[ORAL ARGUMENT SCHEDULED FEBRUARY 23, 2021]

No. 19-5331

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

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

APPELLEE,

v.

DONALD F. MCGAHN, II,

APPELLANT,

BRIEF OF MORTON ROSENBERG AS AMICUS CURIAE IN SUPPORT OF APPELLEE

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Dated: December 23, 2020

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici.

To counsel's knowledge, all parties, intervenors, and amici appearing before this Court are as stated in the Supplemental Brief of Appellee.

B. Rulings Under Review.

References to the rulings at issue appear in the Supplemental Brief of Appellee.

C. Related Cases.

References to the related cases appear in the Supplemental Brief of Appellee.

Respectfully submitted,

/s/ Katharine M. Mapes
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Morton Rosenberg is an individual and therefore does not have a parent company, has issued no outstanding publicly held shares or debt securities, and is not a publicly-owned company.

Respectfully submitted,

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RULE 29 STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the brief's preparation or submission; and no person other than amicus or its counsel contributed money intended to fund the brief's preparation or submission.

CERTIFICATE OF COUNSEL AS TO CIRCUIT RULE 29

Mr. Rosenberg files this brief in order to present to the court legal and historical information he is personally aware of due to his long career in public service. Accordingly, counsel for Morton Rosenberg certifies, pursuant to D.C. Circuit Rule 29(d), that it is not practicable to file a joint *amicus curiae* brief with other potential *amici* in support of Appellee since counsel is aware of no other potential *amici* that share Mr. Rosenberg's unique personal perspective and that it is therefore necessary to file a separate brief.

Pursuant to D.C. Circuit Rule 29(b), counsel for Morton Rosenberg is authorized to represent that both Appellants and Appellees have consented to his filing of an amicus brief.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

FEDERAL COURT CASES

UNITED STATES CONSITUTION

FEDERAL STATUES, RULES, AND REGULATIONS

FEDERAL REPORTS, RESOLUTIONS AND RECORDS

OTHER AUTHORITIES

GLOSSARY

Panel Decision	Opinion, *Comm. on the Judiciary of the U.S. House of Representatives v. McGahn*, 973 F.3d 121 (2020) (No. 19-5331).
DOJ	Department of Justice
CRS	Congressional Research Service

STATEMENT OF THE ISSUES

The issues presented for review are set forth in the Supplemental Brief of Appellee.

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Supplemental Brief of Appellee.

SUMMARY OF ARGUMENT

Morton Rosenberg is a legal scholar with decades of experience dealing with constitutional questions, particularly those involving informational disputes between the executive and legislative branches such as this one. He files this brief to highlight the Panel Decision's failure to (i) consider key Supreme Court precedents; (ii) correctly interpret statutes outlining the Senate's investigative process; and (iii) take into account the historic practices that recognized Congresses' authority to investigate the executive branch.

IDENTITY AND INTEREST OF AMICUS

Morton Rosenberg spent more than 35 years as a specialist in American Public Law with the American Law Division of the CRS Library of Congress. Mr. Rosenberg specialized in the areas of constitutional law, administrative law and process, congressional practice and procedure, and labor law. Mr. Rosenberg further specializes in and has significant professional experience with the legal questions

encountered at the interstice of Congress and the Executive, particularly in the scope of the congressional oversight and investigative prerogatives, the validity of claims of executive and common law privileges before committees, and issues raised by the presidential exercise of temporary and recess appointment power.

Mr. Rosenberg's experience and expertise have been recognized by courts and commentators. His writings have been heavily cited by the Supreme Court, *see NLRB v. SW Gen., Inc.*, 137. S. Ct. 929, 935 (2017); the D.C. Circuit, *see SW Gen., Inc. v. NLRB*, 796 F.3d 67, 70 (D.C. Cir. 2015), *aff'd*, 137 S. Ct. 929 (2017); the Eastern District of New York, *Vidal v. Wolf*, Nos. 1:17-cv-05228-NGG-VMS, 16-CV-4756-NGG-VMS, slip op. at 11 (E.D.N.Y. Nov. 14, 2020); and Congressional hearings, *e.g.*, *Affirming Congress' Constitutional Oversight Responsibilities: Subpoena Authority and Recourse for Failure to Comply with Lawfully Issued Subpoenas: Hearing before the H. Comm. on Sci., Space, & Tech.*, 114th Cong. 110 n.152, 583 n.10, 590 n.10, 706 n.11 (2016) (statement of Elizabeth Price Foley, Professor of Law; statement of Hon. Maura Healey, Att'y Gen. of Mass; *id.*; statement of Hon. Eric T. Schneiderman, Att'y Gen. of N.Y.). As such, Mr. Rosenberg is an experienced scholar with a unique perspective on the issues presented in this case.

