[EN BANC ORAL ARGUMENT SCHEDULED FOR 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,

Plaintiff-Appellee,

v.

DONALD F. MCGAHN, II,

Defendant-Appellant.

On Appeal from the United States District Court for the District of Columbia,
Case No. 1:19-cv-2379

EN BANC BRIEF OF *AMICI CURIAE* FORMER DEPARTMENT OF JUSTICE OFFICIALS IN SUPPORT OF PLAINTIFF-APPELLEE

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STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

Pursuant to D.C. Circuit Rule 29(b), undersigned counsel for *amici curiae* former Department of Justice (DOJ) officials represents that counsel for all parties have been sent notice of the filing of this brief and have consented to the filing.[1]

Pursuant to D.C. Circuit Rule 29(d), undersigned counsel for *amici curiae* certifies that a separate brief is necessary. *Amici* are familiar with the position that DOJ has taken over time regarding Congress's power to file civil actions to enforce congressional subpoenas against Executive Branch officials, and they have a strong interest in ensuring that DOJ's prior views are presented to this Court. Moreover, *amici* are familiar with the long history of the Executive Branch cooperating with legitimate congressional investigations, and they also have a strong interest in presenting this history, which helps explain why there have not been more lawsuits to enforce congressional subpoenas, to this Court.

[1] Pursuant to Fed. R. App. P. 29(c), *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* state that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I. PARTIES AND AMICI

Except for *amici* former Department of Justice officials and any other *amici* who had not yet entered an appearance in this case as of the filing of Brief for Appellant, all parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Brief for Appellant.

II. RULINGS UNDER REVIEW

Reference to the ruling under review appears in the Brief for Appellant.

III. RELATED CASES

Reference to any related cases pending before this Court appears in the Brief for Appellant.

Dated: December 23, 2020

By: /s/ Brianne J. Gorod
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GLOSSARY

DOJ	Department of Justice
OLC	Office of Legal Counsel

INTEREST OF *AMICI CURIAE*

Amici previously served in the Department of Justice (DOJ), including the Office of Legal Counsel (OLC), which provides legal advice to the President and Executive Branch agencies. As former DOJ officials, *amici* are familiar with the position that DOJ has taken over time regarding Congress's power to file civil actions to enforce congressional subpoenas against Executive Branch officials, and they have a strong interest in ensuring that DOJ's prior views are presented to this Court. As *amici* know, OLC has repeatedly taken the position that Congress can file a civil action to enforce its subpoenas, and it has relied on the existence of a cause of action to bring such a civil action to justify its view (on which *amici* take no position) that Congress's power to hold Executive Branch officials in contempt for failing to comply with congressional subpoenas is otherwise limited. Moreover, *amici* are aware of the longstanding history of Executive Branch efforts to comply with congressional subpoenas, and they have a strong interest in presenting this history, which helps explain why there have not been more lawsuits to enforce congressional subpoenas, to this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

In Spring of 2019, the House Judiciary Committee issued a subpoena for the testimony of former White House Counsel Don McGahn, First Panel Op. 3, as part

of its investigation into McGahn's role in President Trump's efforts to obstruct federal investigations into Russia's interference in the 2016 election, *see* Special Counsel Robert S. Mueller, III, *Report on the Investigation into Russian Interference in the 2016 Presidential Election: Vol. II*, U.S. Dep't of Justice 4, 6 (Mar. 2019). As the Committee has explained, McGahn's testimony is necessary for "its ongoing investigation of Presidential misconduct, improper political interference in federal law-enforcement matters, and related agency oversight." Pet. 3.

Generally, when Congress seeks documents or testimony, the Executive and Legislative Branches work out "an accommodation that meets the needs of both branches" and provides Congress with "the information required for legislative [and other] needs." Louis Fisher, Cong. Research Serv., RL31836, *Congressional Investigations: Subpoenas and the Contempt Power* 1 (2003). The Trump Administration, however, did not take that approach. Rather than seek an agreement regarding McGahn's testimony, President Trump directed McGahn not to testify. According to the White House, McGahn was absolutely immune from compelled congressional testimony because he was a close advisor to the President. First Panel Op. 2. A panel of this Court explained that this position "may seriously and even unlawfully hinder the Committee's efforts to probe presidential wrongdoing." *Id*. at 9.

