ORAL ARGUMENT SCHEDULED FOR JANUARY 3, 2020

United States Court of Appeals for the District of Columbia Circuit

No. 19-5331

COMMITTEE ON THE JUDICIARY OF THE 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 in Action No. 1:19-cv-02379, Honorable Ketanji Brown Jackson

BRIEF OF *AMICI CURIAE* REPUBLICAN LEGAL EXPERTS, FORMER GOVERNMENT OFFICIALS AND FORMER MEMBERS OF CONGRESS IN SUPPORT OF PLAINTIFF-APPELLEE IN SUPPORT OF AFFIRMANCE

JUSTIN FLORENCE
justin.florence@protectdemocracy.org
JAMILA G. BENKATO*°
jamila.benkato@protectdemocracy.org
CAMERON O. KISTLER*
cameron.kistler@protectdemocracy.org
PROTECT DEMOCRACY PROJECT
2020 Pennsylvania Avenue, N.W.
Suite # 163
Washington, D.C. 20006
(202) 579-4582
Counsel for *Amici*

STEVEN A. HIRSCH*
steve.hirsch@protectdemocracy.org
PROTECT DEMOCRACY PROJECT
2120 University Avenue
Berkeley, California 94704

**D.C. Circuit admission pending*

°*Not admitted to practice in D.C.; supervised by a member of the D.C. bar*

December 16, 2019

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and *Amici*.

The Defendant-Appellant is Donald F. McGahn, II. The Plaintiff-Appellee is the Committee on the Judiciary of the United States House of Representatives. *Amici* are: Steve Bartlett, Jack Buechner, Tom Coleman, George T. Conway III, Mickey Edwards, Stuart M. Gerson, Gordon J. Humphrey, Bob Inglis, James Kolbe, Steven T. Kuykendall, Jim Leach, Mike Parker, Thomas E. Petri, Trevor Potter, Reid J. Ribble, Jonathan C. Rose, Paul Rosenzweig, Peter Smith, J.W. Verret, and Dick Zimmer.

(B) Rulings Under Review.

References to the rulings at issue appear in the Brief for Defendant-Appellant in this matter.

(C) Related Cases.

This case has not previously been before this Court or any other court. There are no other related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

CIRCUIT RULE 29(d) CERTIFICATE

Undersigned counsel hereby certifies that this brief could not be combined with other amicus briefs supporting affirmance, because its historical content and perspective is sufficiently unique and complex as to make combination with another brief impracticable.

/s/ Justin Florence
Justin Florence

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

CONSTITUTIONAL PROVISIONS

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

Amici have either worked in Congress or the Executive Branch, or have been close observers of the relationship between the branches of government in recent decades. In their view, the broad immunity claims asserted in this case by the Executive Branch, if accepted, would severely disrupt the Constitution's careful balance between that branch and Congress. In *amici*'s assessment, the existing executive privilege rules amply protect any Executive Branch confidentiality interests, obviating the need for absolute immunity for presidential advisors—let alone for former advisors. And in impeachment inquiries in particular, our constitutional system requires that Congress have access to key testimony and materials.

Amici submit this brief to highlight historical sources from the early republic, which *amici* believe demonstrate that the Constitution was not understood at ratification to afford the president, let alone his advisors, absolute immunity from subpoena. As a result, the Executive Branch's claim of absolute testimonial immunity—entirely derivative of the claim that the president enjoys such immunity—lacks any

Founding-era historical support, particularly in the context of impeachment.[1]

Steve Bartlett
U.S. House of Representatives (R-Texas), 1983–1991

Jack Buechner
U.S. House of Representatives (R-Missouri), 1987–1991

Tom Coleman
U.S. House of Representatives (R-Missouri), 1976–1993

George T. Conway III

Mickey Edwards
U.S. House of Representatives (R-Oklahoma), 1977–1993

Stuart M. Gerson
Acting Attorney General of the United States, 1993
Assistant Attorney General, Civil Division, 1989–1993

Gordon J. Humphrey
U.S. Senate (R-New Hampshire), 1979–1990

Bob Inglis
U.S. House of Representatives (R-South Carolina), 1993–1999, 2005–2011

James Kolbe
U.S. House of Representatives (R-Arizona), 1985–2007

---

[1] The parties have consented to the timely filing of this brief. No party authored this brief in whole or in part; no party contributed financially to the preparation or filing of this brief; and no person—other than the *amici*'s counsel—contributed money that was intended to fund preparing or submitting the brief.

