No. 19-5331

IN THE

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.

On Appeal from the United States District Court
for the District of Columbia
No. 1:19-cgv-02379-KBJ
Hon. Ketanji Brown Jackson

BRIEF OF PROFESSORS JONATHAN R. NASH, AZIZ Z. HUQ, MATTHEW I. HALL, AND 22 OTHER LEGAL SCHOLARS AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLEE

Kelsi Brown Corkran
Benjamin F. Aiken
Sarah H. Sloan
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street NW
Washington, DC 20005
(202) 339-8400

Counsel for Amicus Curiae

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

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

Amici are not corporate entities for which a corporate disclosure statement is required pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rules 27(a)(4) and 28(a)(1)(A).

B. Rulings Under Review.

Reference to the ruling under review appears in Plaintiff-Appellee's brief.

C. Related Cases.

Reference to any related cases pending before this Court appears in Plaintiff-Appellee's brief.

/s/Kelsi Brown Corkran
Kelsi Brown Corkran

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STATEMENT OF INTEREST[1]

Amici—Jonathan Nash, Aziz Huq, Matthew Hall, and 22 other legal scholars—teach, research, or write about constitutional law and federal courts.[2] They have a strong interest in the development of sound rules governing federal jurisdiction in accordance with the Constitution.

INTRODUCTION

Without information, Congress cannot perform its constitutionally mandated duties. From enacting laws to appropriating funds to conducting impeachment, Congress is impotent without the power to secure documents and witnesses. Investigative power is critical not just to Article I's legislative function but also to Congress's oversight and impeachment obligations. Unsurprisingly, a broad legislative investigative power is confirmed by historical practice before and after the ratification of the Constitution. Federal courts have therefore long recognized that Congress enjoys subpoena power.

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[1] No party's counsel authored this brief in whole or in part. No party, party's counsel, or any person other than amicus or its counsel contributed money intended to fund preparing or submitting this brief. All parties have consented to the filing of this brief.

[2] A complete list of amici is attached as Appendix A.

Because the investigative power—and the subpoena power that accompanies it—are among Congress's core functions, conduct undermining that power harms Congress as an institution. And when another party's conduct harms an institution's core operations, courts treat that injury as constitutionally cognizable. Congress accordingly has standing to ask the courts to enforce subpoenas. Other federal institutional actors, such as the Executive and its component parts, have long enjoyed standing for courts to enforce subpoenas. States too have standing to enforce their institutional interests in federal court. Nothing in the Constitution instructs courts to recognize the standing of these institutions, along with that of private institutions, but to treat Congress differently. Congress is injured because it cannot perform its constitutional duties—much as the Executive would be handicapped if it could not seek redress in court—and so Congress may turn to the courts to seek redress. None of the alternatives that either the panel or Defendant suggest adequately substitute a court-enforced subpoena.

ARGUMENT

I. The investigatory power is a well-established and essential congressional function.

A. Congress's power to gather information is grounded in the Constitution.

The Constitution vests Congress with "[a]ll legislative Powers herein granted," U.S. Const. art. I, § 1, including that of appropriation, *id.*, § 9, cl. 7. To perform those legislative duties, Congress needs information. *See Barenblatt v. United States*, 360 U.S. 109, 111 (1959). "A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change." *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927); *see* Jonathan Nash, *A Functional Theory of Congressional Standing*, 114 Mich. L. Rev. 339, 363 (2015). Congress's investigative power is no optional accoutrement: It is "an essential and appropriate auxiliary to the legislative function," *McGrain*, 273 U.S. at 174, "co-extensive with the power to legislate," *Quinn v. United States*, 349 U.S. 155, 160 (1955), and "inherent in the legislative process," *Watkins v. United States*, 354 U.S. 178, 187 (1957). Hence, "the constitutional

provisions which commit the legislative function to [Congress] … include [that power]." *McGrain*, 273 U.S. at 175.

The Article I investigatory power enables each House to conduct inquiries "concerning the administration of existing laws." *Watkins*, 354 U.S. at 187. This is the "well settled" power to investigate the actions of Executive branch officials vested with power to spend (and hence to defraud) and to enforce (and hence to misuse) the laws. *See* C.S. Potts, *Power of Legislative Bodies to Punish for Contempt (Continued)*, 74 U. Pa. L. Rev. 780, 826 (1926). Through its investigatory power, a representative assembly can "watch and control the government," "throw the light of publicity on its acts," and "compel a full exposition and justification of all … questionable" acts. John Stuart Mill, *Considerations on Representative Government* 104 (1861). This power obviously "comprehends probes into … the Federal Government to expose corruption, inefficiency or waste." *Watkins*, 354 U.S. at 187. If this oversight unearths Executive abuses, Congress can pass legislation to prevent such abuses in the future; issue a formal censure; or, when the circumstances justify it, initiate impeachment proceedings.