Seeking to enforce its subpoena, the House Judiciary Committee filed a civil action in federal court to compel McGahn to testify. In response, McGahn argued,

among other things, that the Committee lacked Article III standing and a cause of action to bring such a suit. *See id.* at 4. Sitting en banc, this Court held that the Committee has Article III standing to seek judicial enforcement of its duly issued subpoena. However, on remand, a panel of this Court held that the Committee lacks a cause of action to enforce its subpoena. That holding was wrong, and prohibiting Congress from enforcing its subpoenas in court will effectively allow not only the Trump Administration—but all future administrations—to avoid legitimate congressional oversight.

Significantly, the Administration's position that the Committee lacks a cause of action to bring this enforcement action conflicts with prior Executive Branch precedent. In a series of OLC memoranda from the 1980s, DOJ repeatedly stated that Congress can file a civil action to obtain documents and testimony from an Executive Branch official refusing to comply with a subpoena. Indeed, OLC relied on that authority to explain that, in its view, preventing Congress from using the criminal contempt statute or its inherent contempt authority to enforce subpoenas would not harm Congress's ability to conduct meaningful investigations. The Department's current position that the House lacks a cause of action is at odds with this precedent.

According to the panel, the position taken in those DOJ memoranda was wrong because there is no history of Congress bringing civil actions to enforce its subpoenas. *See* Second Panel Op. 4. But one reason Congress did not bring these

suits early in the nation's history is that early Presidents routinely cooperated with congressional investigations. Moreover, when the Executive Branch did withhold information from Congress, it was for specified reasons and occurred within a broader context of accommodation. Thus, that Congress has not often needed to go to the courts to enforce its subpoenas does not mean that it cannot do so when, as is the case here, the Executive Branch is refusing to reach a reasonable accommodation with Congress in response to a subpoena.

ARGUMENT

I. THE EXECUTIVE BRANCH HAS EXPLICITLY RECOGNIZED AND RELIED UPON CONGRESS'S POWER TO BRING CIVIL ACTIONS TO ENFORCE CONGRESSIONAL SUBPOENAS.

Historically, the Executive Branch took the position that Congress can seek civil judicial enforcement of its subpoenas against Executive Branch officials. Indeed, it relied on the existence of that authority to justify its position that Congress cannot invoke criminal contempt procedures or its inherent contempt authority against a recalcitrant Executive Branch official when the President asserts executive privilege. The Department's more recent position is at odds with this precedent.[2]

[2] In two other recent cases, DOJ has also taken the position that the House lacks a cause of action to enforce a subpoena against an Executive Branch official. *See Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008); *Comm. on Oversight & Gov't Reform v. Holder*, 979 F. Supp. 2d 1 (D.D.C. 2013). In neither of those cases did it reconcile that position with the Department's prior precedents on this issue.

Typically, Congress has two avenues to enforce a subpoena other than a civil judicial-enforcement proceeding. First, Congress can ask the Executive Branch to prosecute an uncooperative witness. Federal criminal law makes it a misdemeanor for a witness summoned by Congress to "willfully make[] default, or . . . refuse[] to answer any question pertinent to the question under inquiry." 2 U.S.C. § 192. Congress can vote to hold a witness in contempt and refer the matter to "the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action." 2 U.S.C. § 194.

Second, Congress has inherent contempt authority and can use its own officers to imprison an uncooperative witness. *See* Irvin B. Nathan, *Protecting the House's Institutional Prerogative To Enforce Its Subpoenas*, *in* The Constitution Project 301 (2015) (House can "direct the sergeant-at-arms to arrest [a] witness, try her in the House, and upon conviction, place her in detention in a House facility" until she complies with a subpoena).

