[EN BANC ORAL ARGUMENT SCHEDULED FOR APRIL 28, 2020]

No. 19-5331

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.

On Appeal from a Final Order of the U.S. District Court for the District of Columbia (No. 1:19-cv-02379)

BRIEF OF FORMER GENERAL COUNSELS OF THE U.S. HOUSE OF REPRESENTATIVES AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

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CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

A. *Parties and* amici. – *Amici* adopt the statement of parties and *amici* in Plaintiff-Appellee's brief.

B. *Ruling Under Review*. – *Amici* adopt the statement of the ruling under review in Plaintiff-Appellee's brief.

C. *Related Cases*. – *Amici* adopt the statement of related cases in Plaintiff-Appellee's brief.

/s/ Lawrence S. Robbins
Counsel for Amici Curiae

Dated: April 16, 2020

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PERTINENT STATUTES

Statutes pertinent to this brief are reproduced below:

2 U.S.C. § 192. Refusal of witness to testify or produce papers

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

2 U.S.C. § 194. Certification of failure to testify or produce; grand jury action

> Whenever a witness summoned as mentioned in section 192 of this title fails to appear to testify or fails to produce any books, papers, records, or documents, as required, or whenever any witness so summoned refuses to answer any question pertinent to the subject under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee or subcommittee of either House of Congress, and the fact of such failure or failures is reported to either House while Congress is in session or when Congress is not in session, a statement of fact constituting such failure is reported to and filed with the President of the Senate or the Speaker of the House, it shall be the duty of the said President of the Senate or Speaker of the House, as the case may be, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the Senate or House, as the case may be, to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action.

STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE

This brief addresses the question whether a decision recognizing Congressional committees' standing to enforce subpoenas would open the proverbial floodgates to future subpoena litigation. The panel majority believed that it would, remarking that "[t]he walk from the Capitol to our courthouse is a short one, and if we resolve this case today, we can expect Congress's lawyers to make the trip often." *Comm. on Judiciary v. McGahn*, 951 F.3d 510, 518 (D.C. Cir. 2020).

Amici served as Congress's lawyers: They are former General Counsels and Acting General Counsels of the U.S. House of Representatives who held their positions during the past four decades under both Republican and Democratic Speakers of the House. They did not make the trip to this or any other courthouse often, even though they had always understood House committees to have standing to enforce their subpoenas in Article III courts. They submit this brief to explain why, in their view, this Court's continued recognition of that standing will not usher in an open season for such litigation in the future.

Amici and their dates of service are as follows:

William Pittard served in the Office of General Counsel between 2011 and 2016; he was Acting General Counsel in 2016 under Speaker Paul D. Ryan.

Kerry W. Kircher served in the Office of General Counsel between 1995 and 2016; he was General Counsel between 2011 and 2016 under Speakers Ryan and John A. Boehner.

Irvin B. Nathan served as General Counsel between 2007 and 2010 under Speaker Nancy Pelosi.

Geraldine R. Gennet served in the Office of General Counsel between 1995 and 2007; she was Acting General Counsel between 1996 and 1997 and General Counsel between 1997 and 2007 under Speakers Pelosi, J. Dennis Hastert, and Newt Gingrich.

Thomas J. Spulak served as General Counsel between 1994 and 1995 under Speaker Thomas S. Foley.

Charles Tiefer served in the served in the Office of General Counsel between 1984 and 1995; he was Acting General Counsel in 1994 under Speaker Foley.

Steven R. Ross served as General Counsel between 1983 and 1993 under Speakers Foley, James C. Wright, Jr., and Thomas P. “Tip” O’Neill, Jr.

Stanley Brand served as General Counsel between 1976 and 1983 under Speaker O’Neill.

All parties have consented to the filing of this brief.

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

No party's counsel authored this brief in whole or in part. No party, party's counsel, or any person other than *amici curiae* and their counsel, contributed money that was intended to fund preparing or submitting this brief.

ARGUMENT

RECOGNIZING THE HOUSE'S STANDING WILL NOT OPEN THE FLOODGATES TO SUBPOENA ENFORCEMENT LITIGATION

A. The practice of the last forty-five years confirms that, if this Court sustains standing in this case, the House and its Committees will not make hasty or frequent resort to the courts to resolve information disputes with the Executive Branch.

During their service in the Office of General Counsel, each of Amici understood it to be "clear that the House as a whole has standing to assert its investigatory power" before Article III courts. *United States v. Am. Tel. & Tel. Co.*, 551 F.2d 384, 391 (D.C. Cir. 1976) (*"AT&T I"*). Amici likewise understood it to be clear that the House could "designate a member [or a committee] to act on its behalf." *Id.* It is, after all, "[t]he theory of a committee inquiry . . . that the committee members are serving as the representatives of the parent assembly," *Watkins v. United States*, 354 U.S. 178, 200 (1957), so if the House has standing, its properly authorized committees should as well.

