[ORAL ARGUMENT SCHEDULED FOR JANUARY 3, 2020]

No. 19-5331

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.

On Appeal from the U.S. District Court for the District of Columbia

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BRIEF FOR DEFENDANT-APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies:

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.

B. Rulings Under Review

The ruling under review is the November 25, 2019 order of the district court declaring that Donald F. McGahn, II is not immune from compelled congressional process and enjoining McGahn to appear before plaintiff Committee pursuant to the subpoena that was issued to him. JA967-968. The opinion, JA847-966, will be published and is currently available on Westlaw (2019 WL 6312011).

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).

/s/Martin Totaro
MARTIN TOTARO

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INTRODUCTION

For only the second time in our Nation's history, a court has ordered a close presidential advisor to appear and testify before Congress. The first time that occurred, this Court granted a stay pending appeal after recognizing that the case presented questions 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), but the interbranch dispute was subsequently resolved without judicial involvement. Here, once more, the Committee on the Judiciary of the U.S. House of Representatives has filed suit to compel the testimony of a former White House Counsel, Donald F. McGahn, II. And again, this suit raises critical questions about whether the Committee has Article III standing to seek judicial resolution of an institutional dispute between the political branches; whether Congress itself has even permitted suits of this kind; and whether the House's implied general power to issue subpoenas may constitutionally be extended to compel a former White House Counsel to appear and testify on matters related to his duties as a close advisor to the President.

The district court erred on each of those issues, and for the same over-arching reason. Its decision rests on the fundamentally mistaken premise that

the interbranch nature of this dispute is irrelevant, and that this case is not meaningfully different from any garden-variety subpoena enforcement action.

The district court's insistence that the Committee's status as a component of the Legislative Branch is irrelevant to Article III standing defies the Supreme Court's emphasis on the significance of that factor in *Raines v. Byrd*, 521 U.S. 811 (1997). The court's assertion that the Committee could invoke 28 U.S.C § 1331's general grant of federal-question jurisdiction—notwithstanding Congress's enactment of a specific statute governing the civil enforcement of congressional subpoenas, 28 U.S.C § 1365, that indisputably does not allow this suit—ignores Congress's decision to treat congressional subpoenas differently from ordinary subpoenas. The court's belief that the Committee possesses an implied cause of action directly under Article I contravenes the Supreme Court's holding in *Reed v. Commissioners of Delaware County*, 277 U.S. 376 (1928), that Congress's power to subpoena evidence does not itself legally authorize Congress to seek judicial enforcement of subpoenas. And the court's insistence that a congressional committee may compel the appearance of a close advisor of the President to the same extent as any other citizen has no basis in historical practice and also ignores the severe separation-of-powers concerns in this narrow and sensitive context.

In sum, while the district court is surely correct that "Presidents are not kings," JA962, it is equally foundational that the federal Judiciary lacks the roving mandate of "European constitutional courts," *Raines*, 521 U.S. at 828. Under our Constitution, institutional disputes between the political Branches have always been resolved by political contest and compromise, never by judicial decree in litigation between them. The decision below would radically reshape the balance of powers by injecting courts into the middle of especially fraught battles between Congress and the President. The Committee's suit should be dismissed.

STATEMENT OF JURISDICTION

The Committee's complaint asserted jurisdiction in district court under 28 U.S.C. § 1331. JA18; *but see* Part II.A, *infra*. The order declaring that McGahn was legally required to appear before the Committee and enjoining him to testify is appealable pursuant to 28 U.S.C. § 1292(a). *See Miers*, 542 F.3d at 910. McGahn filed a timely notice of appeal on November 26, 2019. JA969; *see* Fed. R. App. P. 4(a)(1)(B).

STATEMENT OF THE ISSUES

1. Whether the Committee has Article III standing to sue to enforce a congressional subpoena demanding testimony from an individual on matters related to his duties as an Executive Branch official.

2. Whether Congress has denied the federal courts statutory subject-matter jurisdiction to entertain, and House committees a cause of action to bring, a suit to enforce a congressional subpoena demanding testimony from an individual on matters related to his duties as an Executive Branch official.

3. Whether the House's implied constitutional authority to issue testimonial subpoenas permits the Committee to compel testimony from a former White House Counsel on matters related to his duties.

STATEMENT OF THE CASE

A. Factual Background

1. On May 17, 2017, Deputy Attorney General Rod J. Rosenstein appointed Robert S. Mueller III as 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). The Special Counsel's Office asked the White House to allow numerous interviews of current and former White House personnel. Mueller Report, Vol. II at 12. One of those personnel was then-White House Counsel Donald F. McGahn, II. *Id.* at 32.

The House Judiciary Committee announced in March 2019 that it was investigating threats to "our nation's longstanding commitment to the rule of law," and it issued 81 letters to individuals, entities, and government agencies

seeking information relating to the President, his Administration, his family, his businesses, and the 2016 election. *See U.S. House Comm. on the Judiciary Document Requests 3.4.19*, https://go.usa.gov/xpnYD. A letter to McGahn requested information on the same topics covered by the Special Counsel's investigation. JA723-725.

2. The Department of Justice represents McGahn in his capacity as a former government official subjected to demands for information on matters related to his duties. The Department and the Committee negotiated over the scope and necessity of the Committee's requests. Throughout the course of this accommodation process, the Department offered, among other things, to make the Mueller Report available to certain Members of Congress in unredacted form (except redactions required by law for grand-jury material). JA808-811.

Four days after that offer, the Committee issued a subpoena to McGahn that ordered him to produce relevant documents and testify before the Committee a month later. JA618-629. The White House Counsel's Office responded to the Committee that it was interested in continuing to pursue a reasonable accommodation process, but that compelling the testimony of a former White House Counsel presented significant separation-of-powers concerns. JA743-754.

The Committee then directed McGahn to appear to testify before the Committee on May 21 under threat of contempt. JA664. Despite that development, the Counsel's Office offered to have McGahn provide answers to interrogatories and also offered to consider the alternative of allowing him to appear for a private interview, subject to appropriate conditions. JA717. The Committee would not consider any option other than public testimony. *Id.*

The Executive and Legislative Branches reached an accommodation regarding the documents requested from McGahn. The Counsel's Office stated that it would review responsive documents in McGahn's possession for privilege, and then make non-privileged documents (or portions of documents) available for the Committee's review. JA718.

