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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COMMITTEE ON THE JUDICIARY,
UNITED STATES HOUSE
OF REPRESENTATIVES
Plaintiff-Appellee,

v.

DONALD F. MCGAHN, II
Defendant-Appellant.

No. 19-5331

EMERGENCY MOTION FOR STAY PENDING APPEAL AND FOR AN IMMEDIATE ADMINISTRATIVE STAY PENDING DISPOSITION OF THE STAY MOTION

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INTRODUCTION

The Department of Justice, on behalf of former White House Counsel Donald McGahn, respectfully requests that the Court grant a stay pending appeal of the district court's order entered on Monday, November 25, 2019, which declares that McGahn "is not immune from compelled congressional process," and enjoins him "to appear before" Plaintiff Committee on the Judiciary of the United States House of Representatives. Doc. 47, at 1-2. A stay of that order is essential to protect this Court's opportunity to decide the important questions presented by this case before the Executive Branch is irreparably injured by the compelled congressional testimony of a former close advisor to the President.

Furthermore, we request that the Court grant an immediate administrative stay to preserve this Court's jurisdiction pending the disposition of this motion. The Committee has stated that, if the district court refuses to stay its order pending appeal, "the Committee will not oppose a seven-day administrative stay in the D.C. Circuit to ensure that that Court has time to consider the request." Doc. 51, at 3. Accordingly, the Department may need relief from this Court as early as December 4, one week from today. We will inform the Court when the district court acts, but file this motion now in an abundance of caution to ensure that this Court has sufficient time to act before December 4, and so that the government has sufficient time, if necessary, to seek relief in the Supreme Court.

Only once before in our Nation's history has an Article III court attempted to compel a close presidential advisor to appear and testify before Congress. In that case—which likewise involved a former White House Counsel—this Court not only granted a stay pending appeal but took the unusual step of publishing a precedential opinion granting the stay, explaining that the dispute was "of potentially great significance for the balance of power between the Legislative and Executive Branches." *Committee on the Judiciary of the U.S. House of Representatives v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008) (per curiam). The Court should grant a stay again here in materially indistinguishable circumstances. Indeed, the district court relied extensively on *Miers* in ordering McGahn's testimony. And as in *Miers*, the Department has a substantial likelihood of success on appeal.

Throughout its opinion, the district court gave insufficient weight to the separation of powers. The court characterized this case as the type of "garden-variety" dispute to enforce a subpoena that "federal courts address routinely." Doc. 46, at 47-48. It did so notwithstanding that, unlike every such case in this Nation's history other than *Miers*, the plaintiff is a congressional committee and the defendant is a former White House Counsel. But the identity of the parties is the critical reason why this suit is both non-justiciable and meritless.

First, this inter-Branch dispute does not present a "Case[]" or "Controvers[y]" under Article III because the Committee has not suffered the type of legally cognizable injury that is traditionally resolved through civil litigation. Because judicial

resolution of suits between the Executive Branch and Congress is virtually unprecedented in American history, both the Supreme Court and this Court have held that federal legislators lack standing to assert institutional injuries in all but the narrowest circumstances (inapplicable here). *See Raines v. Byrd*, 521 U.S. 811, 829 (1997); *Campbell v. Clinton*, 203 F.3d 19, 23-24 (D.C. Cir. 2000).

Second, Congress has made clear that federal courts should not adjudicate suits by House committees seeking to enforce demands for information from the Executive Branch. "Authority to exert the powers of [Congress] to compel production of evidence differs widely from authority to invoke judicial power for that purpose." *Reed v. County Comm'rs of Del. Cty.*, 277 U.S. 376, 389 (1928). Congress has narrowly conferred subject-matter jurisdiction over suits by Senate committees to enforce subpoenas, *see* 28 U.S.C. § 1365, but it has never done so for House committees. Section 1365, moreover, contains an express exception precluding the judicial enforcement of Senate subpoenas in the face of executive-privilege objections. That statute's specific and circumscribed grant of authority precludes a House committee from invoking the general federal-question statute, 28 U.S.C. § 1331, to sue to enforce subpoenas that do involve executive privilege. Nor can the Committee assert a cause of action under the Constitution itself or invoke an implied cause of action in equity to enforce the subpoena, because there is no tradition of such suits, *see Grupo Mexicano de Desarrolo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 322, 327

(1999), and Congress has created an alternative enforcement scheme, *see Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384-85 (2015).