Mr. Rosenberg submits this amicus brief in the hope that the background he acquired over many years of legal and historical research and analysis will prove

useful to this court. It appears to him that—as with the panel's previous conclusion that the Committee lacked standing—key precedents and important historical context have again been overlooked.

ARGUMENT

In its decision finding the Committee lacks a cause of action, the Panel Decision focused narrowly on recent precedent, stating that "there is . . . nothing 'traditional' about the Committee's claim. The Committee cannot point to a single example in which a chamber of Congress brought suit for injunctive relief against the Executive Branch prior to the 1970s." *Comm. on Judiciary of U.S. House of Representatives v. McGahn*, 973 F.3d 121, 124 (D.C. Cir. 2020) ("Panel Decision"). But the need for the judiciary—namely this Court and the Supreme Court—to resolve interbranch information disputes first arose far earlier than the 1970s. Indeed, history and precedent stretching back to the beginning of the country evidences that the Panel Decision erred in its conclusion.

Mr. Rosenberg is aware of this historical context because, as early as 1975, he worked closely with Representative John Moss, the Chair of the House Commerce Committee's Subcommittee on Oversight and Investigations. Representative Moss was concerned that DOJ's litigation on behalf of the House was becoming an increasing conflict of interest and undermining the House's institutional interests. Over the years of Representative Moss' chairmanship (1975–78), Mr. Rosenberg

therefore prepared fifteen CRS reports and memos regarding the House's ability to enforce its subpoenas by means of civil court enforcement actions and on questions related to challenges of the obstruction of House criminal contempt proceedings by DOJ. As a result, Mr. Rosenberg became intimately familiar with the historical and legal context surrounding the House's exercise of its inherent, inviolable subpoena authority. Based on this experience, it is clear to him that the Panel Decision again failed to take into account key precedents and certain historical context. This brief attempts to remedy that deficit.

I. Key precedent demonstrates that Congress has a cause of action to enforce a subpoena.

The Panel Decision refused to recognize a cause of action under Article I of the Constitution. Citing to certain statutes, discussed *infra*, as evidence that Congress has already recognized its self-imposed limitations on its subpoena power, the Panel Decision concludes that to wade into an interbranch information dispute would ignore these limitations. The Panel Decision further notes that it must exercise "'caution'" when wading into what it characterized as an "interbranch information dispute." Panel Decision at 124 (quoting *Hernandez v. Mesa*, 140 S. Ct. 735, 742 (2020). But this conclusion ignores the fact that the three branches of government have never been kept siloed from each other—and in fact, the Congressional subpoena power is precisely the type of issue which implicates all

three branches of government. The legislative branch's authority is to issue, the executive to respond, and the judicial to adjudicate.

The Supreme Court first acknowledged the interbranch implications of the Congressional subpoena power as early as 1928 in *Reed v. County Commissioners of Delaware County*, 277 U.S. 376 (1928) ("*Reed*"). Although *Reed* dealt with a subpoena issued by Congress pursuant the Senate's constitutionally-based authority and commitment to "be the Judge of the Elections, Returns and Qualifications of its Members," and this case concerns a subpoena issued by Congress to the Executive pursuant to its constitutionally-based power of inquiry, both cases involve Congresses' core institutional self-protective authority under Article I of the Constitution. U.S. Const. art. I, § 5. Critically, *Reed* was part of a trio of landmark cases—including *McGrain v. Daugherty*, 273 U.S. 135 (1927), and *Sinclair v. United States*, 279 U.S. 263 (1929), *overruled on other grounds by United States v. Gaudin*, 515 U.S. 506 (1995)—which irrevocably established the primacy of Congressional oversight and investigative powers and responsibility. Thus, *Reed* is absolutely relevant to the central question at issue here—whether one house of Congress has standing and a cause of action to enforce its subpoena power—and therefore it cannot be ignored. Equally important, it must not be misconstrued, as the Panel Decision did here. Panel Decision at 125.