B. District Court Proceedings

1. In August 2019, the Committee filed suit. JA12-65. The complaint alleged that "McGahn's refusal to testify harms the Judiciary Committee by depriving it of a witness and information that are essential to its investigation, thereby impeding the Judiciary Committee's ability to facilitate the House's fulfillment of its Article I functions." JA17. According to the complaint, "[t]hese functions include the most urgent duty the House can face: determining whether to approve articles of impeachment." *Id.* The complaint also alleged that the absence of McGahn's testimony impedes the Committee's

"ability to assess the need for remedial legislation and to conduct oversight." *Id.*

The complaint sought declaratory and injunctive relief. It requested a declaration that "McGahn's refusal to appear before the Committee in response to the subpoena issued to him was without legal justification" and an injunction "ordering McGahn to appear 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." JA64.

The Department attempted to continue the accommodation process even after the Committee filed suit. But the Department later acknowledged that "it appears unlikely the parties will reach a mutually acceptable accommodation." JA845.

2. The district court granted the Committee's motion for partial summary judgment and denied McGahn's cross-motion for summary judgment. JA847-966; JA967-68.

It relied extensively (*e.g.,* JA849-855) on *Committee on the Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008). In that case, a district court ordered former White House Counsel Harriett Miers to testify before the House Judiciary Committee in response to a subpoena. The

Department of Justice appealed to this Court and sought a stay pending appeal. The Court granted the stay in a published opinion. *Miers*, 542 F.3d at 911. The parties subsequently reached an accommodation, under which Miers would sit for a transcribed interview by the Committee rather than testify at a public hearing. *See* Doc. Nos. 68 & 68-1, No. 08-409 (D.D.C.). The case was settled, and the appeal dismissed as moot.

Repeatedly invoking *Miers*, the district court here concluded that the Committee: (1) established Article III standing to seek judicial resolution of this interbranch dispute, JA894-925, JA929-937; (2) identified both statutory subject-matter jurisdiction and a cause of action to sue to enforce its subpoena, JA889-893; JA925-929; and (3) possessed constitutional authority to compel a former White House Counsel to testify about matters related to his duties as a close presidential advisor, JA937-964.

First, the district court held that Article III permitted it to adjudicate a suit brought by a House committee to resolve its institutional dispute with the President over subpoenaed testimony. The court treated the Committee's complaint as an ordinary subpoena-enforcement action "rais[ing] garden-variety legal questions that the federal courts address routinely." JA895-896; *see* JA875 (reciting "the well-established substantive legal standards that pertain to subpoenas generally"). The court acknowledged that "it appears to be true

that for two hundred years after the Founding, lawsuits between the Congress and the Executive branch did not exist, even though disputes between the Legislative and Executive Branches over congressional requests for information have arisen since the beginning of the Republic." JA899 (quotation marks omitted). Nevertheless, the court dismissed as an "odd idea . . . appear[ing] nowhere in the annals of established constitutional law" that "federal courts' indisputable power to adjudicate questions of law evaporates if the requested pronouncement of law happens to occur in the context of a dispute between branches." JA909 (emphasis omitted).

According to the district court, "[w]hat matters from the standpoint of evaluating the Committee's Article III standing is that the Judiciary Committee has alleged an actual and concrete injury to its right to compel information (like any other similarly situated subpoena-issuing plaintiff)." JA923; *see* JA917. The court deemed irrelevant that the Committee was not asserting an injury to a private right to information, but rather an institutional injury to exercising its legislative functions. JA916, JA936.

Second, the district court concluded that it had statutory subject-matter jurisdiction to entertain the Committee's suit. It reasoned that "federal courts routinely exercise subject-matter jurisdiction over subpoena-enforcement claims under 28 U.S.C. § 1331." JA889. It held that the Committee could

invoke that general statute even though Congress has enacted a specific but limited grant of jurisdiction for congressional subpoena enforcement—28 U.S.C § 1365, which applies only to Senate (not House) subpoenas, and which explicitly carves out subpoena-enforcement actions against executive officials asserting governmental privileges. JA892-893. The court emphasized that "redundancies across statutes . . . are not unusual events in drafting," and concluded that the "chronology of events surrounding the enactment of section 1365" explained why its limitations are negated by Section 1331. *Id.*

The district court further ruled that the Committee had a cause of action to enforce its subpoena. It asserted that "Article I of the Constitution is all the cause that a committee of Congress needs to seek a judicial declaration from the court regarding the validity and enforceability of a subpoena that it has allegedly issued in furtherance of its constitutional power of inquiry." JA925. The court alternatively ruled that the Declaratory Judgment Act authorized the Committee's suit. JA928.

Finally, on the merits, the district court held that Congress's implied constitutional authority to issue testimonial subpoenas permits the Committee to compel testimony by a former White House Counsel on matters related to his duties as a close presidential advisor. The court again relied on the district court opinion in *Miers*, even asserting that "*Miers* is precedential with respect to

the merits." JA939. The court rejected the decades-old position of the Department's Office of Legal Counsel, spanning multiple administrations of both parties, that Congress lacks authority to demand such testimony in light of the separation-of-powers concerns for the Presidency. JA945-950; *see* JA966 (rejecting what the court described as "[f]ifty years of say so within the Executive branch"). In the court's view, close presidential aides have no right to "play a special trump card" to avoid compelled testimony. JA954. And the court held that this was especially so for former advisors, because the "trump card should, at most, be a raincheck, and not [a] lifetime pass." JA956. The court proclaimed that "Presidents are not kings." JA962.

The district court issued a declaratory judgment stating that McGahn "is not immune from compelled congressional process, and that he had no lawful basis for refusing to appear for testimony pursuant to the duly issued subpoena issued to him by the Committee." JA967. It also enjoined McGahn "to appear before the Committee." JA968.

The Department appealed and sought a stay of that order. This Court granted an administrative stay and set the case for expedited briefing and argument. Order (Nov. 27, 2019).

SUMMARY OF ARGUMENT

I. The Committee lacks Article III standing to sue to enforce a congressional subpoena demanding testimony from an individual on matters related to his duties as an Executive Branch official. In *Raines v. Byrd*, 521 U.S. 811 (1997), the Supreme Court established that a plaintiff must identify both a dispute "traditionally thought to be capable of resolution through the judicial process" and also a "concrete and particularized" injury. *Id*. at 819-20. Although the history of interbranch disputes goes back centuries, there is no tradition of resolving such disputes through interbranch litigation in federal court rather than interbranch accommodation in the political process. And unlike ordinary plaintiffs asserting a concrete personal injury from the alleged impairment of a private right to information, the Committee asserts only an abstract and attenuated institutional injury to the House's exercise of its official functions. By insisting that the Committee should be treated the same as a private party asserting a right to information, the district court flouted the decisions of the Supreme Court and this Court, as well as the separation-of-powers principles underlying them.