The Executive Branch, however, has historically taken the position that Congress cannot use these two mechanisms when it seeks to enforce a subpoena against an Executive Branch official refusing to testify because of a claim of executive privilege or immunity. With regard to the criminal-contempt statute, OLC has opined that "the contempt of Congress statute was not intended to apply and could not constitutionally be applied to an Executive Branch official who asserts the

President's claim of executive privilege." *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 102 (1984) (Olson Memorandum); *see Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act*, 10 Op. O.L.C. 68, 85 (1986) (Cooper Memorandum) (similar). Indeed, DOJ's Criminal Division and U.S. Attorneys' Offices have relied on that position in declining to bring prosecutions against Executive Branch officials who claim executive privilege or immunity. And OLC has taken the position that "this same conclusion would apply" to Congress's inherent contempt power because "the reach of the [criminal contempt] statute was intended to be coextensive with Congress' inherent civil contempt powers." Olson Memorandum, 8 Op. O.L.C. at 140 n.42.

Critically, however, OLC was of the view that "Congress has other methods available to test the validity of a privilege claim and to obtain the documents that it seeks." *Id.* at 102. Specifically, when OLC first addressed this issue in 1984, it took the position that "Congress could obtain a judicial resolution of the underlying privilege claim and vindicate its asserted right to obtain any documents *by a civil action for enforcement of a congressional subpoena*." *Id.* at 137 (emphasis added). In fact, a civil suit would be preferable, OLC concluded, because it "would be aimed at the congressional objective of obtaining the documents, not at inflicting punishment on an individual who failed to produce them." *Id.* And specifically

addressing the cause-of-action question, OLC noted that Congress "arguabl[y] . . . already has the power to apply for such civil enforcement" under 28 U.S.C. § 1331. *Id.* at 137 n.36. In short, OLC believed that there was a "relatively slight imposition on Congress in requiring it to resort to a civil rather than a criminal remedy to pursue its legitimate needs." *Id.* at 140; *see Miers*, 558 F. Supp. 2d at 76 ("OLC rather emphatically concluded that a civil action would be the *least* controversial way for Congress to vindicate its investigative authority.").

OLC provided an even more detailed view of its position in 1986, concluding that "[t]he most likely route for Congress" to enforce its subpoenas "would be to file a civil action seeking enforcement of the subpoena." Cooper Memorandum, 10 Op. O.L.C. at 87. Although "the civil enforcement route ha[d] not [at the time] been tried by the House," OLC concluded that "it would appear to be a viable option." *Id.* at 88. The OLC opinion acknowledged that 2 U.S.C. § 288d and 28 U.S.C. § 1365 expressly grant the Senate Legal Counsel, but not the House General Counsel, the power to bring a civil action to enforce a subpoena, but it concluded "[t]he legislative history of these statutes . . . counsels against [the] conclusion" that those statutes imply that the House cannot bring a similar action. *Id.* at 87 n.31. Indeed, OLC quoted a Senate report that explained that the provision was "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." *Id.* (quoting S. Rep. No. 95-170, at 88-89 (1978)). OLC also referenced DOJ's own argument in a prior case that *it* could bring an action under section 1331 to block a response by a third party to a congressional subpoena, explaining that this "rationale . . . would appear to apply equally to suits filed by a House of Congress seeking enforcement of its subpoena against executive privilege claims." *Id.* at 88. Indeed, OLC noted that DOJ had previously argued that "only judicial intervention can prevent a stalemate between the other two branches that could result in a partial paralysis of government operations." *Id.* at 88 n.33.

Finally, in 1989, OLC again noted that a civil action was a viable route for Congress to enforce a subpoena of an Executive Branch official. While recognizing that Congress could potentially use the criminal statute or its inherent contempt authority, it believed that the "most likely option due to legal and practical difficulties associated with [those] two options" would be for Congress to "bring an action in court to obtain a judicial order requiring compliance with the subpoena and contempt of court enforcement orders if the court's order is defied." *Congressional Requests for Confidential Executive Branch Information*, 13 Op. O.L.C. 153, 162 (1989) (Barr Memorandum).

In short, OLC has repeatedly taken the position that Congress has a cause of action to enforce its subpoenas against Executive Branch officials in court, and it

has relied on that authority in justifying its position that Congress likely cannot use the criminal statute or its inherent contempt powers to enforce its subpoenas.