Steven T. Kuykendall
U.S. House of Representatives (R-California), 1999–2001

Jim Leach
U.S. House of Representatives (R-Iowa), 1977–2007

Mike Parker
U.S. House of Representatives (R-Mississippi), 1989–1999

Thomas E. Petri
U.S. House of Representatives (R-Wisconsin), 1979–2015

Trevor Potter
Chair, Federal Election Commission, 1994

Reid J. Ribble
U.S. House of Representatives (R-Wisconsin), 2011–2017

Jonathan C. Rose
Special Assistant to the President, 1971–1973
Assistant Attorney General, Office of Legal Policy, 1981–1984

Paul Rosenzweig
Deputy Assistant Secretary for Policy, Department of Homeland Security, 2005–2008

Peter Smith
U.S. House of Representatives (R-Vermont), 1989–1991

J.W. Verret
Associate Professor of Law,
George Mason University Antonin Scalia Law School*

Dick Zimmer
U.S. House of Representatives (R-New Jersey), 1991–1997

**Institutional affiliation listed for identification purposes only.*

INTRODUCTION

The opinion below provides a persuasive and comprehensive assessment of the constitutional principles at issue in this case. *Amici* agree with the district court's analysis of those principles and its application of them to the congressional subpoena for the testimony of former White House Counsel Donald McGahn. *Amici* submit this brief to provide an additional consideration that may inform this Court's analysis: historical practice in the early decades of the Constitution.

As the Supreme Court has explained time and again, "In separation-of-powers cases this Court has often put significant weight upon historical practice."[2] Historical practice strongly reinforces the district court's opinion that Congress may compel the testimony of a former presidential advisor in an impeachment inquiry. A number of episodes between 1789 and 1846 demonstrate two key points: (1) the Founding generation and those who came immediately after understood Congress's inquiry power to be broad, especially in impeachment proceedings; and (2) Article II was not understood to provide immunity

[2] *Zivotofsky v. Kerry*, ___ U.S. ___, 135 S.Ct. 2076, 2091 (2015) (internal quotation marks omitted) (quoting *Nat'l Labor Relations Bd. v. Noel Canning*, 134 U.S. 513, 523 (2014)).

from subpoenas to the president himself (and so, it follows, wouldn't immunize advisors or former advisors, either). The idea that a president and his current and former advisors enjoy absolute immunity from subpoena—particularly during impeachment proceedings—finds no support in early American practice.

During the early republic, Congresses and presidents recognized that Congress had nearly untrammeled authority to request documents and testimony to support impeachment proceedings. Otherwise, as John Quincy Adams noted, it would make a "mockery" of the Constitution's impeachment power for Congress to have the power to impeach but "not the power to obtain the evidence and proofs on which their impeachment was based."[3]

Not only does early practice establish Congress's *power* to demand information relevant to impeachment proceedings, it also establishes that Article II grants *no absolute immunity* to the president from subpoenas issued by the other branches. In at least three different cases during the early republic, courts were asked to issue subpoenas to the president *himself* (and not just, as here, to a former close presidential

[3] Cong. Globe, 27th Cong., 2d Sess. 580 (1842).

advisor). Two of the three requested subpoenas were issued, and none was denied on the ground that the president is immune from compulsory process. That's because "every person" in the Founding generation "perceived" that the president was not a King, and therefore it stood to reason that the president did not share the King's unique immunity from all process. *United States v. Burr*, 25 F. Cas. 30, 34 (C.C.D. Va. 1807) (No. 14692D) (Marshall, C.J.). It follows that the president's advisors don't either.

The Executive Branch criticizes the district court's reliance on cases involving "federal judicial subpoenas seeking production of records, not congressional subpoenas seeking testimony," reasoning that "a congressional subpoena compelling public testimony raises graver separation-of-powers concerns than a subpoena that is issued under the authority of a neutral federal judge and imposes the lesser burdens of production of records." Br. for Def.-Appellant at 57. But as the historical examples below demonstrate, the president and his advisors enjoy no absolute immunity from compulsory process, regardless of whether the request comes from the courts or Congress, and regardless of whether the request involves documents or testimony.

ARGUMENT

I. Early American practice supports a broad view of Congress's authority to demand and obtain information from the president and Executive Branch officials.

Early American practice reveals that the Framers viewed the Congress not only as a legislative body but also as one charged with constitutional duties of oversight deemed essential to preserving the separation of powers and guarding against tyranny. Congress enjoys broad power to compel the production of evidence (testimonial or otherwise) from the Executive Branch—especially in cases of impeachment

A. The Framers adapted Parliament's plenary investigative powers to support the Constitution's system of checks and balances.

On this subject as on so many others, the English experience provided the Framers with a baseline that they embraced in some respects and rejected or surpassed in others. Certainly the Framers embraced an understanding of the English Parliament as a check on "the progress of arbitrary power."[4] Parliament was regarded as the

[4] James Wilson, *On the Legislative Authority of the British Parliament*, *in* 2 THE WORKS OF JAMES WILSON 505, 520 (James DeWitt Andrews ed., 1896).