In *Reed*, the Court recognized that a Senate resolution expressly authorizing a committee to sue on its behalf could allow that committee to use the judiciary to enforce a demand for information. *Reed* at 388–89. *Reed* arose from a dispute over the power conferred by Senate Resolutions 195 and 324, which created a special committee to investigate election fraud in a contested Senate seat race for Pennsylvania. Resolution 324 conferred on the committee "all powers of procedure with respect to the subject matter" of the resolution, and Resolution 195 authorized the committee to follow its own process to require the production of evidence. S. Res. 324, 69th Cong. (1927) (enacted); S. Res. 195, 69th Cong. (1926) (enacted). The committee demanded election materials from the County Commissioners of Delaware County, who refused. The committee then brought suit to obtain possession.

The Court recognized that Senate resolutions "are to be construed having . . . the power possessed and customarily exerted by the Senate." *Reed* at 388. The Court continued: "It has been customary for the Senate—and the House as well—to rely on its own power to compel attendance of witnesses and production of evidence in investigations made by it or through its committees." *Id.* One of the delegable powers, the Court noted, was the power of the Senate to sue. *See id*. Citing its then-recent *McGrain v. Daugherty* ruling, the Court explicitly recognized that the houses of Congress are, by means of their own process or that of a committee,

"empowered to obtain evidence relating to the matters committed to it by the Constitution." *Id*. (citing *McGrain v. Daugherty*, 273 U.S. 135, 160 (1927)).[1]

The Panel Decision's single reference to *Reed*, invoking the case to justify its position that the House may not bring suit to enforce a subpoena, is inapposite. Contrary to the Panel Decision's use, the Court in *Reed* was in fact illustrating the opposite point: that a duly-empowered committee of Congress could do exactly that. In *Reed*, the Court explained that in order to invoke the judiciary to enforce a subpoena, a committee would need authorization from Congress. *Reed* at 389. The Court was *not* differentiating between a cause of action and standing, but was explaining that because in that case, the committee had not been properly authorized to invoke the judiciary, it could not do so. Here, where the committee has been duly authorized, the courts are the proper venue to bring suit to enforce a subpoena.

The facts here are square with those discussed in *Reed.* The House Judiciary Committee—whose jurisdiction includes "general oversight responsibilities" over special counsels and impeachment, House Rule X.2(a)—is charged with reviewing those subjects "on a continuing basis," House Rule X.2(b)(1), is empowered to "at any time" conduct "investigations and studies," House Rule XI.1(b)(1), and may

[1] In fact, the very day after the Court released its decision on *Reed*, the Senate, apparently responding to the Court, adopted a Standing Resolution explicitly authorizing "[A]ny committee of the Senate . . . to bring suit on behalf of and in the name of the United States in any court of competent jurisdiction." 69 Cong. Rec. 10,596 (1928).

issue subpoenas for testimony and documents, House Rules XI.2(m)(1)(B), (m)(3)(A)(i). Moreover, the House, unlike the Senate in *Reed*, specifically authorized the House Judiciary Committee to commence litigation on its behalf. H.R. Res. 430, 116th Cong. (2019). Contrary to the Panel Decision, *Reed* shows that the historic custom and practice in fact empowered the House to obtain evidence relating to its constitutionally committed responsibilities.

II. The Panel Decision misinterprets key statutes.

The Panel Decision mistakenly concludes that Congress has precluded the House from challenging executive branch actions in the courts because certain statutes authorize the Senate, but not the House, to do so. Panel Decision at 123. The panel decision cites 2 U.S.C. § 288d for the proposition that only the Senate has an express cause of action to sue to enforce a subpoena and 28 U.S.C. § 1365(a) for the proposition that Congress has excluded itself from suits that involve executive-branch assertions of "'governmental privilege.'" Panel Decision at 123 (quoting 28 U.S.C. § 1365(a)). The Panel Decision interprets these statutes to mean that Congress itself has "carefully drafted limitations on its authority to sue to enforce a subpoena." *Id*.

Both statutes, however, refer only to the Senate's subpoena authority. Neither says anything about the enforcement of a subpoena or order issued by the House or a committee or a subcommittee of the House—which is what is at issue here. The

Panel Decision's conclusion—that because this statute applies only to the Senate, the House must not have a parallel right of action—is unsupported. As the Supreme Court has held, each house has exclusive power to make their own rules of proceedings. *See Reed* at 388. Moreover, each house's institutional self-protective powers are inherent and inviolable, and they may not be obstructed by another branch. *McGrain v. Daugherty*, 273 U.S. 135, 173 (1927). The Senate's rule, therefore, cannot be used to obstruct the self-protective powers of the House. That the House conducts its business differently and has not created such a rule does not mean it does not have the same inherent powers as the Senate. Nor does that fact interfere with the House's right of standing or cause of action before the judiciary. Any conclusion otherwise, as was reached by the Panel Decision, is in error.

