977 (D.C. Cir. 1976) (upholding a House request for a report filed with the Federal Trade Commission); *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974) (asserting jurisdiction, but declining to enforce a Senate subpoena for the Nixon tapes).[11] In addition, Senator Levin was well aware that the House had never applied § 1365 to itself nor endorsed an executive branch exception, as demonstrated by the law's text and the bill passed by the House prior to the conference report, Pub. L. No. 104-292, 110 Stat. 3459 (1996).

Contrary to the majority opinion's reading of § 1365, this lawsuit and this brief make plain that the House and Senator Levin continue to advocate judicial adjudication of congressional subpoenas to the executive branch.

## CONCLUSION

Congressional oversight of the executive branch, including impeachment when necessary, is fundamental to the Framers' system of checks and balances. Affirming the majority opinion would impose costs on congressional oversight that would threaten that precious system. Continuing, instead, judicial resolution of inter-branch subpoena disputes would lower the cost of ensuring Congress' right to

[11] *See also* 1978 Senate committee report, *supra* note 10, stating Congress made no finding that federal courts lacked jurisdiction to enforce congressional subpoenas to the executive branch.

information while advancing the rule of law, orderly resolution of disputes, and effective government.

April 16, 2020

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

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April 16, 2020

/s/ *Andrew D. Herman*
Andrew D. Herman

## CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2020, I electronically filed the foregoing **BRIEF OF *AMICI CURIAE* THE LUGAR CENTER AND THE LEVIN CENTER AT WAYNE LAW SUPPORTING APPELLEE AND REVERSAL** with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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