"grand inquisitors of the realm"—the "proudest ministers of the proudest monarchs . . . trembled at [its] censures" and appeared before it "to give an account of their conduct, and ask pardon for their faults."[5]

But this inquiry power had to be mapped onto the tripartite structure of the new constitutional order.[6] In that context, Congress's broad inquiry powers were seen as a check on the Executive Branch and thus as a core component of the system of checks and balances comprising the separation of powers. Montesquieu, the political theorist most influential in the design of that system,[7] explained that "the legislative power in a free government . . . has a right, and ought to have the means of examining in what manner its laws have been executed; an advantage which this government has over that of Crete and Sparta, where the [political leaders] gave no account of their administration."[8]

---

[5] *Id.*

[6] *See Kilbourn v. Thompson*, 103 U.S. 168, 183–90 (1880) (portion of Parliament's investigative power may have stemmed from its dual role as legislature and judiciary—functions separated in the American system).

[7] *See Bowsher v. Synar*, 478 U.S. 714, 722 (1986) (noting importance to U.S. Constitution of Montesquieu's checks-and-balances theory).

[8] 1 BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 188 (10th ed., S.

The House in particular was seen as "the grand inquest of the state."[9] It was expected to "diligently inquire into grievances, arising both from men and things . . . know the evils which exists, and the means of removing them."[10] And this was especially true in the event of an impeachment, where the House would serve as "the grand inquest of the nation" due to its "sole and uncontrollable power" over those proceedings.[11]

It's therefore unsurprising that early American practice reflects a consensus that Congress could obtain access to documents during an impeachment, even if views differed on executive secrecy. We describe illuminating historical cases below.

Crowder, C. Ware, and T. Payne 1773).

[9] 2 THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. 146 (Lorenzo Press 1804).

[10] *Id.*

[11] Tench Coxe, *An American Citizen, on the Federal Government I, II, III*, Independent Gazetteer (Sept. 26–29, 1787); *see also Kilbourn*, 103 U.S. at 190 (finding "no reason to doubt [Congress's] right to compel the attendance of witnesses, and their answer to proper questions," just as in courts).

B. President Washington denied the House's request for documents relating to the Jay Treaty on the ground that the House had no treaty-making role—but conceded that the House would have power in the case of impeachment.

In 1794, with the U.S. on the brink of war with England, President George Washington sent Chief Justice Jay as a special envoy to negotiate a treaty.[12] When the treaty was returned from England, Representative Edward Livingston sponsored a resolution demanding that Washington disclose his instructions to Jay, as well as correspondence and other treaty-related documents.[13] The purpose, Livingston maintained, was not for impeachment of Jay or Washington, but to aid the House in exercising a purported power to approve or

---

[12] 4 RICHARD HILDRETH, THE HISTORY OF THE UNITED STATES OF AMERICA 486–89 (Harper & Brothers Publishers 1856).

[13] *Id.* at 585–86. This wasn't the first instance of Congress calling for information from the executive. That was in 1792, when a House committee "call[ed] for such *persons*, papers, and records, as may be necessary to assist its inquiries" into the military losses of Major General St. Clair. 3 ANNALS OF CONG. 493 (emphasis added). Washington and his cabinet agreed that the House was within its authority, and the incident "established a strong precedent for congressional access to executive materials." Todd B. Tatelman, *Presidential Aides: Immunity from Congressional Process?*, 39 PRESIDENTIAL STUDIES Q. 385, 387 (2009).

reject treaties.[14] The House adopted Livingston's resolution.[15]

Washington's cabinet unanimously advised him that, although the requested papers contained nothing sensitive or embarrassing, he should refuse to disclose them—because he needed to send the House the message that it had no constitutional role to play in treaty-making.[16]

Washington concurred. His written response to the House explained that "the assent of the House of Representatives is not necessary to the validity of a treaty," and that the requested inspection therefore did not relate "to any purpose under the cognizance of the House of Representatives, *except that of impeachment, which the [House] resolution ha[d] not expressed*."[17] He warned that it would "establish a dangerous precedent" to recognize "a right in the House of Representatives to demand and to have as a matter of course all the

---

[14] HILDRETH, *supra* note 12, at 585–86.

[15] *Id.* at 587.

[16] *Id.* at 587–88.

[17] Letter from George Washington to the U.S. House of Reps. (Mar. 30, 1796) (emphasis added), https://founders.archives.gov/documents/Washington/05-19-02-0513.

papers respecting a negotiation with a foreign power[.]"[18] Washington further noted that the requested documents *already* had been furnished to the Senate as part of the constitutionally mandated advice and consent process.[19]

Modern proponents of executive power often mischaracterize Washington's refusal to provide the treaty documents as a sweeping assertion of "executive privilege." But Washington was in fact "making a much narrower claim based on the House's lack of constitutional authority to request those particular documents, as opposed to his [lack of] legal obligation to provide them."[20] Washington's message to the House in fact demonstrates his awareness and acceptance of its power to demand information from the executive in cases of impeachment.[21]

---

[18] *Id.*

[19] *Id.*

[20] Tatelman, *supra* note 13, at 389. *See also* Letter from Charles Lee, U.S. Att'y Gen., to George Washington (Mar. 26, 1796), https://founders.archives.gov/documents/Washington/05-19-02-0491#GEWN-05-19-02-0491-fn-0001 (focusing on the House's lack of authority over treaty-making as well as the lack of any suggestion of impeachment proceedings); Letter from James McHenry, U.S. Sec'y of War, to George Washington (Mar. 26, 1796), https://founders.archives.gov/documents/Washington/05-19-02-0492 (same).