III. Historical context demonstrates that it has long been understood that Congress has authority to enforce subpoenas.

There is a long line of historical practice dating from the founding of the country that further compels the conclusion that the Committee has a cause of action to enforce the subpoena. Congress attempted to exercise its inquiry power as early as 1792. *Inquiry into General St. Clair's Defeat, [13 November] 1792*, Founders Online (Nat'l Archives), https://founders.archives.gov/documents/Madison/01-14-02-0361 (last visited Nov. 21, 2020). Only three years later, in 1795, the nation instituted its first inherent

contempt proceeding.[2] Todd Garvey, CRS, RL34097, *Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure* 3 (2017), https://fas.org/sgp/crs/misc/RL34097.pdf. And it was in the early 19th Century that the Supreme Court first weighed in on these issues. In 1821, it held that the House of Representatives must have the power to "guard itself from contempts." *Anderson v. Dunn*, 19 U.S. 204, 228 (1821). Analogizing to the judiciary's inherent authority to protect and vindicate its institutional integrity, the Court considered the House's constitutional and institutional duties, *id.* at 227, and found that the authority to "guard itself from contempts, " *id.* at 228, must exist because "public functionaries must be left at liberty to exercise the powers which the people have intrusted to them." *Id.* at 226. Like the "Courts of justice," the power could be implied and did not need statutory authority, nor could it be voluntarily abandoned by either house of Congress or the courts or obstructed by the Executive. *See id.* at 227 (finding that although courts had statutory authority, "[I]t does not follow . . . that they would not have exercised that power without the [statute].").

[2] "Inherent contempt" is the power of Congress to rely on its own constitutional authority to detain and imprison a contemnor until the individual complies with congressional demands. Although not specifically granted by the Constitution, it is considered necessary to investigate and legislate effectively. Todd Garvey, CRS, RL34097, *Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure* 10, https://fas.org/sgp/crs/misc/RL34097.pdf (2017).

That Congressional self-protective authority has contained elements of judicial assistance since the 1850s. After *Anderson*, Congress realized that its limitation to the imposition of jail time at the end of a Congressional session—the punitive remedy the court approved of in *Anderson*—undermined the effectiveness of its investigatory authority. So, in 1857, Congress passed legislation allowing either house to order district attorneys to criminally prosecute contemnors as needed. Ch. 19, §1, 11 Stat. 155 (1857), *as amended by* ch. 11, 12 Stat. 333 (1862), *and* ch. 884, 49 Stat. 2041 (1936), *and* ch. 594, 52 Stat. 942 (1938) (codified at 2 U.S.C. §§ 192-194). Congress was then allowed to enforce the attendance of witnesses on the summons of either House. *Id.* That framework still stands today. If an individual fails to appear or refuses to answer pertinent questions, that person can be indicted for misdemeanor in the courts. *Id.* Witnesses can invoke their Fifth Amendment right not to incriminate themselves. The 1857 law, as amended, was upheld by the Supreme Court. *In re Chapman*, 166 U.S. 661 (1897). The weight of history and tradition demonstrates that judicial recognition of Congressional subpoena authority is not new or novel.

A deeper understanding of historical context does not support the conclusion that a cause of action is non-traditional. For the first century of this Nation until the establishment of DOJ in 1870, prosecution of contempts of Congress was vested in district attorneys who until 1897 were private functionaries, paid on case-by-case

basis and able to continue in private practice, who received their litigative assignments as a result of congressional delegations to executive branch officials. Over the ensuing century, this prosecution was entrusted to DOJ. Act to Establish the Department of Justice, Pub. L. No. 41-97, 16 Stat. 162 (1870). In the 1970s, however, Congress became increasingly involved in information-related disputes with the executive branch and it became clear that it could no longer rely on DOJ to represent its interests in these disputes. Between 1975 and 1983, Congressional committees or subcommittees voted to hold in criminal contempt the Secretaries of State, Commerce, Health, Education, and Welfare, Energy—not once but twice—and Interior, and the Administrator of the Environmental Protection Agency, for withholding testimony or materials. Louis Fisher, CRS, RL31836, *Congressional Investigations: Subpoenas and Contempt Power* 18–32 (2003), https://fas.org/sgp/crs/misc/RL31836.pdf. Total or substantial compliance was eventually achieved in each of these episodes without ultimate resort to criminal prosecution.[3]