II. In any event, this Court need not decide whether Article III forecloses the Committee's suit, because Congress itself has foreclosed civil enforcement of House subpoenas. In 28 U.S.C. § 1365(a), Congress provided

district courts only with limited subject-matter jurisdiction over suits by the Senate or its committees to enforce testimonial subpoenas against persons not objecting based on their service as federal executive officials. Congress thus has declined to provide jurisdiction for House suits to enforce testimonial subpoenas against persons like McGahn as to whom the Executive Branch has asserted a governmental objection. The district court erred by circumventing this limitation through the general federal-question statute, 28 U.S.C. § 1331. Where a general jurisdictional authorization and a more limited, specific authorization exist side-by-side, the requirements of the latter must be met or they would be rendered nullities. Regardless, Congress also has not provided the Committee with a cause of action to enforce its subpoena. The district court held that an implied cause of action exists under the Constitution itself, but that is directly contrary to the Supreme Court's holding that the "[a]uthority to exert the powers of the [House] to compel production of evidence differs widely from authority to invoke judicial power for that purpose." *Reed v. Commissioners of Delaware Cty.*, 277 U.S. 376, 389 (1928).

III. Although this Court should not reach the merits because of the numerous and independent threshold defects, the Committee's subpoena purporting to compel McGahn's testimony is constitutionally invalid. The House's subpoena power is implied under the constitutional structure, and that

structure bars extending this incidental power to compel testimony from a former White House Counsel on matters related to his duties as a close presidential advisor. Such an extension would be a dramatic departure from historical tradition, and the burdens imposed by such a subpoena would impede the President's necessary reliance on his immediate assistants in exercising his Article II powers and duties. The district court's contrary reasoning ignores the lack of historical tradition for the Committee's novel use of its implied power and minimizes the serious separation-of-powers issues that arise when Congress seeks to enlist the Judiciary to compel testimony from the President's close advisors.

STANDARD OF REVIEW

This Court reviews a district court's "grant and denial of summary judgment *de novo*." *Mayo v. Reynolds*, 875 F.3d 11, 19 (D.C. Cir. 2017).

ARGUMENT

I. The Committee Lacks Article III Standing To Seek Judicial Resolution Of This Interbranch Dispute

"No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). That limitation is designed "to prevent the judicial process from being used to usurp the powers of the political branches." *Id.*

Article III standing "requires, among other things, that the plaintiff have suffered 'an invasion of a legally protected interest which is . . . concrete and particularized' *and* that the dispute is 'traditionally thought to be capable of resolution through the judicial process.'" *Raines v. Byrd*, 521 U.S. 811, 819 (1997) (emphasis added; citations omitted); *FEC v. Akins*, 524 U.S. 11, 24 (1998) (Article III requires the "concrete specificity that characterized those controversies which were the traditional concern of the courts at Westminister"). Because "the law of Art. III standing is built on a single basic idea—the idea of separation of powers"—the inquiry is "especially rigorous" in suits involving the rights and duties of the political branches of the federal government. *Raines*, 521 U.S. at 819.

Here, the Committee fails to satisfy these bedrock requirements of Article III standing. *First*, despite a history of interbranch informational disputes dating back to President Washington, there is no tradition of resolving such disputes through legal rulings by the Judiciary rather than through the give-and-take of the political process. *Second*, unlike plaintiffs asserting a concrete personal injury from the alleged impairment of a private right to information, the Committee asserts merely an abstract and attenuated institutional injury to the House's exercise of its official functions. *Third*, by insisting on adjudicating this interbranch dispute notwithstanding the

Committee's failure to satisfy these standing requirements, the district court seriously undermined the separation of powers. *Finally*, the court's insistence that the Committee should be treated no differently than a private party asserting a right to information fundamentally misunderstands Article III's requirements.

A. This interbranch dispute over information is not traditionally amenable to judicial resolution

In *Raines*, the Supreme Court held that Members of Congress lacked Article III standing to bring a claim that the Line Item Veto Act unconstitutionally expanded the President's power and divested them of their role in repealing legislation. 521 U.S. at 816, 829-30. The Court emphasized that "historical practice . . . cut against" the Members' standing, because "[i]t is evident from several episodes in our history that in analogous confrontations between one or both Houses of Congress and the Executive Branch, no suit was brought on the basis of claimed injury to official authority or power." *Id.* at 526.

For example, several Presidents objected to the constitutionality of the Tenure of Office Act of 1867—which restricted the power of the President to remove Senate-confirmed officers—but "it occurred to [none of them] that they might challenge the Act" even though it caused a "diminution of [their] official power." *Raines*, 521 U.S. at 826-27. Conversely, neither Congress nor any

member thereof "challenged the validity of President Coolidge's pocket veto" of an enacted bill, even though his action prevented them from trying to override his veto. *Id.* at 828. In both situations, the legal questions were not addressed by the Judiciary until persons with private interests at stake initiated litigation that required courts to decide the questions in the course of resolving the dispute between the parties. *Id.* at 827-28. Because courts adjudicated these constitutional questions only within the confines of a concrete controversy involving private rights and obligations, they avoided being "improperly and unnecessarily plunged into the bitter political battle being waged between the President and Congress." *Id.* at 827.

These principles apply with equal force to interbranch disputes over information. Confrontations involving congressional requests for executive information have existed since the beginning of the Republic. 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. *Nixon v. Sirica*, 487 F.2d 700, 733-34 (D.C. Cir. 1973) (en banc) (MacKinnon, J., concurring in part and dissenting in part). "Washington rejected the demands of Congress" for that information "squarely on the ground of separation of powers." *Id.* at 770 (Wilkey, J., dissenting). Other Presidents, including John

Adams, Thomas Jefferson, James Monroe, Andrew Jackson, John Tyler, James Polk, Millard Fillmore, James Buchanan, Andrew Johnson, Ulysses Grant, Benjamin Harrison, Grover Cleveland, William McKinley, Theodore Roosevelt, Calvin Coolidge, Herbert Hoover, and Franklin Roosevelt all followed Washington's precedent and withheld information requested by Congress. *Id.* at 733-36 & n.9 (MacKinnon, J., concurring in part and dissenting in part); Corwin, *The President: Office and Powers 1787-1957*, at 110-11 (4th ed. 1957); *History of Refusals by Executive Branch Officials To Provide Information Demanded by Congress*, 6 Op. O.L.C. 751, 752-71 (1982). Not once in that history did Congress ask a federal court to referee the dispute, much less did a court do so and declare a winner. Instead, all such contests were resolved by "political struggle and compromise." *See Barnes v. Kline*, 759 F.2d 21, 55 (D.C. Cir. 1984) (Bork, J., dissenting), *vacated sub nom. Burke v. Barnes*, 479 U.S. 361 (1987).