[21] Appellant cites Judge MacKinnon's partial dissent in *Nixon v. Sirica*,

C. In 1842, Congressman John Quincy Adams led an ultimately successful fight to force the Tyler administration to disclose reports concerning official wrongdoing against the Cherokee Nation.

Following enactment of the Indian Removal Act in 1830, members of the Cherokee Nation (among others) were forcibly and illegally removed to parts of what is now Oklahoma, despite a Supreme Court decision affirming their right to stay.[22] In May 1842, the House passed a resolution demanding that the Department of War disclose reports of a departmental investigation into claims that federal agents had robbed and starved to death the departing Cherokees. Secretary of War John Canfield Spencer refused.[23]

On June 4, 1842, the House debated whether to refer the matter to the Indian Affairs Committee. Representative and former President

---

487 F.2d 700, 733–34 (D.C. Cir. 1973) (MacKinnon, J., concurring in part and dissenting in part), for examples of presidents refusing to provide Congress with documents. *See* Br. for Def.-Appellant at 17. But that list does not support a claim of blanket authority to deny Congress information—the examples didn't involve impeachment inquiries and, as the Washington example demonstrates, early presidents accepted Congress's broad inquiry power in that context. Moreover, the *Nixon* majority agreed with *amici* that early American practice established that the president can be subpoenaed. *Id.* at 709–11 (en banc majority).

[22] *See* RALPH K. ANDRIST, THE LONG DEATH: THE LAST DAYS OF THE PLAINS INDIANS 9 (1993); *Worcester v. Georgia*, 31 U.S. 515 (1832).

[23] Cong. Globe, 27th Cong., 2d Sess. 579 (1842).

John Quincy Adams rose to express his "firm conviction that it was the right, and in the power of the House, to call on the heads of departments for every paper that passes through their hands, or that comes into their possession," a view "founded on that portion of the Constitution . . . which gives to this House the power of impeachment."[24] He reportedly exclaimed:

> Why, what mockery it would be for the Constitution of the United States to say that that House should have the power of impeachment, extending even to the President of the United States himself, and yet to say that the House had not the power to obtain the evidence and proofs on which their impeachment was based. It appeared . . . equivalent to a self-evident principle, that the power of impeachment gives to the House necessarily the power to call for persons and papers.[25]

The matter was subsequently referred to the committee, which ultimately prevailed upon Tyler to release the reports (albeit under protest).[26]

---

[24] Cong. Globe, 27th Cong., 2d Sess. 580 (1842).

[25] *Id.*

[26] In the course of this affair, the committee penned an 18-page treatise rebutting Tyler's protest in every respect and reasserting the House's power to demand evidence from the Executive Branch. *See* H.R. Rep. No. 271 at 1–18 (27th Cong., 3d Sess., 1843).

Adams's remarks provide another instance in which a member of the Founding generation (he was a young man in law tutelage at the time of the Constitution's ratification) took an expansive view of the House's power—rooted in but not limited to its impeachment power—to demand extensive evidence from the Executive Branch.

D. In 1846, President Polk resisted the House's call for public disclosure of how Secretary of State Daniel Webster had spent secret foreign-affairs funds—but conceded that Congress's impeachment power gave it the power to compel the testimony of any government official.

In 1846, members of the House Committee on Foreign Affairs accused Daniel Webster of having misused foreign-affairs-related funds while he served as Secretary of State. Part of those funds was available for unvouchered use if the president certified that they had been spent for confidential purposes.[27]

The House passed a resolution asking President James K. Polk to make public all records of expenditures of those funds during Webster's

[27] *James K. Polk, 1845–49*, Cent. Intelligence Agency (Mar. 19, 2007), https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/our-first-line-of-defense-presidential-reflections-on-us-intelligence/polk.html.

tenure as Secretary of State.[28] In denying that request, Polk also "cheerfully admitted" that the House's impeachment powers entitled it to "penetrate into the most secret recesses of the Executive Departments," to "command the attendance of *any and every agent of the Government*," and to "compel them to produce all papers, public or private, official or unofficial, *and to testify on oath to all facts within their knowledge*," so long as proper precautions were taken to "prevent the exposure of all such matters the publication of which might injuriously affect the public interest."[29]

Polk added that if the House, "as the grand inquest of the nation," ever wished to investigate an allegation that a public officer had misused public funds, "all the archives and papers of the Executive Departments, public or private, would be subject to the inspection and control of a committee of their body and every facility in the power of the Executive be afforded to enable them to prosecute the investigation."[30]

---

[28] *Id.*

[29] 5 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897 at 2284 (James D. Richardson ed. 1896) (emphasis added).