Third, the district court was wrong on the merits. McGahn was the White House Counsel, and the Committee's traditional implied subpoena power does not extend to a novel, extraordinary demand for such a close presidential advisor to appear to testify regarding his official duties. Fundamental separation-of-powers principles protect both the independence and autonomy of the Presidency, and the confidentiality essential to the President's effective performance of his functions under the Constitution. A congressional committee violates that independence and autonomy by compelling the President's immediate advisors to testify about their official duties.

For those reasons, this Court should issue a stay pending appeal, as it did in *Miers*. In addition, to protect the Court's jurisdiction to decide this stay motion, it should enter an administrative stay of the district court's order no later than Wednesday, December 4, 2019. If the Court denies the stay motion, it should at a minimum grant a reasonable administrative stay to allow the Solicitor General to seek relief from the Supreme Court.

STATEMENT

A. The Special Counsel's Investigation

On May 17, 2017, the Acting Attorney General appointed a Special Counsel to investigate "whether individuals associated with the" campaign of Donald J. Trump

"were coordinating with the Russian government in interference activities" regarding the 2016 election. Mueller Report, Vol. I at 1 (2019). As part of its expansive investigation, the Special Counsel's Office asked the White House to allow numerous interviews of current and former White House personnel. *Id.* at Vol. II at 12. Then-White House Counsel Donald McGahn sat for more than thirty hours of interviews.

B. The Committee's Investigation

The Committee announced on March 4, 2019, that it was investigating unspecified actions that it claimed "threaten our nation's longstanding commitment to the rule of law," and it issued 81 letters to individuals, entities, and government agencies seeking a sweeping amount of material relating to the President, his Administration, his family members, his businesses, and the 2016 election. *See* https://judiciary.house.gov/story-type/letter/house-judiciary-committee-document-requests-3419. The letter to McGahn requested information related to the Special Counsel's investigation. Doc. 33-3, at 13-15.

C. The Department of Justice's Accommodations

The Department of Justice and the Committee negotiated over the scope and necessity of the Committee's requests. The Department agreed to, among other things, make the Mueller Report available to certain Members of Congress in unredacted form (except redactions required by law for grand-jury material); make Attorney General Barr available for testimony discussing the Report; and allow

inspection of the FBI interview reports, subject to certain terms and conditions, including redaction of privileged information. Doc. 33-4, at 34-37.

The Committee issued a subpoena to McGahn on April 22, purporting to compel McGahn to testify before the Committee on May 21. Doc. 1-21; Doc. 33-3, at 5, 17-18. After the White House explained that compelling the testimony of a former White House Counsel presented significant separation-of-powers concerns, the Committee directed McGahn to appear to testify before the Committee on May 21 under threat of contempt. Doc. 1-25. Both the White House and McGahn's counsel informed the Committee that it cannot compel McGahn's testimony, and that he had been instructed not to appear at the hearing. Doc. 33-3, at 5-6, 46-47; *see* Doc. 1-24. But the White House offered to accommodate the Committee by having McGahn provide answers to interrogatories and also offered to consider allowing him to appear for a private interview, subject to appropriate conditions, as an alternative. Doc. 33-3, at 7. The Committee was not willing to consider any option other than testimony at a public hearing. *Id.*

D. District Court Proceedings

On August 7, 2019, the Committee filed this suit, seeking a court order enforcing its subpoena and directing McGahn to appear before the Committee and "testify as to matters and information discussed in the Special Counsel's Report and any other matters and information over which executive privilege has been waived or is not asserted." Compl. Prayer for Relief. The Committee sought a declaration that

McGahn's failure to testify before the Committee is without legal justification, and an injunction ordering him to "appear and testify forthwith before the Committee." *Id.* After receiving briefing, on November 25, the district court issued an opinion and order declaring that McGahn "is not immune from compelled congressional process," and enjoining him to appear before the Committee pursuant to its subpoena. Doc. 47; *see* Doc. 46.