The history is the same in the specific context of disputes concerning congressional demands for testimony by close presidential advisors. Although such extraordinary demands are of more modern vintage, they have been made for over seventy years. The first "outright refusal" of a presidential advisor to appear before Congress "apparently occurred" in 1948, when a House subcommittee subpoenaed an Assistant to the President to testify about his

communications with President Truman. *Testimonial Immunity Before Cong. of the Former Counsel to the President*, 43 Op. O.L.C. ___, 2019 WL 2315338, at *5 (May 20, 2019) (*Testimonial Immunity Op.*). Two decades later, the Johnson Administration refused a Senate request for testimony by an Associate Special Counsel to the President related to a Supreme Court nomination. *Id.* at *6. Similar disputes over demands for testimony by senior presidential advisors have routinely arisen across Administrations, regardless of political party. *Id.* at *6-8. And each Administration has taken the position—unchallenged by Congress in court until 2007—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 the district court in *Miers* departed from that historical understanding, this Court stayed that ruling given the "potentially great significance for the balance of power between the Legislative and Executive Branches," 542 F.3d at 911, and the case ultimately settled without appellate resolution.

In sum, although "[t]here would be nothing irrational about a system that granted standing" in such interbranch disputes, "it is obviously not the regime that has obtained under our Constitution to date," which "contemplates a more restricted role for Article III courts." *Raines*, 521 U.S. at 828. That "'long settled and established practice is a consideration of great

weight in a proper interpretation of constitutional provisions' regulating the relationship between Congress and the President." *NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014).

B. The Committee asserts an abstract and attenuated institutional injury rather than a concrete personal injury

In rejecting the standing of the legislative plaintiffs in *Raines*, the Supreme Court also reasoned that they were asserting an abstract institutional injury rather than a concrete personal injury. 521 U.S. at 821, 825-26, 829-30. The court emphasized that a "key" defect was the plaintiffs' failure to allege "*personal injury*." *Id.* at 818-19. The legislators could not "claim that they have been deprived of something to which they personally are entitled—such as their seats as Members of Congress" and a "consequent loss of salary." *Id.* at 821. Rather than the "loss of any private right," they were asserting only "a type of institutional injury (the diminution of legislative power)." *Id.*

Raines noted that the Court had only ever "upheld standing for legislators (albeit *state* legislators) claiming an institutional injury" in "one case." 521 U.S. at 821. In *Coleman v. Miller*, 307 U.S. 433 (1939), a bloc of Kansas Senators comprising half the Senate brought suit in state court contending that their votes in the legislature, which were enough to reject a proposed federal constitutional amendment, had been "completely nullified" through an improper voting procedure that ratified the amendment. *See Raines*,

521 U.S. at 821-23. *Raines* explained that *Coleman* stands—"at most"—for "the proposition that 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." *Id.* at 823. And the Court held that the "abstract dilution of institutional legislative power" attributable to the Line Item Veto Act fell well short of the absolute "vote nullification" in *Coleman*. *Id.* at 825-26. Accordingly, the Court had no need to decide whether *Coleman* should extend to a suit "brought by federal legislators" in light of the additional "separation-of-powers concerns" presented. *Id.* at 824 n.8.

Since *Raines*, the Supreme Court has upheld the standing of a state legislature asserting the institutional injury that it had been stripped of its authority under the U.S. Constitution to draw congressional districts by a voter initiative vesting redistricting power in an independent commission. *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2665 (2015). But much like in *Coleman*, the state legislature's institutional injury was that it had been "*permanently* deprived" of a legislative right. *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1954 (2019); *see Campbell v. Clinton*, 203 F.3d 19, 22-23 (D.C. Cir. 2000) (holding that "the key to understanding the [*Raines*] Court's treatment of *Coleman* and its use of the

word nullification" is that the *Coleman* plaintiffs "had no legislative remedy"); *Raines*, 521 U.S. at 829 (noting the plaintiffs there retained "an adequate remedy" through legislative means). And *Arizona State Legislature* expressly admonished that "a suit between Congress and the President would raise separation-of-powers concerns absent" there. 135 S. Ct. at 2665 n.12. Of course, unlike components of the government asserting only institutional harms to themselves, the sovereign itself has standing to sue file suits, brought by authorized executive officers, to redress the harm that it suffers from violations of federal law by third parties. *See In re Debs*, 158 U.S. 564, 583 (1895); *Bethune-Hill*, 139 S. Ct. at 1951.

Under these precedents, the Committee cannot establish an injury that "is personal, particularized, concrete, and otherwise judicially cognizable." *Raines*, 521 U.S. at 820. The Committee alleges that McGahn's refusal to testify "depriv[es] it of a witness and information that are essential to its investigation, *thereby impeding the Judiciary Committee's ability to facilitate the House's fulfillment of its Article I functions*." JA17 (emphasis added). Those functions, the Committee alleges, "include the most urgent duty the House can face: determining whether to approve articles of impeachment." *Id.*; *see id.* (alleging that McGahn's absence "is impeding the Judiciary Committee in its ability to assess the need for remedial legislation and to conduct oversight").

Thus, as in *Raines*, the Committee does not and could not claim that either it or its members "have been deprived of something to which they *personally* are entitled" or have suffered the "loss of any private right." 521 U.S. at 821. Unlike cases where a private party "fails to obtain information which must be publicly disclosed pursuant to a statute," *Akins*, 524 U.S. at 21, the Committee is asserting solely "a type of institutional injury (the diminution of legislative power)," *Raines*, 521 U.S. at 821. In particular, the Constitution does not "expressly invest[] either house with power to make investigations and exact testimony" for their own sake, but the Supreme Court has held that "this power is so far incidental to the legislative function as to be implied," "to the end that [each House] may exercise its legislative function advisedly and effectively." *McGrain v. Daugherty*, 273 U.S. 135, 161 (1927); *accord id.* at 174 ("the power of inquiry . . . is an essential and appropriate auxiliary to the legislative function"). Indeed, "[i]nvestigations conducted solely for the personal aggrandizement of the investigators" would be "indefensible." *Watkins v. United States*, 354 U.S. 178, 187 (1957).

The Committee's lack of standing follows *a fortiori* from *Raines*. There, the plaintiffs alleged that they had a personal interest in "maintaining the effectiveness of their votes"—the core legislative power expressly granted by the Constitution—but the Court held that even this was only an "abstract

dilution of institutional legislative power" that failed to satisfy Article III. 521 U.S. at 825-26. Here, the Committee alleges only an impairment of its "incidental" authority to obtain information potentially relevant to House votes, and this attenuated institutional injury to an "auxiliary" power is necessarily more abstract. In any event, this Court should not allow federal legislators to base standing on institutional injuries *at all* given the heightened separation-of-powers concerns presented. *See id.* at 524 n.8; *Arizona State Legislature*, 135 S. Ct. at 2665 n.12.