[30] *Id.* at 2285.

The House concurred, both as to the need for secrecy in the circumstances of the case and also as to the House's sweeping investigative powers. Polk accordingly made the necessary documents and witnesses available to the committee on condition of secrecy; and the investigation subsequently cleared Webster of all charges. The House committee's final report concluded that, "[i]nasmuch . . . as no evidence has been exhibited to the committee which can lay any foundation for an impeachment, all the reasons which induced the President to decline to make these facts public on the call of the House, return in their full force against their disclosure now."[31]

Thus, all sides in this dispute agreed that the House's impeachment powers included the authority to compel testimony under oath by *any* government official—even with respect to the most sensitive (indeed, clandestine) issues of foreign policy, and subject only to practical measures to preserve necessary secrecy.

* * *

These episodes demonstrate that both executive and congressional officials during the early republic agreed that Congress would have

[31] H.R. Rep. No. 684 at 4 (29th Cong., 1st Sess., 1846).

access to documents *and* the testimony of executive officials during an impeachment, even if there were differing views as to executive secrecy when Congress was not pursuing impeachment. Historical practice thus supports a conclusion that Congress's subpoena here constitutes a legitimate exercise of congressional power—an exercise to which the Executive Branch must fully respond.

II. Early American judicial practice also demonstrates that Article II does not immunize the president from subpoenas; it follows that presidential advisors lack absolute immunity.

On at least three occasions in the early days of the republic, courts were asked to issue subpoenas to a sitting president. Two of the three requested subpoenas were issued. None was denied on the ground that the president is immune from compulsory process. Early judicial practice thus refutes the notion that Article II affords the president complete immunity from process from the other branches of government.[32] If Article II does not provide such immunity to the

[32] It also demonstrates that courts have been comfortable adjudicating requests for presidential documents, contra Br. for Def.-Appellant at 16–20. *See generally* Mem. Op., *Comm. on Judiciary of the U.S. House of Representatives v. McGahn, II*, No. 19-cv-2379, 2019 WL 6312011 (D.D.C. Nov. 25, 2019), ECF No. 46.

president, there is no historically-grounded argument that it provides that immunity to his advisors.

A. Chief Justice Marshall issued subpoenas to President Jefferson in *United States v. Burr* (1807), holding that the president is not a "king" exempt from compulsory process.

In February 1807, a U.S. Army lieutenant clutching a "proclamation of conspiracy" signed by President Thomas Jefferson arrested Jefferson's former Vice President, Aaron Burr, on charges of treason.[33] Burr's co-conspirator, U.S. Army General James Wilkinson, fearing discovery, had turned informant and sent information about the plot to President Jefferson.[34]

At Burr's 1807 treason trial, his lawyers moved the Court to issue a subpoena duces tecum to the president to obtain documents from the informant, copies of the president's reply to Wilkinson, and certain directives issued by the Departments of War and Navy.[35] In response,

---

[33] Except where noted, historical background on the Burr trial presented here is drawn from CHARLES F. HOBSON, THE AARON BURR TREASON TRIAL (Federal Judicial Center 2006), https://www.fjc.gov/sites/default/files/trials/burrtrial.pdf.

[34] *Id.* at 3.

[35] *Id.* at 5.

Chief Justice Marshall, co-presiding over the trial, penned an opinion concluding not only that a general subpoena could issue to the president—a point the government conceded—but that a subpoena duces tecum could issue to him as well. *United States v. Burr*, 25 F. Cas. 30, 34 (C.C.D. Va. 1807) (No. 14692D). In fact, Marshall observed that he did not know of "any court of the United States" that had "decided that a subpoena cannot issue to the president." *Id.*[36]

[36] Marshall's opinion on this point is important for a second reason: it gave appropriately little weight to a prior ruling that could have muddied the executive-privilege analysis. Seven years before Marshall's opinion, Justice Samuel Chase denied a request to issue a subpoena to President Adams in a Sedition Act prosecution. *See United States v. Cooper*, 25 F. Cas. 631 (C.C.D. Pa. 1800) (No. 14,865). The historical record is unclear as to the basis on which Justice Chase denied the subpoena, but Chase himself denied that the ruling was founded on presidential immunity grounds. *See* Thomas Cooper, AN ACCOUNT OF THE TRIAL OF THOMAS COOPER 10 (1800) (Chase stating that "[i]t is not upon the objection of privilege that we have refused this subpoena"). Chase suggested that his reasoning was tied to the Sedition Act itself—namely, that it would exacerbate the very injury that the Act was designed to prevent to allow a defendant charged with bringing the president into disrepute to question the president at trial regarding whether the disrepute was warranted. *See id.* But the court clerk later testified that the subpoena was denied on procedural grounds. *See Documents, Accompanying the report of the committee appointed to enquire into the official conduct of Samuel Chase and Richard Peters*, Telegraphe and Daily Advertiser (Apr. 9, 1804) at 2 ("Mr. Chase told me that I acted very properly in refusing the subpoena, that Mr. Cooper ought to know that the president could not be subpoenaed, he being a party in the cause."). Marshall almost certainly

Marshall reasoned as follows:

1. The president is not a King. Marshall first observed that the Constitution (and the statute authorizing subpoenas) contained "*no exception whatever*" to the right to compulsory process. *Id.* (emphasis added). Any exception had to be found in evidence law, which excused only (1) those not legally capable of providing admissible testimony, and (2) "the king"—as it was said to be "incompatible with his dignity" to appear in court under the compulsion of legal process. *Id*.