Each chamber separately and distinctly exercises a power to investigate under our Constitution. Each chamber has distinctive functions, responds to distinctive electorates, and writes its own internal rules. Relevant here, the Constitution vests the House of Representatives with "the sole Power of Impeachment." U.S. Const. art. I, § 2, cl. 5. Just as Congress requires information to pass laws, the House requires evidence to impeach. As then-Representative John Quincy Adams explained post-presidency, it would be a "mockery… for the Constitution … to say that [the] House should have the power of impeachment … and yet to say that the House had not the power to obtain the evidence and proofs on which their impeachment was based." Cong. Globe, 27th Cong., 2d Sess. 580 (1842). To Adams, it was "self-evident" "that the power of impeachment gives to the House necessarily the power to call for persons and papers." *Id.* The Supreme Court confirmed 140 years ago that "[w]here the question of … impeachment is before [the House or the Senate]," that body has "the right to compel the attendance of witnesses, and their answer to proper questions." *Kilbourn v. Thompson*, 103 U.S. 168, 190 (1880).

B. Congress's investigatory power is rooted in historical tradition.

The legislative power "to summon witnesses and compel the production of records and papers … was well established in early British Parliamentary practice." William Marshall, *The Limits on Congress's Authority to Investigate the President*, 2004 U. Ill. L. Rev. 781, 785 (2004). By 1689, numerous Parliamentary committees were investigating a range of government operations. James Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 Harv. L. Rev. 153, 162 (1926). That tradition carried over to colonial legislatures, which pursued their own inquiries by demanding testimony and papers as early as 1691. Telford Taylor, *Grand Inquest: The Story of Congressional Investigations* 11 (1955). For example, the Massachusetts House summoned military officers before it to investigate their failure to carry out certain operations, and the Pennsylvania House of Delegates created a standing committee—with the authority to send for persons, papers, and records—to audit the Treasurer. Landis, 40 Harv. L. Rev. at 166.

Against this historical background, the Founders designed a Congress vested with robust powers to investigate. Indeed, James

Wilson described the House of Representatives as "the grand inquest of the state," empowered to "inquire into grievances." 2 James Wilson, *The Works of the Honourable James Wilson* 146 (1804).

Unsurprisingly, then, "[t]he power of inquiry has been employed by Congress throughout our history, over the whole range of the national interests concerning which Congress might legislate." *Barenblatt*, 360 U.S. at 111. As early as 1792, Congress was investigating General Arthur St. Clair's failed military campaign in the Northwest Territory, and it empowered the responsible committee "to call for such persons, papers, and records, as may be necessary to assist their inquiries." 3 Annals of Cong. 493 (1792); *see also McGrain*, 273 U.S. at 161 (noting then-Representative James Madison supported the investigation).

Since then, Congress has frequently conducted investigations—with the investigating committees empowered to "send for persons and papers." *See, e.g.*, 3 Hinds § 2342 (impeachment investigation of Justice Samuel Chase); Landis, 40 Harv. L. Rev. at 166 (investigation of President Jackson); Cong. Globe, 36th Cong., 1st Sess. 997 (1860) (investigation of President Buchanan). For example, in the 1920s

Congress launched several investigations into the Teapot Dome scandal and issued subpoenas pursuant to those investigations. *See* Marshall, U. Ill. L. Rev. at 792-96. As part of those investigations, the target of a Senate subpoena refused to comply, was detained by the Senate, and challenged the scope of Congress's investigatory power in a habeas petition. *McGrain*, 273 U.S. at 150-52. The Court evinced no hesitation about adjudicating that dispute.

C. To effectuate its investigatory power, Congress must be able to enforce that power.

Congress often "does not itself possess the requisite information" to carry out its oversight and investigatory roles and so must rely on third parties to provide testimony and produce documents for Congress's consideration. *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504-05 (1975). Witnesses who refuse to testify or to provide relevant evidence handicap Congress's ability effectively to fulfill its Article I obligation.