C. The district court's adjudication of this dispute between the political branches undermines the separation of powers

The resolution of this dispute is "of potentially great significance for the balance of power between the Legislative and Executive Branches." *Miers*, 542 F.3d at 911. In flouting *Raines*, the district court damaged the "separation of powers" principles on which "Article III standing is built." 521 U.S. at 820. Indeed, the court's insistence on deciding the validity of the subpoena here threatens—by anointing a winner, declaring a loser, and awarding coercive relief—permanent harm to both the relationship between the political branches and the Judiciary's relationship with those branches and the public.

First, the district court's ruling "provides a blueprint for extensive expansion of the legislative power" by allowing Congress to "arrogate power

to itself." *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 500 (2010). The Constitution grants the Legislative Branch specific, yet "abundant[,] means to oversee and control" the Executive Branch, *INS v. Chadha*, 462 U.S. 919, 955 n.19 (1983), and seeking judicial relief for perceived harms inflicted by the Executive Branch is not one of those means.

Among other tools, Congress instead can enact ameliorative or restraining legislation, *see McGrain*, 273 U.S. at 173-74, reduce or eliminate appropriations as a deterrent, *see Barenblatt v. United States*, 360 U.S. 109, 111 (1959), make a case to the public to redress at the ballot box any perceived injury, *see id.* at 132-33, or even consider whether to remove officials itself, U.S. Const. art. I, § 2, cl. 5. Contrary to the district court's denigration of such political tools (JA932), "Congressional control over appropriations and legislation is an excellent guarantee that the executive will not lightly reject a congressional request for information." *Sirica*, 487 F.2d at 778 (Wilkey, J., dissenting). Indeed, because the Legislative Branch may employ these means of "political self-help" if dissatisfied with the Executive Branch's response to a congressional investigation—as it has done for two hundred years without the Republic falling—it "may not challenge the President's [actions] in federal court." *Campbell*, 203 F.3d at 23-24; *contra* JA931 (district court holding, despite *Campbell*, that Article III standing does "not include a 'last resort'

requirement" for legislators to invoke "political" remedies). In short, the "[a]uthority to exert the powers of the [House] to compel production of evidence differs widely from authority to invoke judicial power for that purpose." *Reed v. Commissioners of Delaware Cty.*, 277 U.S. 376, 389 (1928).

Second, and conversely, the district court's ruling impairs the Executive Branch "in the performance of its constitutional duties." *Free Enterprise Fund*, 561 U.S. at 500. Even if the House and Senate may "inform themselves through committees of inquiry on subjects that fall within their legislative competence and to hold in contempt recalcitrant witnesses before such committees," a leading constitutional scholar long ago explained, this "prerogative of Congress 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." Corwin, *supra*, at 116.

This reflects the structural principle that the traditional means of enforcing congressional subpoenas is through contempt prosecutions brought by the Executive. *See McGrain*, 273 U.S. at 167. It violates Article II to vest in a legislative body the core executive "responsibility for conducting civil litigation in the courts of the United States [to] vindicat[e] public rights." *Buckley v. Valeo*, 424 U.S. 1, 140 (1976) (per curiam). Indeed, even when

Congress has previously perceived a potential conflict of interest in the President's control of federal-government litigation, Congress did not seek to enforce the law itself, but rather created procedures for an independent counsel within the Executive Branch. *See Morrison v. Olson*, 487 U.S. 654, 659-60 (1988).

Finally, the district court's ruling threatens to undermine the Judiciary itself. To be sure, "[i]t is emphatically the province and duty of the judicial department to say what the law is" *when* "apply[ing] [a] rule to particular cases" between aggrieved parties otherwise properly before a court. *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 177 (1803). But interbranch disputes over institutional prerogatives are "far from the model of the traditional common-law cause of action at the conceptual core of the case-or-controversy requirement," and judicial intervention in such matters "risk[s] damaging the public confidence that is vital to the functioning of the Judicial Branch[,] . . . by embroiling the federal courts in a power contest nearly at the height of its political tension." *Raines*, 521 U.S. at 833 (Souter, J., concurring). Courts also would inevitably be drawn into resolving interbranch privilege disputes even though "constitutional confrontation[s] between the . . . branches" occasioned by assertions of executive privilege "should be avoided whenever possible." *Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 389-90 (2004).

The public's esteem for the Judiciary is a direct result of its remove from politics; the district court's sweeping assertion of judicial power poses a clear threat to that vital distance from the political fray.

Moreover, if interbranch informational suits were permitted, "the system of checks and balances" meant to govern the relations between the Legislative and Executive Branches would quickly be "replaced by a system of judicial refereeship." *Moore v. U.S. House of Representatives*, 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia, J., concurring in result). Filing a complaint in federal court is far easier than mustering the votes necessary in Congress to take legislative action in response to executive objections to subpoenas. Indeed, the *day after* the district court issued its decision here, a House committee filed suit seeking to enforce unrelated subpoenas issued to the Attorney General and the Secretary of Commerce. *See Committee on Oversight & Reform v. Barr*, No. 19-3557 (D.D.C.). If this Court affirms the district court here, courts in this Circuit will likely be deluged with cases raising "nerve-center constitutional questions" about the scope of congressional subpoena power and executive privilege. *United States v. AT&T*, 551 F.2d 384, 394 (D.C. Cir. 1976).

D. The district court's contrary reasoning is fundamentally misguided

The district court entirely failed to grapple with the unique Article III problems posed by interbranch litigation. The court recognized that "it

appears to be true that for two hundred years after the Founding lawsuits between the Congress and the Executive branch did not exist." JA899 (quotation marks omitted). But the court suggested that the "few recorded instances" of Congress suing the Executive to enforce its subpoenas merely reflect that "the Legislature has rarely needed such assistance," JA932, because the Executive branch has "wisely picked its battles" and "routinely consented to negotiate the terms of its performance," JA903-904. That is flatly inconsistent with the court's own acknowledgement that "disputes between the Legislative and Executive Branches over congressional requests for information have arisen since the beginning of the Republic." JA899; *see* pp. 17-19, *supra*.