Marshall pointed to two critical respects in which the King of England and the president of the United States differed "in respect to the personal dignity conferred on them by the constitutions of their respective nations." *Id*.

First, it was "a principle of the English constitution that the king can do no wrong, that no blame can be imputed to him, [and] that he cannot be named in debate." *Id*. Under the U.S. Constitution, by

---

would have known of *Cooper*, as Justice Chase's Sedition Act rulings had resulted in Chase's impeachment just three years before the *Burr* trial. But in *Burr*, Marshall gave the *Cooper* ruling the back of his hand, writing that he did not know of "any court of the United States" that had "decided that a subpoena cannot issue to the president." *Burr*, 25 F. Cas. at 34.

contrast, the president could be impeached and removed from office for high crimes and misdemeanors. *Id.*

Second, "[b]y the constitution of Great Britain, the crown is hereditary, and the monarch can never be a subject"; whereas, under the U.S. Constitution, "the president is elected from the mass of the people, and . . . returns to the mass of the people again." *Id.*[37] "[E]very person," Marshall wrote, could readily see "[h]ow essentially this difference of circumstances must vary the policy of the laws of the two countries[.]" *Id.*

2. The president's busy schedule does not immunize him. Marshall likewise turned aside any notion that the president may be deemed "exempt from the general provisions of the constitution"—referring evidently to a defendant's Eighth Amendment right to compulsory process—"because his duties as chief magistrate demand his whole time for national objects." *Id.* "This demand is not unremitting," Marshall noted; and while the president could raise

[37] *See also* U.S. CONST. art. I, § 9, cl. 8 ("No Title of Nobility shall be granted by the United States"—i.e., no kings); *Youngstown Sheet Tube & Co. v. Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring) (expressing "doubt that [the Framers] were creating their new Executive in [the King's] image").

specific schedule conflicts as a ground for not appearing in court at the requested time, such practical objections had no bearing on whether a subpoena could issue in the first instance. *Id*.

Far from resembling the English King, the president held a position analogous to members of England's "cabinet counsel," whose duties were just as "arduous and unremitting"—yet it had "never been alleged, that a subpoena might not be directed to them." *Id*.

Anticipating that his approach might be deemed "disrespect[ful] to the chief magistrate," Marshall observed that the president was entitled to "as guarded a respect . . . as is compatible with [his] official duties," but that "go[ing] beyond" this would "exhibit a conduct which would deserve some other appellation than the term respect." *Id*. at 37.

3. Like anyone, the president may object to a subpoena, and the court will rule upon those objections. Based on the principles he had elucidated, Marshall concluded that a blanket immunity from the issuance of process was not the right way to protect the president from being "harassed by vexatious and unnecessary subpoenas"; rather, it was up to the court, in its discretion, to take the president's objections into account when reviewing his formal "return"

to the subpoena. *Id.* at 34. Marshall acknowledged that, in a different case, a court might have had to suppress matter that it would be "imprudent" to disclose, if not "immediately and essentially applicable to the point." *Id.* at 37. But that question was not presented, as the court had seen nothing to suggest that the requested documents contained any material whose disclosure would "endanger the public safety." *Id.*

4. Ditto as to subpoenas duces tecum. All the same considerations necessarily applied to a subpoena duces tecum ordering the president to bring documents with him when he appeared: Any objection that the document contained sensitive matter could be dealt with "on the return of the subpoena." *Id.* at 34–35, 37. Marshall was adamant:

> The propriety of introducing any paper into a case, as testimony, must depend on the character of the paper, not on the character of the person who holds it. A subpoena duces tecum, then, may issue to any person to whom an ordinary subpoena may issue, directing him to [bring] any paper of which the party praying it has a right to avail himself as testimony . . . . *The court can perceive no legal objection to issuing a subpoena duces tecum to any person whatever, provided the case be such as to justify the process.*

Id. at 34–35 (emphasis added).

Jefferson complied with the subpoena largely without objection, even instructing his Attorney General that "if Burr believed 'there are any facts within the knowledge of the heads of department or of myself, which can be useful for the defense, from a desire of doing anything our situation will permit in furtherance of justice,' those officials would be *available for deposition in Washington, DC*."[38] Thus, Jefferson didn't raise the claim of absolute immunity from testimony in Washington D.C. that Mr. McGahn is relying on here—rather, Jefferson "drew the line only at having to *personally* attend the trial at *Richmond*."[39]

Burr was acquitted; but the question of the president's amenability to process recurred when the government tried Burr again, this time on the misdemeanor charge of waging war on Spain.