The subpoena power is necessary to execute this obligation. "Experience has taught that mere requests for … information often are unavailing, and also that information which is volunteered is not always accurate or complete," and so the Supreme Court has recognized

that "means of compulsion are essential" for Congress "to obtain what is needed." *Id.* at 505 (quoting *McGrain*, 273 U.S. at 175). It is "the power of inquiry—*with process to enforce it*—[that] is an essential and appropriate auxiliary to the legislative function." *McGrain*, 273 U.S. at 174 (emphasis added). Absent subpoena power, a committee or "[s]ubcommittee may not be able to do the task assigned to it by Congress." *Eastland*, 421 U.S. at 505. For that reason, "[t]he issuance of a subpoena pursuant to an authorized investigation is … an indispensable ingredient of lawmaking." *Id.*

Of course, the threat of a subpoena is hollow without means to enforce it. For this reason, "[f]rom 1789 until modern times, the House and the Senate asserted the power to conduct investigations *and* to litigate any disputes related to those investigations." Tara Leigh Grove & Neal Devins, *Congress's (Limited) Power to Represent Itself in Court*, 99 Cornell L. Rev. 571, 575 (2014) (emphasis added). This Court has likewise recognized Congress's standing to litigate disputes with the Executive branch over enforcement of congressional subpoenas. In *Senate Select Committee on Presidential Campaign Activities v. Nixon*, a Senate committee sought to enforce a subpoena against President

Nixon. 498 F.2d 725 (D.C. Cir. 1974). Although this Court concluded that the materials were protected by executive privilege, its consideration of the merits demonstrates that the Committee had standing. Likewise, in *United States v. AT&T Co.*, this Court held that the House had "standing to assert its investigatory power" in a "clash between the executive and legislative branches" over a House subcommittee subpoena issued pursuant to an investigation into warrantless wiretaps. 551 F.2d 384, 385, 391 (D.C. Cir. 1976).

II. Congress's ability to gather information will be stymied if it cannot enforce subpoenas in court.

Courts regularly recognize that institutional injuries are constitutionally cognizable. Defendant's argument would cordon off Article I bodies from seeking redress in the courts while continuing to allow Article II bodies, States, and private plaintiffs to both contest and enforce Article I interests. Separation-of-powers concerns do not support that counterintuitive result—they contradict it.

A. Institutional harms to the House are constitutionally cognizable injuries.

Hindered from performing its Article I duties, "Congress suffers an injury when its investigative efforts are stymied." Nash, 114 Mich.

L. Rev. at 374. And when "a legislative body" suffers "the elimination of a prerogative belonging to that legislative body," "the [Supreme] Court's legislative standing case law" has treated that harm as a constitutionally cognizable institutional injury. Matthew Hall, *Making Sense of Legislative Standing*, 90 S. Cal. L. Rev. 1, 27 (2016). That is true whenever a "house of Congress" or its authorized committee, as opposed to an unauthorized individual legislator, seeks to "litigate over a prerogative" that it has "authority to exercise." *Id.* at 28. Accordingly, "the standing of committees or houses of Congress to seek judicial assistance in enforcing subpoenas is supported by a fairly long historical pedigree, dating back at least to the 1920s." Vicki Jackson, *Congressional Standing to Sue: The Role of Courts and Congress in U.S. Constitutional Democracy*, 93 Ind. L.J. 845, 867 (2018); *see also* Grove & Devins, 99 Cornell L. Rev. at 627 (explaining that "each house is constitutionally authorized to … seek[] judicial enforcement of subpoenas" while recognizing other "structural constraints" on congressional standing).

This conclusion is consistent with our constitutional design. "[T]he Constitution created Congress … [and so] it is logical that an

imposition on Congress's constitutionally designed function constitutes an injury." Nash, 114 Mich. L. Rev. at 368. Recognizing defiance of the House's investigative authority as a cognizable injury safeguards against self-interested or partisan aggrandizement by any one branch of government. This, in turn, strengthens "the ability of constituents to associate government actions with the elected officials responsible for those actions in order to foster electoral accountability." *Id.* at 370.

B. Separation-of-powers concerns counsel in favor of the Committee's standing, not against it.

The panel opinion (at 7-8), concurrence (at 7-8), and Defendant (at Appellant's Opening Brief ("OB") 24-28), all suggest that separation-of-powers concerns undercut the Committee's argument here. That has it backwards—recognizing the Committee's standing to vindicate its Article I role ensures that power remains where the Constitution placed it.

Article III's "overriding and time-honored concern" is "about keeping *the Judiciary's power* within its proper constitutional sphere." *Raines v. Byrd*, 521 U.S. 811, 820 (1997) (emphasis added). Asking courts to carry out a core Article III function by enforcing a subpoena poses no threat to that concern. Nor does the potential that the court

might become involved in an interbranch dispute counsel against standing. Courts often adjudicate such disputes, "even those it would gladly avoid." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 194-95 (2012) (internal quotation marks omitted). In *Zivotofsky*, the Court labeled its role in deciding whether a "statute impermissibly intrudes upon Presidential powers under the Constitution" or instead was a lawful exercise of congressional power "a familiar judicial exercise." *Id.* at 196. Indeed, the Supreme Court has evaluated the lawfulness of congressional subpoenas. *See, e.g.*, *McGrain*, 273 U.S. at 178; *Eastland*, 421 U.S. at 505.