The district court otherwise principally rested on the general point that "claims regarding the enforceability of a subpoena raise garden-variety legal questions that the federal courts address routinely." JA895-896. The court emphasized its view that "an injury-in-fact for Article III standing purposes is all but *assumed* in the myriad [private] subpoena-enforcement cases that are filed in federal courts with respect to civil actions every day." JA917. And the court further observed that private parties may sue to challenge congressional subpoenas, JA900-901, JA905-906, and that the United States may sue to

prevent States from undermining the federal government's sovereign right to issue subpoenas as authorized by federal law, JA917-918.[1]

Indeed, the court derided what it called "DOJ's odd idea that federal courts' indisputable power to adjudicate questions of law evaporates if the requested pronouncement of law happens to occur in the context of a dispute *between* branches," stating that it "appears nowhere in the annals of established constitutional law." JA909. And the court asserted that "[t]he Supreme Court has never suggested that the Judiciary has the power to perform its constitutionally assigned function *only* when it speaks to private citizens, or when it is called upon to resolve a legal dispute between a private citizen and one of the branches of government." *Id.*

That analysis reflects a remarkable misunderstanding of Article III. In *Marbury v. Madison*, the seminal case establishing judicial review, the Supreme Court admonished that "[t]he province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers,

[1] The court also noted that the Department has not contested the jurisdiction of the federal district court that empaneled the Special Counsel's grand jury to consider the Committee's application for an order disclosing certain grand jury materials. JA906-908. But that case arises in a completely different procedural posture. The court there has continuing jurisdiction to supervise matters concerning the grand jury it empaneled, and any "interested person" may make an application for disclosure of otherwise-secret grand jury materials. D.D.C. Crim. R. 57.6; Fed. R. Crim. P. 6(e)(3)(E).

perform duties in which they have a discretion." 5 U.S. at 170. In *Lujan v. Defenders of Wildlife*, the landmark modern precedent on Article III standing, the Supreme Court reaffirmed that "Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights." 504 U.S. 555, 577 (1992). And in *Raines v. Byrd*, the leading precedent on legislative standing, the Supreme Court explained that "[t]he standing inquiry focuses on whether the plaintiff is the proper party to bring this suit" and "often turns on the nature and source of the claim asserted." 521 U.S. at 818. *Raines* summarized the "restricted role for Article III courts" with the following proclamation: "The irreplaceable value of the power [of judicial review under *Marbury*] lies in the protection it has afforded the constitutional rights and liberties of individual citizens," "not [in] some amorphous general supervision of the operations of government." *Id.* at 829.

Given all this, the district court's insistence that the Committee's status as a legislative institution is *irrelevant* to Article III standing is indefensible. It is also directly contrary to the facts of *Raines* itself. As the dissent there observed, *private parties* suffer a traditional Article III injury when their right to vote is allegedly diluted, 521 U.S. at 837 (Stevens, J., dissenting), but the majority nonetheless held that the "abstract dilution of institutional legislative power" is insufficiently "concrete and particularized" to support legislative

standing, especially given the absence of historical precedent, *id.* at 819, 821, 825-26. Likewise, the *legal question* on which *Raines* refused to opine at the behest of members of Congress—the constitutionality of the Line Item Veto Act—was resolved the following year in a proper suit by private parties and a local government. *See Clinton v. City of New York*, 524 U.S. 417 (1998).

The district court suggested (JA924) that *Raines* was distinguishable because the institutional injury there was asserted by individual members of Congress rather than a Committee authorized to sue on behalf of the whole House, but that distinction is untenable. Again, *Raines* emphasized the need for a "*personal injury*," and it relied on the fact that "no suit was brought on the basis of claimed injury to official authority or power" during "several episodes in our history [involving] analogous confrontations between one or both Houses of Congress and the Executive Branch." 521 U.S. at 818, 826. For example, during "the bitter political battle being waged between [several] President[s] and Congress" over the Tenure of Office Act, it never "occurred" to any aggrieved President that he "might challenge the Act in an Article III court," *id.* at 827, notwithstanding that a *private* executive could challenge a federal law that unlawfully restricted his ability to fire subordinates. As the Chief Executive could not sue to protect his own institutional rights, the

Committee plainly cannot sue to protect the institutional rights of a single House of Congress.

Finally, the district court was wrong to suggest (JA897-898) that it was bound by this Court's precedent in *United States v. AT&T*, to hold that the Committee has standing to sue. That case involved a suit brought by the Executive Branch to enjoin a private company from complying with a congressional subpoena, not a suit brought by Congress against the Executive Branch. 551 F.2d at 385. While this Court later held that a Congressman authorized by the House to intervene on its behalf had standing to appeal, it did so only after the district court had quashed the subpoena. *See id.* at 391; *cf. Arizona State Legislature*, 135 S. Ct. at 2665. *AT&T* thus did not hold that the House has standing to challenge mere non-compliance with a still-extant subpoena. And particularly in light of the Supreme Court's intervening decision in *Raines*, there is no basis for extending *AT&T* to this interbranch dispute.

II. Congress Itself Has Foreclosed House Committees From Enforcing Subpoenas Through Civil Actions

Although the Article III defect is clear, this Court need not address it because the Committee's suit founders for an additional threshold reason—Congress itself deprived district courts of statutory subject-matter jurisdiction over suits by House committees to enforce subpoenas demanding testimony

from close presidential advisors on matters related to their duties as Executive Branch officials. *See Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430-31 (2007) (explaining that a court may choose among certain threshold nonmerits grounds when dismissing a case). Moreover, even if jurisdiction were to exist, Congress also has denied the Committee a cause of action to enforce its subpoena.

A. Congress deprived the district court of statutory subject-matter jurisdiction over suits brought by House committees to enforce subpoenas

1. Congress has enacted a specific, limited grant of subject-matter jurisdiction for the civil enforcement of congressional subpoenas, and it plainly does not encompass the Committee's suit. The statute, entitled "Senate actions," provides:

> (a) The United States District Court for the District of Columbia shall have original jurisdiction, without regard to the amount in controversy, over any civil action *brought by the Senate or any authorized committee or subcommittee of the Senate* to enforce . . . any subp[o]ena or order issued by [them] to any entity acting or purporting to act under color or authority of State law or to any natural person. . . . *This section shall not apply* to any action to enforce . . . any subp[o]ena or order issued to an officer or employee of the executive branch of the Federal Government acting within his or her official capacity, *except that this section shall apply* if the refusal to comply is based on the assertion of a personal privilege or objection and is not based on [the assertion of an authorized] governmental privilege or objection. . . .

28 U.S.C. § 1365(a) (emphasis added). The statute then authorizes the Senate (or an authorized committee or subcommittee) to make an application to enforce a covered subpoena, and lays out procedural rules for such civil actions. *Id.* § 1365(b); *see also* 2 U.S.C. §§ 288b(b), 288d (authorizing the Senate Legal Counsel to institute a civil action to enforce a subpoena under Section 1365 when so directed by the full Senate). Section 1365 is the only statute that specifically grants federal courts jurisdiction over civil actions to enforce congressional subpoenas, and it is facially inapplicable here, for two reasons.