In the course of those proceedings, Burr discovered one letter to Jefferson that was material to his defense. *United States v. Burr*, 25 F. Cas. 187, 190 (C.C.D. Va. 1807) (No. 14,694).[40] The Court issued a

---

[38] *See* Louis Fisher, *Jefferson and the Burr Conspiracy: Executive Power Against the Law*, 45 PRESIDENTIAL STUDIES Q. 157, 169 (2015) (emphasis added).

[39] *Id.* (emphasis added).

[40] *See also* Irwin S. Rhodes, *What Really Happened to the Jefferson Subpoenas*, 60 A.B.A. J. 52, 53 (1974).

subpoena to the prosecutor, who responded that the letter contained two passages of such sensitivity that he doubted that they "could be extorted from him under any circumstances." *Id.* The prosecutor claimed that Jefferson had delegated to him the discretion to decide which passages to withhold. *Id.*

Marshall was not moved. As a threshold matter, he noted that that the government was not disputing the principle that "the president of the United States may be subpoenaed, and examined as a witness, and required to produce any paper in his possession[.]" *Id.* at 191. Marshall then ruled that because the president could not delegate his own judgment as to which passages must be withheld and Jefferson had not himself designated the sensitive passages, the court would order the letter produced to the defendant, while reserving the right to withhold it from the public after reviewing its contents. *Id.* at 192.

En route to that result, Marshall ruminated on how a court might strive to balance the president's objections to disclosure against a criminal defendant's need for the document: "[O]n objections being made by the president to the production of a paper, the court would not

proceed further in the case without such an affidavit as would clearly shew the paper to be essential to the justice of the case." *Id.*

Ultimately, the prosecutor produced an edited version of the letter accompanied by a certificate from the president attesting that the redactions were "in nowise material for the purposes of justice on the charges of treason or misdemeanor and "irrelevant to any issues which can arise out of those charges, & could contribute nothing towards his acquittal or conviction."[41]

Although some have contended that Jefferson's putatively voluntary surrender of the requested documents deprived Marshall's *Burr* rulings of significance,[42] that view is difficult to credit.[43] Fairly read, the rulings stand plainly for the propositions that

---

[41] THE WRITINGS OF THOMAS JEFFERSON VOLUME IX 1807–1815 64 (Paul Leicester Ford ed.) (1898).

[42] *See, e.g.*, Joseph Isenbergh, *Impeachment and Presidential Immunity from Judicial Process*, 18 YALE L. & POL'Y REV. 53, 55 n.7 (1999). For a detailed refutation of that view, see Raoul Berger, *The President, Congress, and the Courts*, 83 YALE L.J. 1111, 1111–22 (1974).

[43] Note that the majority in *Nixon v. Sirica* cited *Burr* as establishing that "[t]he Constitution makes no mention of special presidential immunities. Indeed, the Executive Branch generally is afforded none." 487 F.2d at 711. "This silence cannot be ascribed to oversight." *Id.* Appellant's misplaced citation to a *Nixon* dissent, *see* Br. for Def.-Appellant at 17, is unavailing for the reasons discussed *supra* note 21.

- the president is not a King;
- he has no absolute immunity from compulsory process;
- such process may issue against him for both testimony (in Washington, D.C., at least) and documents; and
- his objections founded on public safety are matters for the court to rule upon in the normal exercise of its discretion.[44]

And there can be no disputing that Jefferson, while declining to appear personally, in fact complied with the requirements of the *Burr* subpoenas, even offering to place his cabinet members—that is, his closest advisors, in person—at the defendant's disposal if need be.[45]

B. A court martial issued a subpoena to President Monroe in the case of Dr. William C. Barton (1818), and Monroe complied by submitting interrogatories.

Burr's case served as key precedent eleven years later, when President Monroe became the second president to be served with a subpoena while in office. The case involved the court martial of Dr. William C. Barton, a naval surgeon who had pressed Monroe for a position at the Philadelphia Naval Hospital. Barton eventually received

---

[44] *See* Paul A. Freund, *Foreword: On Presidential Privilege*, 88 HARV. L. REV. 13, 30–31 (1974); Berger, *supra* note 42, at 1111–22.

