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Levin and Lugar Centers File Amicus Brief Urging D.C. Circuit Court of Appeals to Support Congressional Oversight

**Brief supports overturning decision to end judicial review
of congressional subpoenas aimed at executive branch**

Today, the Levin Center at Wayne Law and The Lugar Center filed a bipartisan friend-of-the-court (“amicus”) brief urging the entire D.C. Circuit Court of Appeals to overturn a decision by a three-judge panel that federal courts lack jurisdiction to resolve subpoena disputes between Congress and the executive branch. The amicus brief contends that retaining congressional access to the courts to resolve interbranch subpoena disputes would better support congressional oversight and the constitutional system of checks and balances envisioned by the Framers.

In the case, the House Judiciary Committee requested judicial enforcement of a subpoena to obtain testimony from former White House counsel Donald McGahn about matters involving President Trump. The U.S. Department of Justice, representing Mr. McGahn, requested dismissal of the case claiming that, as a former executive branch official, Mr. McGahn was absolutely immune to congressional subpoenas, and that federal courts lacked jurisdiction to hear a subpoena dispute between the legislative and executive branches. In a 2-1 decision with three separate opinions, an appeals court panel with Judges Thomas Griffith, Karen Henderson, and Judith Rogers, ruled that the courts lacked jurisdiction to hear the case. The full D.C. Circuit Court of Appeals granted a request by the House Judiciary Committee for an en banc hearing to review the panel’s decision which surprised some oversight experts by overturning prior rulings asserting jurisdiction over interbranch subpoena disputes.

“Federal courts have been enforcing congressional subpoenas for over 100 years; this is the first time a court has shut its doors claiming a lack authority to rule on a congressional subpoena involving the executive branch,” former Senator Carl Levin, the Levin Center chair, said. “If Congress is excluded from the courts, it will be forced to use other tactics to obtain information from the executive branch like slowing appropriations, sidelining federal agency nominees, or even detaining executive branch officials, none of which makes sense during a pandemic. If the courts shirk their constitutional responsibility to decide interbranch subpoena disputes, they will doom the country to more partisan division, more dysfunction, and more damaging fights between Congress and the president. I am hopeful the full appeals court won’t let that happen.”

“In recent decades, Congress has ceded far too much power to the executive branch, more by inaction or neglect, rather than by choice,” said Jay Branegan, Senior Fellow at The Lugar Center. “To take away, by court decision, the traditional right of Congress to conduct oversight of the executive branch, and to compel via subpoena the testimony and documents needed for such oversight, would render virtually meaningless Congress’s constitutional obligation to be a check on the executive branch. Without effective oversight, including the power of an enforceable subpoena, raw partisanship would trample all efforts at bipartisan governance.”

The amicus brief filed by the two centers warns: “Forcing Congress to revert to aggressive political tactics to obtain information from the executive branch would impose significant national costs: increased political tension and governmental dysfunction, weakened checks and balances, and diminished respect for the rule of law.” Citing long-standing precedents in which courts resolved interbranch subpoena disputes – sometimes in favor of Congress and sometimes in favor of the executive branch – the brief states: “The Constitution does not compel this Court to limit Congress to enforcement measures that would spark new levels of political warfare and federal dysfunction, exacerbating the partisanship now dividing the country and hindering effective government.” The brief explains: “Good government requires good oversight, and good oversight is impossible without good information. Judicial action ensuring Congress obtains the information needed to carry out its constitutionally-assigned functions is essential to a sustainable democracy.”

The case is *Committee on the Judiciary of the United States House of Representatives v. McGahn*, Case No. No. 1:19-cv-02379 (D.C. Cir.). It is the second in which the two Centers have filed a joint amicus brief. The first involves a pending Supreme Court review of two cases, *Trump v. Mazars USA, LLP* and *Trump v. Deutsche Bank AG*, in which President Trump seeks to block congressional subpoenas to an accounting firm and two banks for financial records related to him and his businesses. The Supreme Court has scheduled oral argument by telephone conference in mid-May.

The centers’ amicus brief in the *McGahn* case can be viewed [here](#). The House also filed its brief today along with other amicus briefs filed by legal scholars and civil society groups.

The Lugar Center was founded by former Senator Richard G. Lugar from Indiana who, during his six terms in the Senate, chaired the Senate Committee on Foreign Relations and the Committee on Agriculture, Nutrition, and Forestry. The Center’s mission is to foster informed debate, enhance bipartisan governance, and bridge ideological divides on important issues.

The Levin Center at Wayne Law was founded and is presently chaired by former Senator Carl Levin from Michigan who, during his six terms in the Senate, chaired the Senate Armed Services Committee and the Permanent Subcommittee on Investigations of the Committee on Homeland Security and Governmental Affairs. The Center's primary mission is to strengthen bipartisan, fact-based oversight, particularly in Congress. The Levin Center is affiliated with Wayne State University Law School, but the brief does not purport to present the institutional views, if any, of either the university or the law school.