ARGUMENT

The propriety of a stay pending appeal turns on: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426 (2009).

As this Court has already held on essentially identical facts, that standard is readily satisfied here. *See Miers*, 542 F.3d at 911. The Committee's suit is non-justiciable and meritless. The district court's order should not be permitted to take effect without this Court's review.

I. The Department is likely to succeed on appeal

A. Article III's judicial power does not extend to disputes between Congress and the Executive Branch

Two hundred years of history demonstrate that Article III's judicial power does not extend to resolve inter-Branch disputes over the scope of their respective

constitutional prerogatives. Allowing courts to referee such disputes between the Legislative and Executive Branches would pose grave threats to the separation of powers, entangle courts in political controversies, and distort the delicate balance between the two political branches of government that has persisted for well over two centuries.

1. Where a dispute is not "traditionally thought to be capable of resolution through the judicial process," *Raines*, 521 U.S. at 819, the plaintiff lacks standing and the suit must be dismissed for lack of an Article III case or controversy. As the Supreme Court in *Raines* explained, the absence of any "historical practice" supporting judicial resolution of inter-Branch disputes despite numerous "confrontations between one or both Houses of Congress and the Executive Branch" provides strong evidence that components of the federal government generally cannot sue based on asserted institutional injuries to themselves. *Id.* at 826.

Confrontations about congressional requests for information have existed since the beginning of the Republic, but suits involving Congress's access to information held by the Executive Branch have not. For example, in 1792, President Washington clashed with the House of Representatives over records relating to a failed military expedition, and he later refused to provide the House certain documents relating to the negotiation of a treaty. *See Nixon v. Sirica*, 487 F.2d 700, 733-34 (D.C. Cir. 1973) (MacKinnon, J., concurring in part and dissenting in part). Other Presidents, including Thomas Jefferson, Andrew Jackson, John Tyler, James Polk, James

Buchanan, Ulysses Grant, Grover Cleveland, Theodore Roosevelt, Calvin Coolidge, Herbert Hoover, and Franklin Roosevelt also withheld information requested by Congress. *Id.* at 733-36 & n.9.

"The first outright refusal of a presidential adviser to appear apparently occurred during the Truman Administration, in 1948," when a House subcommittee subpoenaed an Assistant to the President "to testify about his communications with President Truman regarding administration of the Taft-Hartley Act during a strike." *Testimonial Immunity Before Cong. of the Former Counsel to the President*, 43 Op. O.L.C. ___, 2019 WL 2315338, at *5 (May 20, 2019). The Johnson Administration likewise refused a Senate request for testimony by an Associate Special Counsel to the President. *Id.* at *6. Similar disputes over demands for testimony by senior presidential advisors have arisen in every Administration since. And each Administration, regardless of political party, has taken the position that the President's immediate advisors cannot be compelled to appear and give testimony before Congress concerning their official duties. *Id.* at *2-8.

Although inter-Branch information disputes were commonplace, for two centuries the Legislative Branch never sought to invoke the power of the Judiciary to decide which side should prevail in a political battle with the Executive. *See, e.g.*, Corwin, *The President: Office and Powers 1787-1957*, at 116 (4th ed. 1957) (the "prerogative of Congress" to "inform themselves through committees of inquiry on subjects that fall within their legislative competence and to hold in contempt

recalcitrant witnesses before such committees" has "always been regarded as limited by the right of the President to have his subordinates refuse to testify either in court or before a committee of Congress concerning matters of confidence between them and himself"). That unbroken history continued until the decision in *Committee on the Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008), on which the district court relied extensively throughout its opinion. But that case never resulted in an appellate ruling because the parties settled, allowing for a transcribed interview of Ms. Miers by the Committee, not testimony at a public hearing. Doc. 33, at 48 n.10. The court here erred by allowing the Committee to supplant the centuries-old process of accommodation by using the Article III power as a non-political lever to distort the resolution of an inter-Branch dispute.