[45] Fisher, *supra* note 38, at 169.

an appointment, replacing Dr. Thomas Harris. Harris then brought charges of "intrigue and misconduct" against Barton, and the court martial subpoenaed Monroe to testify on the subject of his meetings with Barton.[46]

Advising Monroe, Attorney General William Wirt cited Marshall's *Burr* analysis as authority that the president may be subpoenaed to testify.[47] Wirt did not embrace the Executive Branch's broad theory here that Article II always grants the president and his close advisors absolute immunity from subpoena. Instead, Wirt believed that constitutional problems would arise only if Monroe were forced to leave the seat of government when presidential duties demanded his presence

---

[46] Ronald D. Rotunda, *Presidents and Ex-Presidents as Witnesses: A Brief Historical Footnote*, 1975 LAW FORUM 1, 5–6 (1975). *See also* Frank Lester Pleadwell, *William Paul Crillon Barton (1786–1856), Surgeon, United States Navy—A Pioneer in American Naval Medicine*, in *The Military Surgeon*, 46 J. OF THE ASS'N OF MILITARY SURGEONS OF THE U.S. 241, 260–62 (James Robb Church ed., 1920); *Nixon*, 487 F.2d at 710 n. 42.

[47] *See* Select Comm. on Pres. Campaign Activities, *Appendix to the Hearings of the Select Comm. on Pres. Campaign Activities of the U.S. Sen.: Documents Related to the Select Comm. Hearings*, Pt. I, at 740 (1974) ("A subpoena *ad testificandum* may I think be properly awarded to the President of the U.S.").

there.[48] Wirt therefore advised Monroe to pursue a compromise: the president would remain in Washington but respond via deposition[49] (which, of course, is no more or less than Mr. McGahn, who no longer has *any* official duties, is being asked to provide now).

Monroe followed Wirt's advice and submitted two-and-a-half handwritten pages of interrogatory answers in the case.[50] So, once again, a court, a close presidential advisor, and a president of the Framers' generation confirmed that a president is not immune from subpoena. Mr. McGahn's case is simpler. Monroe had the excuse that the burdens of his office prevented his personal appearance. Mr. McGahn—now a litigation partner in private practice—has no such excuse.[51]

---

[48] *Id.* at 742–43.

[49] *Id.*

[50] *See* Letter from President James Monroe to George M. Dallas (Feb. 14, 1818) Records of the Office of the Judge Advocate General (Navy), Record Group 125, (Records of General Courts Martial and Courts of Inquiry, Microcopy M-272, case 282), National Archives Building, *available at* https://www.familysearch.org/ark:/61903/3:1:3Q9M-CS1G-5QT8-6?i=831&cat=573135.

[51] *See McGahn*, 2019 WL 6312011, at *42.

C. If the president is not absolutely immune from compulsory process, neither are his current and former advisors.

As the district court observed, the government's argument that Mr. McGahn has absolute testimonial immunity is entirely derivative of the claim that the president enjoys such immunity. *See McGahn*, 2019 WL 6312011, at *40. But as the above examples show, the claim of absolute presidential immunity—the foundation on which Mr. McGahn's claim of immunity rests—lacks any Founding-era historical support, particularly in the context of impeachment.[52]

Where, as here, the subpoena issues not to the president himself, but to one of his subordinates, the case against immunity from process becomes all the stronger. Indeed, one "time-honored means of accommodation" between "the claims of governance and those of restraint" has been "the availability of a subordinate."[53] For example, "[i]f members of Congress cannot be sued for their official conduct, still officers of their house may be answerable for carrying out those

---

[52] The reverse doesn't follow: even if the Court were to decide that the president enjoys absolute testimonial immunity, that immunity would not extend to presidential advisors. Here, *amici* again agree with the district court.

[53] Freund, *supra* note 44, at 19.

actions, [just] as cabinet officers may be legally accountable for executing presidential directions."[54]

CONCLUSION

The Framers understood the Constitution as conferring broad powers on Congress to subpoena Executive Branch officials and documents in impeachment-related proceedings. They also firmly rejected any notion that Article II immunizes the president from subpoenas issued by the other branches. There is thus no basis in early constitutional practice for finding absolute immunity from process for former presidential advisors like Mr. McGahn. In light of these early interpretations and practices, this Court should affirm the district court's judgment.

[54] *Id.*

Dated: December 16, 2019

Respectfully submitted,

By: */s/Justin Florence*

JUSTIN FLORENCE [Bar No. 52916]
justin.florence@protectdemocracy.org
JAMILA G. BENKATO*°
jamila.benkato@protectdemocracy.org
CAMERON O. KISTLER*
cameron.kistler@protectdemocracy.org
(202) 579-4582
Protect Democracy Project
2020 Pennsylvania Ave. NW
Suite # 163
Washington, D.C. 20006

STEVEN A. HIRSCH*
steve.hirsch@protectdemocracy.org
Protect Democracy Project
2120 University Ave
Berkeley, CA 94704

**D.C. Circuit admission pending*
°*Not admitted to practice in D.C.; supervised by a member of the D.C. bar*

Counsel for *amici*

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 6,284 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)–(6) because it was prepared using Microsoft Word 2016 in Century Schoolbook 14-point font, a proportionally spaced typeface.

/s/ Justin Florence
Justin Florence

CERTIFICATE OF SERVICE

I certify that on December 16, 2019, the foregoing was electronically filed through this Court's CM/ECF system, which will send a notice of filing to all registered users.

/s/ Justin Florence
Justin Florence