It is illogical, as a matter of Article III standing, to permit the litigation of Article I interests by individuals, as in *Zivotofsky*, but to preclude it by Article I institutions themselves. Those institutions are *better* positioned than any private litigant to defend Article I prerogatives, including investigative power.

While recognizing the Committee's standing presents no separation-of-powers concerns—because it does not expand the judiciary's constitutional role—*denying* standing here would create such concerns because it would produce a troubling asymmetry between

coequal institutions. Courts regularly enforce subpoenas by the Executive, including by its independent agencies. *See CFPB v. Accrediting Council for Indep. Colls. & Sch.*, 854 F.3d 683, 689 (D.C. Cir. 2017) (explaining that "judicial review of an administrative subpoena typically results in enforcement"). Limiting that remedial option to the Executive would concentrate the investigative power in the Executive branch—creating the very "accumulation of all powers, legislative, executive, and judiciary, in the same hands" that Madison "pronounced the very definition of tyranny," The Federalist No. 47, at 373-74 (James Madison) (Hamilton ed. 1880), and that separation-of-powers principles aim to avoid.

The panel also doubted the Committee's standing given a perceived lack of "historical antecedents" of courts "resolv[ing] interbranch information disputes." Panel Op. 16. That confuses an absence of evidence with evidence of an absence. Myriad partisan and strategic dynamics mean that the Executive often provides the information that Congress requests before Congress has to resort to judicial proceedings. The branches are repeat players with strong incentives to preserve the possibility of subsequent beneficial

cooperation. In the meantime, "the mere shadow of congressional responses" to Executive defiance has often been "sufficient to induce" Congress's preferred Executive responses. Aziz Huq, *Standing for the Structural Constitution*, 99 Va. L. Rev. 1435, 1500 (2013). If anything, the absence of cases thus suggests the *opposite* of the panel's inference: The specter of court enforcement explains 230 years of consistent compliance with Congressional subpoenas by Executive officials from all parties.

Further tempering resort to the bench are legislative and presidential immunities. President Johnson could not have challenged the Tenure of Office Act, *see* Panel Op. 13; OB 32, because to do so he would have had to sue Congress, which enjoys legislative immunity, *Bogan v. Scott-Harris*, 523 U.S. 44, 48 (1998). Likewise, Congress could not "sue the President for failing" to give the State of the Union, Panel Op. 24, because the President would be immune from such suit, *see Mississippi v. Johnson*, 4 Wall. 475, 501 (1866) ("[T]his court has no jurisdiction of a bill to enjoin the President in the performance of his official duties."). These examples do not mean that either branch

suffers no injury. Rather, they demonstrate that separate doctrines, inapplicable here, would rebuff those claims.

C. Congress's alternative remedies are insufficient substitutes for court-ordered compliance with a subpoena.

At Defendant's urging, the panel dismissed any concerns that foreclosing judicial review here would undermine Congress's constitutional obligation to investigate, on the theory that Congress has alternative remedies. *See* OB 25-26; Panel Op. 13. But none of these alternatives mitigate the Committee's constitutional injury. They are inadequate substitutes for judicial enforcement of a subpoena—and even threaten the very rule of law that the federal courts exist to propound and protect.

It is unfathomable that the Framers intended to force Congress to take such drastic measures as "delay[ing] or derail[ing] the President's legislative agenda" or "withhold[ing] appropriations" whenever the Executive resists its subpoenas. Panel Op. 13; *see also* OB 25. In ordinary times, such measures impose enormous costs on the public without regard to how justified the Executive's refusal to comply has been. The panel's suggestion that Congress should respond to

Executive recalcitrance by stymieing the President's legislative agenda is all the more problematic now, when his legislative agenda aims to protect the public from a massive spike in mortalities and once-in-a generation economic destruction. The idea that information-related fights be pursued at the cost of, for example, the urgent national interest in fighting a deadly pandemic only underscores how implausible and unrealistic the panel's approach is.

Likewise, no Congress should have to choose between enforcing a subpoena and defunding the White House Counsel's office. The latter has long provided important counsel to the President on many policy matters unrelated to congressional oversight. In effect, the panel's position would compromise unrelated constitutional and human interests to preserve an illusory arm's length between federal courts and an interbranch dispute.