The Supreme Court's opinion in *Raines v. Byrd*, 521 U.S. 811 (1997), did not change Amici's understanding as to whether the House of Representatives—or its properly authorized committees—had standing to enforce their subpoenas in court. *Raines*, after all, concerned the standing of individual Members who had "not been authorized to represent their respective Houses of Congress." *Id.* at 829. Both Houses of Congress had, in fact, "actively oppose[d]" the Members' lawsuit. *Id.* at

829. And in holding that those Members lacked standing, *Raines* explained that "[t]he standing inquiry focuses on whether the plaintiff is the proper party to bring [a] suit." *Id.* at 818. A Member who lacks authorization from his or her respective House is plainly not the proper party to bring a suit on behalf of the House.

Yet despite Amici's understanding that House committees had standing to enforce duly authorized subpoenas, the House has not resorted to such litigation with any regularity.[1] To the contrary, in the three decades after this Court held that "the House as a whole has standing to assert its investigatory power," *AT&T I*, 551 F.2d at 391, and ruled on the merits of the Senate committee's lawsuit in *Senate Select*

[1] What is more, throughout much of this time, Amici understood that the Executive Branch *shared* the understanding that Congressional committees could enforce their subpoenas in court. Thus, in 1982, the Office of Legal Counsel opined that it "seems clear that . . . [a House] committee . . . could seek authority from the Congress, if it does not already exist, to bring a civil action to enforce [a] subpoena." *Continuing Effect of a Cong. Subpoena Following the Adjournment of Cong.*, 6 Op. O.L.C. 744, 748 (1982). "Declaratory relief would be available; and if the court rejected [any] claim of executive privilege, it could order injunctive relief." *Id.* Two years later, the Office of Legal Counsel again opined that Congress "could obtain a judicial resolution of [an executive] privilege claim and vindicate its asserted right to obtain any documents by a civil action for enforcement of a congressional subpoena." *Prosecution for Contempt of Cong. of an Exec. Branch Official Who Has Asserted a Claim of Exec. Privilege*, 8 Op. O.L.C. 101, 137 (1984) ("Olson Op."). And in 1986, the Office of Legal Counsel opined yet again that "the civil enforcement route . . . would appear to be a viable option" for Congress. *Response to Cong. Requests for Info. Regarding Decisions Made Under the Indep. Counsel Act*, 10 Op. O.L.C. 68, 88 (1986). What is more, the Executive Branch once took the position that interbranch information disputes were justiciable, and affirmatively sought their resolution by the courts. *See United States v. U.S. House of Representatives*, 556 F. Supp. 150, 152 (D.D.C. 1983).

Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974) (en banc), neither the House nor its committees filed a single subpoena enforcement lawsuit. When occasion for such a lawsuit finally did arise, the district court quite properly observed, "certainly no rush to the courthouse . . . is evident," "notwithstanding th[e] fact" that "*AT&T I*[] and *Senate Select Comm.* . . . have already paved the way for claims of this type." *Comm. on Judiciary v. Miers*, 558 F. Supp. 2d 53, 96 (D.D.C. 2008). And no rush has been evident since: This is only the fourth such interbranch case since Watergate. *See Comm. on Oversight & Gov't Reform v. Holder*, 979 F. Supp. 2d 1 (D.D.C. 2013) (the second such case); *Comm. On Ways and Means v. U.S. Dept. of the Treasury*, 1:19-cv-01974 (D.D.C. 2019) (the third).

That is not because Congress and the Executive Branch have always seen eye to eye. To the contrary, at virtually any moment during each of Amici's service in the House Office of General Counsel, there were dozens, even hundreds, of disputes between committees and the Executive Branch over testimony or documents. But the Executive generally cooperated with most information requests and, when disputes arose, the House was able to resolve them through the accommodations process and the other tools at its disposal. The House Office of General Counsel recommended civil litigation only in the most extraordinary circumstances.

B. "[T]here are powerful reasons to believe" that Congress will continue to

make only infrequent and measured resort to civil enforcement lawsuits in information disputes with the Executive Branch. *Miers*, 558 F. Supp. 2d at 96.

First, Members of Congress recognize that the "coordinate branches do not exist in an exclusively adversary relationship to one another." *United States v. Am. Tel. & Tel. Co.*, 567 F.2d 121, 127 (D.C. Cir. 1977) ("*AT&T II*"). As a rule, they take seriously the "implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches," *id.*, and, thus, prefer to resolve disagreements with the Executive Branch through negotiation, where such negotiation is possible.