During this period Congress also began to explore other avenues for enforcing its constitutional responsibilities. In 1975, the House intervened in the pending

[3] For a detailed review and analysis of the aggressive attempts and ultimate failure of the Executive between 1981 and 1989 to establish a so-called "unitary executive", *see* Morton Rosenberg, *Congress's Prerogative over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive*, 57 Geo. Wash. L. Rev. 627 (1989).

litigation of *Ashland Oil, Inc. v. Federal Trade Commission* to oppose the refusal of the Federal Trade Commission to comply with a Subcommittee's subpoena of documents material to its investigation of natural gas reserves. *Ashland Oil, Inc. v. Fed. Trade Comm'n*, 548 F.2d 977 (D.C. Cir. 1976). Ashland believed that a statutory trade secret provision denied committee access, which was supported by DOJ. The legal and practical basis for Chairman Moss's authorization request was provided by a CRS memo by Mr. Rosenberg that cited the 1928 *Reed* ruling as the direct constitutional precedent for such action. The memo was included as part of the accompanying House Report. See H.R. Rep. No. 94-756 (1975). The litigation resulted in successfully gaining full access to the documents.

In 1976, Chairman Moss again sought and received House authorization to intervene in a litigation that arose from his subcommittee's investigation of wiretapping of private parties by AT&T at the behest of DOJ. AT&T had agreed to comply with a subcommittee subpoena on the matter but DOJ obtained a restraining order. *See United States v. Am. Tel. & Tel. Co.*, 551 F.2d 384 (D.C. Cir. 1976) ("*AT&T I*"). Mr. Moss proposed to oppose DOJ in *AT&T I* on the grounds that "The President's assertions . . . directly threaten the power of the legislative branch to inquire by wrapping a broad class of information in the cloak of 'executive privilege.'" H.R. Rep. No. 94-1422, at 5 (1976).[4] It is interesting to note that the

[4] In 1977, Speaker of the House, Tip O'Neill went a step further by creating the

dissenting opposition to the authorization made no claim with respect to either the constitutional or statutory authority of the House to make the authorization. Rather the complaints centered on Moss's tardiness in seeking the authorization and the cost of hiring outside counsel when it had enough staff counsel to do the work alone. H.R. Rep. No. 94-1422, at 21–22 (1976). In response, this Court recognized Congresses' historical independence and found that "[i]t is clear that the House as a whole has standing to assert its investigatory power . . . ." in a dispute with the executive branch. *AT&T I* at 391.

Finally, in *United States v. Nixon*, the Court reached the conclusion that it is the province of the judiciary to "'say what the law is'" with respect to the claim of executive privilege presented in that case. *United States v. Nixon*, 418 U.S. 683, 705 (1974) (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)). That this case stems from a Congressional subpoena does not change that fact—indeed, it is critical that the judiciary ensure that Congressional power is not made meaningless. To reach "[a]ny other conclusion would be contrary to the basic concept of separation of

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House General Counsel's Office and authorizing it to represent the interest of the House and its various committees in litigation. *See generally*, Morton Rosenberg, *When Congress Comes Calling: A Study on the Principles, Practices, and Pragmatics of Legislative Inquiry* 128 n.128 (The Constitution Project, 2017), https://archive.constitutionproject.org/wp-content/uploads/2017/05/WhenCongressComesCalling.pdf.

powers and the checks and balances that flow from the scheme of a tripartite government." *Id.* at 704 (citing *The Federalist No.* 47 (James Madison)).

CONCLUSION

The Court should find that the Committee has a cause of action to pursue the House's institutional interests in this proceeding for the reasons articulated above and in the Committee's Supplemental Brief.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Katharine M. Mapes, in reliance on the word count of the word processing system used to prepare this brief, certify that the foregoing brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B), Circuit Rule 32(e)(2)(B), and this Court's order dated March 20, 2020. The brief contains 3,395 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(e)(1).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6).

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I hereby certify that I have on this 23th day of December, 2020, caused the foregoing document to be electronically served through the Court's CM/ECF system, if they are registered CM/ECF users, or if they are not, by serving a true and correct copy by email, upon:

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