2. The Supreme Court's decision in *Raines* confirms that the Committee fails to state a cognizable injury. In *Raines*, six Members of Congress who had unsuccessfully opposed the Line Item Veto Act brought suit following its enactment seeking to declare the Act unconstitutional. 521 U.S. at 814-16. The Court held that the plaintiff legislators lacked a judicially cognizable injury under Article III. *Id.* at 818, 829-30. Although the dissent in *Raines* objected that private parties routinely have an Article III injury when their right to vote is allegedly diluted, *id.* at 837 (Stevens, J., dissenting), the majority recognized that the "abstract dilution of *institutional* legislative power" is, by contrast, insufficiently "concrete and particularized" to sustain standing, *id.* at 819, 821, 825-26 (emphasis added).

Raines rejected the plaintiffs' reliance on *Coleman v. Miller*, 307 U.S. 433 (1939), holding that *Coleman* stands at most for the proposition that "[state] legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been *completely nullified*." 521 U.S. at 823 (emphasis added). *Raines* held that, even assuming that *Coleman* may be extended to federal legislators, *cf. id.* at 824 n.8, the "abstract dilution of institutional legislative power" attributable to the Line Item Veto Act fell well short of the absolute "vote nullification" necessary to satisfy Article III's injury-in-fact requirement, *id.* at 825-26, 830; *see also Campbell*, 203 F.3d at 23-24 (holding that "vote nullification" under *Coleman* as construed in *Raines* requires that the legislator plaintiffs have no political remedies available to address their alleged institutional injury).

Raines and *Campbell* foreclose the Committee's suit. The Committee states that it issued a subpoena to McGahn as "part of" its impeachment inquiry and "to consider relevant legislation and to conduct necessary oversight." Doc. 38, at 13. The absence of McGahn's testimony does not "nullify" congressional votes in the sense required by *Raines* and *Campbell*. Rather, the House brought this suit to vindicate its assertion of institutional prerogative against a competing claim of institutional autonomy: the House contends that it has the constitutional authority to compel a close presidential advisor to appear before Congress, and the Executive contends that

it does not. Such disputes are not, and have never been, justiciable cases or controversies in Article III courts.

3. Because Article III courts have no role to play in the "amorphous general supervision of the operations of government," *Raines*, 521 U.S. at 829, this Court has already recognized that asking the federal judiciary to resolve an inter-Branch dispute over congressional subpoenas is "of potentially great significance for the balance of power between the Legislative and Executive Branches," *Miers*, 542 F.3d at 911. The Constitution vests "enforcement powers" concerning compliance with federal law in the Executive, not the Legislative, branch, *see Buckley v. Valeo*, 424 U.S. 1, 138, 140-41 (1976), and Congress has ample legislative tools to enforce its demands for information from the Executive Branch, *see Campbell*, 203 F.3d at 23.

For example, Congress can legislate change within the Executive Branch, *see McGrain v. Daugherty*, 273 U.S. 135, 173-74 (1927), cut budgets, *see Barenblatt v. United States*, 360 U.S. 109, 111 (1959), make a case to the public to redress any perceived injury done to it by Executive Branch at the ballot box, *see id.* at 132-33—or, as this case itself demonstrates, consider whether to impeach officials, U.S. Const. art. I, § 2, cl. 5. The availability of those remedies both underscores why courts should not intervene in ways that would unsettle the allocation of powers between the political branches and demonstrates how—contrary to the district court's assertion, Doc. 46, at 40—the Executive Branch does not "wield[] virtually unchecked power."

4. The district court fundamentally erred in its repeated suggestion that the Committee had Article III standing merely because private parties may sue to enforce subpoenas and other private rights to information. Doc. 46, at 41-45. And the court similarly erred in suggesting that it was bound by *United States v. AT&T*, 551 F.2d 384 (D.C. Cir. 1976). Doc. 46, at 49-50. That case involved a suit brought by the Executive Branch against a private company, not a suit brought by Congress against the Executive Branch. While in *AT&T* this Court permitted the House to appeal, by the time it did so the district court had already quashed the subpoena, and thus *AT&T* did not hold that the House has standing to challenge mere non-compliance with a still-extant subpoena. Doc. 40, at 14. Particularly in light of the intervening decision in *Raines*, there is no basis for extending *AT&T* to this inter-Branch dispute.