Second, "[r]esort to the judicial process is . . . not a particularly expedient way to obtain prompt access to sought-after information." *Miers*, 558 F. Supp. 2d at 96. The House, in particular, has only a two-year term; its committees are well aware that they are unlikely to obtain a judicial resolution of their claims until after that term has expired. Further, there are few political incentives for the House to sue: except in cases of extreme Executive intransigence or legal innovation, a judicial ruling is unlikely to award any clean victories and rulings on document disputes will often come long after the Nation's political attention has moved on to other issues.

Third, the threat of criminal sanctions will often provide a sufficient—and, from Congress's perspective, more efficient—incentive to compliance. Since 1857, it has been a crime for the recipient of a Congressional subpoena to "willfully make[]

default, or . . . having appeared, [to] refuse[] to answer any question pertinent to the question under inquiry." 2 U.S.C. § 192. And if either House certifies a statement of the underlying facts to the appropriate United States attorney, "it shall be" his or her "duty . . . to bring the matter before the grand jury for its action." 2 U.S.C. § 194. In the vast majority of cases, the mere *in terrorem* threat of a referral for prosecution—and the stigma accompanying such a referral—have been and will remain enough to achieve compliance.

To be sure, a series of opinions from the Office of Legal Counsel has reduced the potency of the threat of criminal sanctions as to Executive officials. Specifically, in 1984, the Office of Legal Counsel first took the positions that (1) notwithstanding the contempt-of-Congress statute's mandatory language, the Executive does have discretion not to bring at least some prosecutions, Olson Op., 8 Op. O.L.C. at 102; and (2) 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." *Id.*; *accord Prosecutorial Discretion Regarding Citations for Contempt of Congress*, O.L.C. Slip Op. at *1 (June 16, 2014) (re-affirming this interpretation) ("Thompson Op."). This assertion of Executive discretion—and effective promise of non-prosecution, at least as to certain cases—has emboldened Executive officials in resisting legitimate

Congressional demands for information.[2]

But even before the 1984 Olson opinion, there was always some doubt as to whether the Executive Branch would in fact bring a prosecution against an Executive Branch official. What is more, the courts have never sanctioned the Executive Branch's interpretation, and the offense of contempt of Congress has a five-year limitations period, *see* 18 U.S.C. § 3282, while the Nation's chief law enforcement officers are subject to replacement every four, *see* U.S. Const., art II, § 1, cl. 1. Thus, even after the Olson opinion, the threat of a Congressional contempt citation—and the possibility that it may lead to a prosecution under some future administration, which believes itself bound to follow the statute's mandatory language—has resulted in several officials providing information to Congress, after initial denials. For example:

- In 1991, after the House Judiciary Committee Chairman proclaimed that he was "fully prepared to move forward with the contempt process against the attorney general," the Department of Justice agreed to allow Committee members to review a secret OLC memorandum allowing

[2] The Congress that enacted the contempt-of-Congress statute, however, did not understand it to "exempt a witness from testifying upon . . . ground" of privilege, even about "diplomatic matters" or "the propriety of a secret-service fund to be used upon the discretion of the executive department." Cong. Globe, 34th Cong., 3d Sess. 431 (1857) (quoting floor debate); *see also id.* at 429 (recognizing that the statute's broad language could apply to "punish [a] Cabinet officer").

FBI agents to apprehend fugitives in foreign countries.[3]

- In 1996, the House Committee on Government Reform and Oversight held three White House officials, including White House Counsel Jack Quinn, in contempt, after they failed to produce subpoenaed documents concerning the firings of White House Travel Office employees. But shortly before the contempt citation was taken up by the full House—a necessary step before referral to the U.S. Attorney—the White House released the subpoenaed documents to the Committee.[4]
- In February 2002, after the House Committee on Government Reform threatened to hold DOJ officials in contempt if the Department did not release documents concerning Whitey Bulger and confidential informants more generally, the Department agreed to provide the Committee access to the relevant subset of documents.[5]

And these are just clashes that went to the brink. Far more disputes are resolved

[3] James Rowley, "Congress, Justice Department Reach Deal to Avoid Legal Confrontation," Associated Press (July 31, 1991); *see also* Louis Fisher, *The Politics of Executive Privilege* 97-100 (2004).

[4] *See* Fisher, *Executive Privilege*, at 130-31.

[5] *See* 2 *Investigation into Allegations of Justice Department Misconduct in New England: Hearings before the H. Comm. on Gov't Reform*, 107th Cong. (February 13, 14, 27, 2002); Alissa M. Dolan, "The House Committee on Government Reform Investigation of the FBI's Use of Confidential Informants," in *When Congress Came Calling* 269 (Morton Rosenberg ed., 2017).

long before the invocation of any express threat of criminal prosecution.[6]

C. Though civil enforcement actions have not often been filed, their *availability* serves as an important backstop and complement to the other methods by which the House can obtain information.