II. COOPERATION BETWEEN THE EXECUTIVE AND LEGISLATIVE BRANCHES REGARDING COMPLIANCE WITH LAWFUL CONGRESSIONAL SUBPOENAS DATES BACK TO THE EARLY DAYS OF THE REPUBLIC.

In contrast to DOJ's longstanding view, the panel held that the House lacks a cause of action in part because there is no history of Congress bringing civil actions to enforce its subpoenas. *See* Second Panel Op. 4. However, one reason that Congress did not bring this type of suit early in the nation's history is that early Presidents accepted Congress's power to investigate and substantially cooperated with subpoenas of Executive Branch officials. *See Assertion of Executive Privilege in Response to a Congressional Subpoena*, 5 Op. O.L.C. 27, 31 (1981) (noting the "obligation of each branch to make a principled effort to acknowledge, and if possible to meet, the legitimate needs of the other branch").[3] This Administration's intransigence—not Congress's efforts to obtain information it needs to complete legitimate investigations—is what is unprecedented.

As George Mason explained during the Constitutional Convention, Members of Congress "possess inquisitorial powers" and "must meet frequently to inspect the

[3] Another reason, as OLC has noted, is that until 1980, 28 U.S.C. § 1331 included an amount-in-controversy requirement, erecting a barrier to civil subpoena-enforcement actions. *See* Olson Memorandum, 8 Op. O.L.C. at 137 n.36.

Conduct of the public offices." 2 Records of the Federal Convention of 1787, at 206 (Max Farrand ed., 1937). Since the early days of the republic, Congress has engaged in investigations of the Executive Branch to assess the government's performance and to discover wrongdoing.

Importantly, Congress has often requested testimony and documents from Executive Branch officials to obtain necessary information. And the Executive Branch has consistently cooperated with Congress to accommodate its reasonable investigative requests. *See, e.g.*, Stephen W. Stathis, *Executive Cooperation: Presidential Recognition of the Investigative Authority of Congress and the Courts*, 3 J.L. & Pol. 183, 188 (1986) (noting "hundreds of instances since 1789 when a chief executive has willingly responded to requests for records in the custody of the Executive Branch").

For example, in 1792, the Second Congress created a special committee to inquire into a significant military defeat involving General St. Clair's expedition in the Northwest Territory. *See* 3 Annals of Cong. 493 (1792). Notably, "Mr. Madison, who had taken an important part in framing the Constitution only five years before, and four of his associates in that work, were members of the House of Representatives at the time, and all voted [in favor of] the inquiry." *McGrain v. Daugherty*, 273 U.S. 135, 161 (1927). Shortly thereafter, "Secretary of War [Henry]

Knox received a request from the committee for all the original letters and instructions pertaining to the St. Clair expedition." Stathis, *supra*, at 204.

President Washington, after consulting with his Cabinet, cooperated fully with this request. One member of the Cabinet, then-Secretary of State Thomas Jefferson, wrote that although "there might be papers of so secret a nature as that they ought not to be given up," the Cabinet agreed that a House investigative committee "might call for papers generally . . . [and] the Executive ought to communicate such papers as the public good would permit [and] refuse those the disclosure of which would injure the public." *Id.* at 204-05 (quoting 1 P. Ford, The Writings of Thomas Jefferson 189-90 (1892)). On that advice, Washington "directed Secretary Knox to send copies of the pertinent records to the committee; and [Treasury Secretary Alexander] Hamilton and Knox appeared before the Committee for two hours." *Id.* at 205.

President Jefferson also cooperated with congressional investigations into Executive Branch wrongdoing. As Jefferson explained, if the President withheld relevant information and left Congress to "plunge on in the dark," the government would become one "of chance not design." Stathis, *supra*, at 208 (quoting Thomas Jefferson to Barnabas Bidwell, July 5, 1806, *in* 11 A. Lipscomb, The Writings of Thomas Jefferson 117 (1903)). Thus, Jefferson cooperated with Congress's request for information concerning former Vice President Aaron Burr's efforts to separate

the western states from the Union, transmitting, among other things, a letter sent by Burr to General James Wilkinson that offered evidence of Burr's conspiracy. *Id.* at 208-09.