B. Federal courts do not have jurisdiction over suits by House committees seeking to enforce subpoenas against Executive officials

In limiting both the grants of subject-matter jurisdiction and the causes of action available to enforce congressional subpoenas, Congress has barred this suit.

1. Congress has provided a specific, limited grant of subject-matter jurisdiction to enforce certain congressional subpoenas, and that provision is inapplicable here. Section 1365 of Title 28 grants the District Court for the District of Columbia "original jurisdiction" over civil actions to enforce certain congressional subpoenas—but only for *Senate* subpoenas, and only in circumstances not involving an assertion of executive privilege. 28 U.S.C. § 1365. The subpoena here falls outside

those specific limits—and, indeed, the Senate could not enforce this subpoena under Section 1365 because it encompasses matters in which executive privilege would apply—and thus the Committee's suit exceeds the jurisdiction conferred by Congress. *See Keene Corp. v. United States*, 508 U.S. 200, 207 (1993) ("Congress has the constitutional authority to define the jurisdiction of the lower federal courts, . . . and, once the lines are drawn, limits upon federal jurisdiction . . . must be neither disregarded nor evaded.").

The district court instead located jurisdiction in the general federal-question statute, 28 U.S.C. § 1331. But interpreting Section 1331 to provide federal courts with jurisdiction to enforce any congressional subpoena would render Section 1365's specific jurisdictional grant superfluous and its jurisdictional limitations nullities. That cannot be reconciled with the basic principle that, where "a general authorization and a more limited, specific authorization exist side-by-side," "[t]he terms of the specific authorization must be complied with." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012); *see Howard v. Pritzker*, 775 F.3d 430, 441 (D.C. Cir. 2015).

The district court held that it was permissible to read Section 1331 as rendering Section 1365 a nullity because, in the court's view, Section 1365 is an outdated vestige of a time when Section 1331 was limited by an amount-in-controversy requirement. Doc. 46, at 41-45. But even if a court could disregard a jurisdictional statute in this manner, the district court got the chronology wrong. Congress removed Section

1331's amount-in-controversy requirement in 1976 for suits against the government and government officials before it enacted Section 1365. *See* Pub. L. No. 94-574, 90 Stat. 2721, 2721 (1976). Yet the following year, a Senate report acknowledged that Congress still lacked authority to enforce subpoenas through civil actions. *See* S. Rep. No. 95-170, at 16 (1977) ("Presently, Congress can seek to enforce a subp[o]ena only by use of criminal [contempt] proceedings [under 2 U.S.C. § 192] or by the impractical procedure of conducting its own trial before the bar of the House of Representatives or the Senate."). Only in 1978 did Congress through Section 1365 attempt to establish jurisdiction to compel compliance with certain Senate subpoenas. And even then, Congress excluded suits against executive officials asserting executive privilege, without enacting any provision for suits to enforce House subpoenas. Indeed, the Senate version of the bill would have conferred district-court jurisdiction to enforce subpoenas issued by the House or its committees as well, but the House refused to support the Senate's proposal to confer that jurisdiction because the appropriate House committees had not considered the Senate's proposal. *See* H.R. Rep. No. 95-1756, at 80 (1978).

Moreover, in 1996—well after Congress in 1980 had completely eliminated Section 1331's amount-in-controversy requirement—Congress amended Section 1365 to clarify that the statute would confer jurisdiction in cases where an executive official's refusal to comply was based upon a personal (rather than governmental) privilege. *See* Pub. L. No. 104-292, § 4, 110 Stat. 3459 (1996). That amendment

would have been pointless if, as the district court believed, Section 1331 already conferred jurisdiction for suits by Congress seeking to enforce demands for information.