First, "the prospect of ultimate judicial resolution . . . help[s] to ensure that the parties continue to negotiate in good faith rather than rewarding intransigence." *Miers*, 558 F. Supp. 2d at 96-97. A dispute involving the Senate Special Whitewater Committee provides the most vivid demonstration: when the White House refused to comply with the Committee's subpoena for the notes of a meeting with the Clintons' personal lawyers, the Senate voted to authorize its legal counsel to go to court to enforce the subpoena. *See* S. Res. 199, 104th Cong. (1995). The very next day, the White House agreed to release the disputed notes.[7] No lawsuit was ever filed; the mere knowledge that one would be was enough to resolve the dispute. If the panel majority's opinion had been the law, the Committee might never have achieved compliance with its subpoena.

Further, civil enforcement actions can complement, and maintain the efficacy

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[6] Two of the House's previous civil enforcement actions, *Miers* and *Holder*, were filed only after a criminal contempt referral failed to prompt either compliance or a prosecution by the Executive Branch. But the *possibility* of a prosecution—and the desire to avoid a constitutional clash—has been enough to ensure compliance in a far greater number of cases.

[7] *See* Louis Fisher, *Congressional Investigations: Subpoenas and Contempt Power*, Report for Congress (Apr. 2, 2003) at 18; Susan Schmidt, "Whitewater Notes Being Surrendered," The Washington Post (Dec. 22, 1995).

of, criminal contempt-of-Congress sanctions. They do so in at least two ways:

- *First*, they can clarify the rights and obligations of witnesses, particularly in circumstances where good-faith legal disputes may make imprisonment (or the threat of it) inappropriate. Because a "mistaken view of the law is no defense" to a contempt-of-Congress prosecution, *Sinclair v. United States*, 279 U.S. 263, 299 (1929), Congressional investigations presenting novel legal issues can force witnesses to "guess[] how a court will rule on difficult questions" of law, *Tobin v. United States*, 306 F.2d 270, 276 (D.C. Cir. 1962), with imprisonment as the consequence if they are wrong. "Especially where the contest is between different governmental units, the representative of one unit in conflict with another should not have to risk jail to vindicate his constituency's rights." *Id.*[8]

- *Second*, without a civil enforcement remedy, the Executive Branch will wrongfully decline to bring prosecutions based on erroneous legal interpretations, thus diminishing the efficacy of the contempt-of-Congress statute. The Executive Branch has declined to present contempt-of-Congress referrals to grand juries, notwithstanding 2 U.S.C. § 194's direction that it

[8] That admonition applies equally to the suggestion that Congress should invoke its inherent contempt power to jail recalcitrant Executive officials. While such jailed officials could seek legal rulings via a habeas petition, they would have to not just "risk jail," *Tobin*, 306 F.2d at 276, but spend time in it, to have their claims heard.

> "shall" do so, because it asserts it may not be compelled to bring prosecutions when it does believe "a violation of the law has occurred." Olson Op., 8 Op. O.L.C. at 102; Thompson Op., O.L.C. Slip Op. at *1. But if Congress cannot present legal issues to the courts itself, the Executive Branch might be left as the final arbiter of what the law requires, and thus able to turn the contempt-of-Congress statute into a dead letter. Congress's only choice would be to invoke its "essential and inherent power" to arrest and detain contumacious witnesses, *In re Chapman*, 166 U.S. 661, 672 (1897), so that courts could make legal rulings via habeas review. *E.g.*, *McGrain v. Daugherty*, 273 U.S. 135 (1927). That cannot be what the Constitution requires. *See supra* n.8.

For such reasons, this Court has itself twice suggested that Congress should seek to have disputed legal issues "settled by declaratory judgment." *United States v. Fort*, 443 F.2d 670, 678 (D.C. Cir. 1970) (quotation marks omitted); *Tobin*, 306 F.2d at 276. Such civil actions allow courts to provide legal guidance before any witness's liberty is jeopardized and permit Congress to establish that the Executive's legal interpretations are incorrect, thus restoring the *in terrorem* threat of criminal prosecution in future cases. But no flood of civil actions need or would result, just as one has not to date.

CONCLUSION

This Court should hold that duly authorized committees of the U.S. House of Representatives have Article III standing to enforce their subpoenas.

Respectfully submitted,

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Dated: April 16, 2020

CERTIFICATE OF COMPLIANCE

1. This brief complies with type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,059 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

2. This 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman type.

/s/ Lawrence S. Robbins
Counsel for Amici Curiae

Dated: April 16, 2020

CERTIFICATE OF SERVICE

I certify that on April 16, 2020, I filed one copy of the foregoing document via the CM/ECF system of the United States Court of Appeals for the District of Columbia Circuit, which I understand caused service on all registered parties.

/s/ Lawrence S. Robbins
Counsel for Amici Curiae

Dated: April 16, 2020