First, Section 1365 "does not . . . include civil enforcement of subpoenas by the House of Representatives" at all. *Application of U.S. Senate Permanent Subcomm. on Investigations*, 655 F.2d 1232, 1238 n.28 (D.C. Cir. 1981). Notably, the omission of House subpoenas was intentional. The Senate had proposed a bill that would have conferred district-court jurisdiction to enforce subpoenas issued by the Senate and the House, but the House did not support the proposal. H.R. Rep. No. 95-1756, at 80 (1978). As the House Report explained, "[t]he appropriate committees in the House . . . have not considered the Senate's proposal to confer jurisdiction on the courts to enforce subp[o]enas of House and Senate committees." *Id.* Despite the House's reticence, "[t]he Senate . . . twice voted to confer such jurisdiction on the

courts and desire[d] . . . to confer jurisdiction on the courts to enforce Senate subp[o]enas." *Id.* Congress therefore passed, and the President signed, a version of the bill limited only to Senate subpoenas.

Second, as highlighted above, Section 1365(a) expressly provides that its grant of jurisdiction "shall not apply" to actions to enforce subpoenas against a federal executive official "acting within his or her official capacity" so long as the refusal to comply is based on an authorized "governmental privilege or objection." The Committee's subpoena here was issued to McGahn for testimony on matters related to his duties as White House Counsel, and his refusal to comply is based on an assertion of "governmental privilege or objection" by the President. Thus, even if the Senate had issued the identical subpoena to McGahn, Section 1365(a) still would not have conferred subject-matter jurisdiction.

In short, Congress has enacted a specific statute defining the jurisdiction of the district courts to entertain civil actions to enforce congressional subpoenas, but that statute does not extend here. Because "Congress has the constitutional authority to define the jurisdiction of the lower federal courts" as a statutory matter, once "the lines are drawn, limits upon federal jurisdiction . . . must be neither disregarded nor evaded." *Keene Corp. v. United States*, 508

U.S. 200, 207 (1993) (quotation marks omitted). The district court should have dismissed the complaint on this basis alone.

2. Instead, the district court located jurisdiction in the general federal-question statute, 28 U.S.C. § 1331, which provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." It reasoned that federal courts "routinely exercise subject-matter jurisdiction over disputes concerning subpoenas" under Section 1331, and they generally "assess their subject-matter jurisdiction on the basis of the claims that are presented, not on the identity of the parties." JA890, JA896-897. Regardless of whether that is generally true, however, it plainly is not true here. Subject-matter jurisdiction under Section 1365(a) expressly depends on which House of Congress is suing and what type of person has been subpoenaed. The district court erred in circumventing those specific party-based limitations by invoking the general federal-question jurisdiction statute.

The district court reasoned that "redundancies across statutes . . . are not unusual events in drafting" and it "must give effect" to each statute absent a "positive repugnancy" between them. JA893. But precisely such a repugnancy exists here. The court's invocation of Section 1331 not only makes Section 1365's specific jurisdictional grant superfluous, but renders Section

1365's specific jurisdictional limitations *nullities*. That is why, 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). As a result, "general grants of subject matter jurisdiction such as 28 U.S.C. § 1331" do not "control over the specific limitation of subject matter jurisdiction contained" in other provisions. *Gila River Indian Cmty. v. U.S. Dep't of Veterans Affairs*, 899 F.3d 1076, 1081 (9th Cir. 2018).

The district court, however, obscured the clear conflict between the statutes. To do so, it incorporated analysis (JA892-893) from *Committee on Oversight & Government Reform v. Holder*, 979 F. Supp. 2d 1 (D.D.C. 2013)—the only other post-*Raines* decision besides *Miers* to hold that a House committee may sue to enforce a subpoena against the Executive Branch. *Holder* concluded that "the chronology of events surrounding the enactment of section 1365" is the reason that its limitations have been negated by Section 1331. *Id.* at 18. In particular, the court observed that, when Section 1365 was enacted in 1978, Section 1331 had an amount-in-controversy requirement for suits against non-federal parties but not for suits against federal officials. The court thus reasoned that Congress limited Section 1365's grant of jurisdiction to

enforcement of Senate subpoenas against non-federal parties because jurisdiction already existed to enforce Senate subpoenas against federal executive officials under Section 1331. *See id.* at 18-19. That convoluted analysis is incorrect.

As a threshold matter, neither *Holder* nor the district court here explained why Congress in 1978 would have decided *to expressly carve out* suits to enforce (Senate) subpoenas against federal executive officials from Section 1365's specific jurisdictional grant merely because such suits purportedly already were covered by Section 1331's general jurisdictional grant. Nor did either of those courts explain why Congress also provided an express cause of action in Section 1365(b) to enforce *only* Senate subpoenas if it believed that jurisdiction also existed to enforce House subpoenas under Section 1331 rather than Section 1365(a). The simpler explanation is that Congress did all this because it was conferring jurisdiction only on the Senate and only for Senate subpoenas against non-federal parties.

More fundamentally, the 1996 amendments to Section 1365 refute *Holder*'s theory. In that year—well after Congress in 1980 had completely eliminated Section 1331's amount-in-controversy requirement, *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506 (2006)—Congress amended Section 1365 to make clear that a federal executive official's refusal to comply based upon a personal

(rather than governmental) privilege does *not* defeat jurisdiction. *See* Pub. L. No. 104-292, § 4, 110 Stat. 3459, 3460 (1996). That amendment would have been pointless if, as *Holder* reasoned, Section 1365's specific jurisdictional grant had become an anachronism because Section 1331's general jurisdictional grant already applied to *all* suits to enforce congressional subpoenas, regardless of whether a federal executive official was resisting a Senate subpoena based on personal or governmental privilege. Thus, in enacting the 1996 amendments, Congress necessarily treated Section 1365's specific jurisdictional grant to have displaced Section 1331's general jurisdictional grant. *See West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 100 (1991) (Statutory provisions should be construed "to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law."). Yet *Holder* and the district court here simply ignored the 1996 amendments to Section 1365.

Section 1365 likewise refutes the district court's assertion (JA897-898) that it was bound by *United States v. AT&T*, *supra*, to hold that Section 1331 confers jurisdiction over the Committee's suit. Again, *AT&T* did not involve a suit brought by Congress to enforce a subpoena, and its jurisdictional holding—that the United States could invoke Section 1331 to enjoin a private company from complying with a congressional subpoena—did not implicate

Section 1365 at all. 551 F.2d at 385, 389. In fact, *AT&T*, which was decided in 1976, *preceded* the enactment of Section 1365 in 1978, let alone the 1996 amendments. *AT&T* thus 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]

3. At a minimum, Section 1331 does not *unambiguously* confer jurisdiction over the Committee's suit in light of Section 1365. Accordingly, the constitutional-avoidance canon requires construing Section 1331 not to confer jurisdiction, because that statutory resolution will pretermit the "significan[t]" separation-of-powers questions the Committee's suit presents. *Miers*, 542 F.3d at 911; *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 466-67 (1989). If Congress truly wants to put courts in the middle of disputes between its committees and the Executive, it must say so clearly.