The district court also cited *AT&T* as support for its position that Section 1331 provides jurisdiction. Doc. 46, at 42. But, as noted above, *AT&T* did not involve an inter-Branch dispute brought by Congress. And *AT&T* precedes not only the 1996 amendments to Section 1365, but also the enactment of that provision altogether. *AT&T* thus did not address and could not have addressed Congress's explicit decision in Section 1365 to define and delimit the circumstances in which federal courts may entertain civil actions to enforce congressional subpoenas.

2. The district court held that "Article I of the Constitution is all the cause that a committee of Congress needs" to bring suit. Doc. 46, at 77. That the district court rested its order on this remarkable assertion is sufficient reason alone to grant a stay pending appeal. Neither this Court nor the Supreme Court has suggested that implicit in Article I is a cause of action for Congress to invoke the power of the Judicial Branch to enforce its will against the Executive Branch. The district court appears to have reasoned that, because the Framers anticipated that Congress would have the power to investigate, they likewise must have intended Congress to have the inherent power to seek judicial enforcement of its demands. But that is a fallacy. As the Supreme Court has stressed, the "[a]uthority to exert the powers of [Congress] to

compel production of evidence differs widely from authority to invoke judicial power for that purpose." *Reed*, 277 U.S. at 389.

Even outside the context of inter-Branch disputes, the Supreme Court has repeatedly rejected the notion of an automatic implied right to sue under the Constitution itself. Rather, "most often" Congress itself must provide a cause of action because of the separation-of-powers principles at stake. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017); *see Armstrong*, 135 S. Ct. at 1383 (Supremacy Clause "certainly does not create a cause of action"). Absent a statute, the question is whether Congress has implicitly authorized suit through a cause of action in equity. *See Armstrong*, 135 S. Ct. at 1385-86. The answer here is no.

First, implied causes of action in equity must be based on "traditional equity practice." *Grupo Mexicano*, 527 U.S. at 322, 327. Here, because inter-Branch informational suits have no historical tradition, there is no basis to imply a cause of action in equity. *See id.* at 319, 322 (refusing to allow a pre-judgment creditor to seek an injunction restraining a debtor's assets that is traditionally available only to post-judgment creditors).

Second, a court's equitable powers are "subject to express and implied statutory limitations." *Armstrong*, 135 S. Ct. at 1385. Congress has had "specific occasion to consider" whether its committees should be authorized to enforce their subpoenas through a civil suit. *Abbasi*, 137 S. Ct. at 1865. It granted statutory authority to the Senate Legal Counsel to institute civil proceedings to enforce a subpoena when

directed by the full Senate to do so, 2 U.S.C. §§ 288b(b), 288d, subject to jurisdictional limitations, 28 U.S.C. § 1365, and it otherwise authorized the Executive Branch to institute contempt proceedings, 2 U.S.C. § 192. Congress has *not*, however, chosen to authorize subpoena-enforcement suits brought by House committees, thus strongly militating against the courts fashioning such a cause of action as a matter of equity.

The district court likewise erred when it relied on the Declaratory Judgment Act, 28 U.S.C. § 2201, to enforce its demands for McGahn's testimony. Doc. 46, at 80. The Declaratory Judgment Act does not "provide a cause of action." *Ali v. Rumsfeld*, 649 F.3d 762, 778 (D.C. Cir. 2011). It only "enlarge[s] the range of remedies available in the federal courts" for cases that already can be litigated there. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950). The "availability of relief" under the Declaratory Judgment Act thus "presupposes the existence of a judicially remediable right." *C & E Servs., Inc. of Washington v. District of Columbia Water & Sewer Auth.*, 310 F.3d 197, 201 (D.C. Cir. 2002). The Committee has none here.

C. Congress does not have to power to compel testimony from McGahn regarding his official duties as Counsel to the President

In any event, if this Court reaches the merits, the Executive Branch is likely to succeed in defending its longstanding, consistent position across Administrations that a congressional committee does not have the power to compel testimony of immediate advisors to the President, such as McGahn.