Other early Presidents similarly cooperated with congressional requests for information. *See id.* at 209 (calculating that Presidents James Madison, James Monroe, and John Quincy Adams responded favorably to dozens of congressional inquiries collectively). As President Monroe explained in 1822, he supported the disclosure of "all the information in the possession of the Executive respecting any important interest of our Union which may be communicated without real injury to our constituents." *Id.* (quoting 2 J. Richardson, A Compilation of the Messages and Papers of the Presidents 682 (1897)).

Finally, in a notable example from the Jackson Administration, the House investigated President Jackson himself, as well as his Secretary of War, for potential misconduct. H.R. Rep. No. 22-502, at 1 (1832). As part of the investigation, the House subpoenaed William B. Lewis—a Treasury Department auditor and Jackson's friend and advisor, *see* Jon Meacham, American Lion: Andrew Jackson in the White House xiv, xxi, 65 (2009)—"requiring his attendance forthwith before the committee; and that he bring with him such correspondence within his power or possession, as may have passed between Major Eaton and the President of the United States." H.R. Rep. No. 22-502, at 64. Lewis appeared as a witness and brought with

him a letter from Eaton to the President, as well as the President's reply. *Id.* at 66. The House also subpoenaed several witnesses who testified about their discussions with the President. *See, e.g.*, *id.* at 24, 58.

To be sure, early Presidents occasionally refused to cooperate with congressional requests for testimony and documents, but those refusals were based on specific concerns that have no application here, and they typically occurred in a broader context of cooperation and accommodation. For instance, in 1796, the House requested "a copy of the instructions to [John Jay], who negotiated the [Jay] Treaty with the King of Great Britain, together with the correspondence and other documents relative to that Treaty," 5 Annals of Cong. 760 (1796), to determine whether to appropriate funds to implement the Treaty. President Washington acknowledged that a President should not "withhold any information which the Constitution has enjoined upon the President, as a duty, to give, or which could be required of him by either House of Congress as a right." *Id.* However, he withheld the requested documents because the Constitution "vest[s] the power of making Treaties in the president with the advice and consent of the Senate," so "the inspection of the papers asked for" was not "relative to any purpose under the cognizance of the House of Representatives." *Id.* Notably, Washington was clear that "all the papers affecting the negotiation with Great Britain were laid before the Senate, when the Treaty itself was communicated for their consideration and

advice." *Id.* at 761. Moreover, Washington recognized that he *would* be required to turn over such documents were the House engaged in an impeachment investigation, which it was not. *Id.* at 760.

Similarly, Presidents Adams and Jefferson each complied with congressional requests for information, but withheld certain personal identifying information to protect individuals' privacy. For instance, in 1798, President Adams complied with a House request for documents regarding communications from representatives of the United States to France, but omitted "some names and a few expressions descriptive of the persons" involved. *History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress*, 6 Op. O.L.C. 751, 754 (1982) ("*History of Refusals*") (quoting 1 Richardson, *supra*, at 265). Notably, there is little evidence that members of the House were dissatisfied with the documents Adams produced. *See* 8 Annals of Cong. 1375-80 (1798). Likewise, as described above, President Jefferson complied with the Burr investigation but "declined to mention the names of other alleged participants" to protect their "'safety'" and to ensure "'justice.'" *History of Refusals*, *supra*, at 755 (quoting 1 Richardson, *supra*, at 412).

Thus, early Presidents' cooperation with congressional requests for information largely obviated any need for Congress to go to court, and the disputes that occasionally arose were marginal and occurred in a broader context of

accommodation. That history does not mean that the House cannot bring this action in response to the Trump Administration's unprecedented refusal to comply with the House's subpoena.

CONCLUSION

For all those reasons, this Court should hold that the Committee has a cause of action.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 3,392 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

I further certify that the attached *amici* brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 14-point Times New Roman font.

Executed this 23rd day of December, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system on December 23, 2020.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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