The House's contempt power is also an inadequate alternative to judicial enforcement of a subpoena. Holding an Executive officer in contempt and then physically detaining that officer invites violence, lawlessness, and uncertainty. It would also inevitably spark the separation-of-powers litigation the panel wishes to avoid. Upon arrest,

Defendant could immediately seek his freedom through a petition for a writ of habeas corpus. This would necessarily force courts to consider precisely the same legal and factual questions as the present dispute. *See McGrain*, 273 U.S. at 177-78; *Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act*, 10 U.S. Op. Off. Legal Counsel 68 (1986); Panel Op. 22.

Such drastic steps are unnecessary. There is no need for a standoff between the Executive and Legislature to devolve into a manhunt led by the Sergeant at Arms. Nor must Congress make a Hobson's Choice between information and Americans' health and lives. Article III authorizes courts to recognize the institutional harm that occurs when Congress cannot carry out a core constitutional function and to provide a neutral forum where such disputes can be settled without the collateral consequences of the alternative remedies urged by the panel and Defendant.

CONCLUSION

The Court should hold that the Committee has standing.

April 16, 2020

Respectfully submitted,

/s/ Kelsi Brown Corkran

Kelsi Brown Corkran
Benjamin F. Aiken
Sarah H. Sloan
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street NW
Washington, DC 20005
(202) 339-8400

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5), because this brief contains 3231 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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 2016 in Century Schoolbook 14-point font.

ORRICK, HERRINGTON & SUTCLIFFE LLP

/s/ Kelsi Brown Corkran
Kelsi Brown Corkran
Counsel for Amicus Curiae

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 District of Columbia Circuit by using the appellate CM/ECF system on April 16, 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.

ORRICK, HERRINGTON & SUTCLIFFE LLP

/s/ Kelsi Brown Corkran
Kelsi Brown Corkran
Counsel for Amicus Curiae

APPENDIX A

List of *Amici Curiae*

This Appendix provides amici's titles and institutional affiliations for identification purposes only and not to imply any endorsement of the views expressed herein by amici's institutions.

Dr. Cynthia Boyer
Institut Maurice Hauriou, Université Toulouse Capitole, France

William M. Brooks
Clinical Professor of Law
Touro Law Center

Ronald K. Chen
University Professor, Distinguished Professor of Law and
Judge Leonard I. Garth Scholar
Rutgers Law School

S. Alan Childress
Conrad Meyer III Professor of Civil Procedure
Tulane University Law School

Michael G. Collins
Joseph M. Hartfield Professor of Law
Joseph W. Dorn Research Professor of Law
University of Virginia School of Law

John N. Drobak
George A. Madill Professor of Law
and Professor of Economics
Washington University School of Law

Mary L. Dudziak
Asa Griggs Candler Professor of Law
Emory University School of Law

Heather Elliott
Alumni, Class of '36 Professor of Law
University of Alabama School of Law

Barry Friedman
Jacob D. Fuchsberg Professor of Law
Affiliated Professor of Politics
New York University School of Law

Michael J. Gerhardt
Burton Craige Distinguished Professor of Jurisprudence
University of North Carolina School of Law

Matthew I. Hall
Associate Professor of Law
University of Georgia School of Law

Andrew Hammond
Assistant Professor of Law
University of Florida Levin College of Law

Christoph Henkel
Professor of Law
Mississippi College School of Law

Helen Hershkoff
Herbert M. and Svetlana Wachtell Professor of Constitutional Law and Civil Liberties
Co-Director, Arthur Garfield Hays Civil Liberties Program
New York University School of Law

Aziz Z. Huq
Frank and Bernice J. Greenberg Professor of Law
Mark Claster Mamolen Teaching Scholar
University of Chicago Law School

Doron M. Kalir
Clinical Professor of Law
Appellate Practice Clinic
Cleveland-Marshall College of Law

Corinna Barrett Lain
S. D. Roberts & Sandra Moore Professor of Law
University of Richmond School of Law

Jonathan R. Nash
Robert Howell Hall Professor of Law
Associate Dean for Research
Emory University School of Law

Michael J. Perry
Robert W. Woodruff Professor of Law
Emory University School of Law

Edward A. Purcell Jr.
Joseph Solomon Distinguished Professor of Law
New York Law School

Joan M. Shaughnessy
Roger D. Groot Professor of Law
Washington and Lee University School of Law

Andrew M. Siegel
Associate Dean for Academic Affairs and Professor of Law
Seattle University School of Law

David Sloss
John A. and Elizabeth H. Sutro Professor of Law
Santa Clara University School of Law

Stephen F. Smith
Professor of Law
University of Notre Dame Law School

Maxwell Stearns
Venable, Baetjer & Howard Professor of Law
University of Maryland Carey School of Law