The Constitution does not expressly grant either House of Congress a power to issue subpoenas. The Supreme Court has held that such a power is nonetheless implicit in Article I, both because it is functionally necessary in aid of the House's powers and because such subpoenas are supported by historical tradition. *See McGrain*, 273 U.S. at 161, 175. The Committee thus may not press that implied power to the point where it begins to interfere with the functions of other, coequal Branches of Government. Nor may it press that power beyond the scope of the historical tradition that justified it in the first place. Here, congressional subpoenas to the President's immediate advisors compelling their testimony regarding their official duties would interfere with the President's autonomy and independence from Congress, and would threaten the confidentiality essential to the President's effective performance of his duties. *See OLC Opinion*, *supra*, at *3-4. Such subpoenas also have no sound historical basis. *See id.* at *1-8.

It makes no difference that McGahn no longer serves the President. Even where a President no longer depends on the daily advice and assistance of a former immediate advisor, the risk to presidential autonomy posed by compelling that advisor to testify at a committee hearing continues after the advisor's service ends. *OLC Opinion*, *supra*, at *10-11. Nor will individualized assertions of executive privilege adequately protect the Executive Branch's interests because, among other things, allowing such assertions would do nothing to protect against using compulsory

testimonial process to harass or retaliate against the President's immediate advisors. *Id.* at *3-4.

II. The other factors likewise support a stay

As in *Miers*, the Executive Branch will be irreparably harmed absent a stay. If the order is not stayed, and McGahn must appear before the Committee, then the claim that the Committee lacks the power to compel his appearance to testify will have been "effectively lost." *Mitchell v. Forysth*, 472 U.S. 511, 526 (1985). The irreparable harm from that testimony would extend to McGahn and the Executive Branch: The compelled testimony itself and the realistic possibility that privileged information may be inadvertently disclosed would cause harm, and if the appeal were to become moot, the Executive Branch would be deprived of the opportunity to seek appellate review of these important constitutional issues.

By contrast, the Committee would not be prejudiced by a stay pending appeal. Although the Committee has stated that its follow-up investigation to the Mueller Report is part of its impeachment inquiry, Doc. 45, at 3, the current focus of the House's investigation appears to be on events that relate to Ukraine and postdate McGahn's service as Counsel to the President. Moreover, the Committee has represented that it cannot "effectively question" McGahn without obtaining the grand jury materials that underlie that Special Counsel's report. *In re: Application for an Order Authorizing the Release of Certain Grand Jury Materials*, No. 19-00048, Doc. 1, at 2-3 (D.D.C. July 26, 2019). But the appeal of the request for grand-jury materials has

been administratively stayed through at least January 3, 2020. Order, *In re: Application of the Committee on the Judiciary, U.S. House of Representatives*, No. 19-5288 (D.C. Cir. Nov. 18, 2019). Because the Committee will not obtain materials that it says are "essential" to questioning McGahn until at least early 2020, the Committee would not be harmed by waiting to question McGahn until at least that time. At a minimum, any harm to the Committee pales in comparison to the irreparable harm to the Executive Branch of vitiating its defense without any opportunity for appellate review.

Finally, if this suit is rendered moot by the denial of a stay, the political branches and the courts in this district will be denied appellate guidance concerning both the justiciability of this sort of inter-Branch suit and the amenability of senior presidential advisors to congressional subpoenas. On an issue of this importance to the Nation, it plainly serves the public interest for the issues raised by this case to be resolved by an appellate tribunal.

CONCLUSION

This Court should (1) enter an immediate administrative stay of the district court's order, by December 4, 2019, pending consideration of this motion, and (2) enter a stay of the order pending appeal. If the Court denies this request, we respectfully request that the Court at a minimum enter an administrative stay, or continue such a stay, for a reasonable period to allow the Solicitor General an opportunity to seek relief from the Supreme Court.

Respectfully submitted,

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NOVEMBER 2019

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion satisfies the type-volume limitation in Rule 27(d)(2)(A) because it contains 5,184 words. This motion complies with the typeface and type-style requirements of Rule 32(a)(5) and Rule 32(a)(6) because it was prepared using Microsoft Word 2013 in Garamond, 14-point font, a proportionally-spaced typeface.

/s/ *Martin Totaro*
Martin Totaro

CERTIFICATE OF SERVICE

I hereby certify that on November 27, 2019, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. I further certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ *Martin Totaro*
Martin Totaro