B. Congress denied House committees a cause of action to enforce their subpoenas

Even if this Court were to conclude that Article III and subject-matter jurisdiction exists, the Committee still lacks a cause of action to enforce its subpoena. Congress has provided an express cause of action to the Senate to

[2] The district court likewise erred by invoking an OLC opinion that predated the 1996 amendments to Section 1365 by a decade. JA891-892.

enforce its subpoenas (subject to Section 1365's jurisdictional limits). *See* pp. 34-35, *supra*. And Congress otherwise has authorized the Executive Branch to institute contempt proceedings to enforce congressional subpoenas. 2 U.S.C. § 192. But Congress has not authorized House committees to enforce any subpoenas, much less one seeking testimony concerning matters related to a close presidential advisor's duties as an Executive Branch official. The district court erred in holding that the Committee nevertheless has a right to sue.

1. The district court's primary rationale was that "Article I of the Constitution is all the cause that a committee of Congress needs" to bring suit, because "a committee of Congress's right to enforce its subpoenas is intrinsic to its constitutional authority to conduct investigations in the first place." JA925-926. That remarkable assertion is contrary to black-letter law.

As the Supreme Court explained almost a century ago, 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 (emphasis added). In *Reed*, the Senate had authorized a special committee to issue a subpoena, and the committee filed suit to enforce the subpoena under a jurisdictional grant covering "any officer [of the United States] authorized by law to sue." *Id.* at 386-87. Even though the Senate had authorized the committee "to do such other acts as may be necessary," the

Court held that this was insufficient to constitute authorization to sue. *Id.* at 388-89. The Court emphasized that the Senate's "established practice" was "to rely on its own powers" to issue subpoenas enforceable through contempt, rather than for it "to invoke the power of the Judicial Department." *Id.* at 389. Although the district court here tried to distinguish *Reed* by emphasizing the lack of congressional authorization there, JA928 n.23, that just underscores the court's error: *Reed*'s holding that the Senate committee was not "authorized by law to sue" necessarily means that *the Constitution itself* does not authorize a cause of action to enforce any authorized subpoena.

The district court was led astray (JA927) by its "repeated" misinterpretation of "*McGrain*'s conclusion . . . that 'the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function,' *McGrain*, 273 U.S. at 174." The point of the "process to enforce it" clause from *McGrain* was merely that Congress could go beyond voluntary requests and issue compulsory process enforceable through contempt. *See* 273 U.S. at 167-68. All the historical examples and precedent *McGrain* relied on to support Congress's implied "auxiliary" power involved the enforcement of subpoenas exclusively through contempt. *See id.* at 168-74. Indeed, *Reed* cited *McGrain* in reasoning that the Senate had not authorized suit because that would have been a "depart[ure] from its established usage." 277

U.S. at 388-89. In short, *McGrain* identifies no historical tradition supporting the notion that the House itself could seek judicial enforcement of its subpoenas—a dearth of tradition that is fatal to any argument that the right to sue is also "an essential and appropriate auxiliary to the legislative function." 273 U.S. at 174.

More generally, the Supreme Court has admonished that, "[w]hen a party seeks to assert an implied cause of action under the Constitution itself," "separation-of-powers principles are . . . central to the analysis," and thus, "most often," Congress "should decide" whether to permit a suit. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017); *see Armstrong v. Exceptional Child Ctr.*, 135 S. Ct. 1378, 1383 (2015) (Supremacy Clause "certainly does not create a cause of action," as it "is silent regarding who may enforce federal laws in court"). To be sure, even absent a statutory cause of action, a court's "traditional equitable powers" may authorize relief in some circumstances. *Abbasi*, 137 S. Ct. at 1856; *see Armstrong*, 135 S. Ct. at 1384. But even there, Congress's failure to act is a significant factor in the analysis, and Congress's denial of a cause of action here should be dispositive.

A court's equitable powers remain "subject to express and implied statutory limitations." *Armstrong*, 135 S. Ct. at 1385. And where, as here, Congress has had "specific occasion to consider" the means for enforcing

congressional subpoenas, *Abbasi*, 137 S. Ct. at 1865, its decision to authorize various other methods while denying the Committee an express cause of action "suggests that Congress intended to preclude" suit by the Committee, *Armstrong*, 135 S. Ct. at 1385. Moreover, Congress's grant of equity jurisdiction to the federal courts is limited to the relief that "was traditionally accorded by courts of equity," and thus a "substantial expansion of past practice" is "incompatible with [the courts'] traditionally cautious approach to equitable powers, which leaves . . . to Congress" such policy judgments. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S.308, 318-19, 329 (1999). Given the manifest separation-of-powers concerns here, Congress must decide whether to provide the Committee with the unprecedented right to sue to enforce a congressional subpoena seeking testimony from an individual on matters related to his duties as an Executive Branch official serving as a close advisor to the President.

2. The district court alternatively held that, "[i]f Congress does somehow need a statute to authorize it to file a lawsuit to enforce its subpoenas, the "the Declaratory Judgment Act plainly serves that purpose." JA928. But that is also wrong, for two reasons.

First, the Declaratory Judgment Act, 28 U.S.C. § 2201, does not substantively "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). In other words, the "availability of relief" under the Act "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 Act thus cannot provide the Committee with a cause of action if one is otherwise lacking. Second, Section 1365(a) expressly authorizes the Senate and its committees, but not the House and its committees, "to secure a declaratory judgment concerning the validity of" covered subpoenas. That specific and limited cause of action displaces any general cause of action created by the Declaratory Judgment Act. *See* pp. 34-37, *supra*.

3. In all events, relief under equity jurisdiction or the Declaratory Judgment Act is not appropriate in these circumstances. Such relief is not available as a matter of right, because it rests in courts' discretion. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008); *Wilton v. Seven Falls Co.*, 515 U.S. 277, 281-82 (1995). And as this Court explained in *Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999), even pre-*Raines* decisions finding legislator standing under Article III still denied relief on "equitable discretion" grounds "because of the separation of powers problems" the suits created. *Id.*

at 114-15 (discussing cases). That disposition would be especially warranted here, given Congress's failure to clearly grant the Committee subject-matter jurisdiction and a cause of action to sue.

III. The Committee Lacks The Constitutional Authority To Subpoena McGahn

Were this Court to reach the merits, the Committee's subpoena is constitutionally invalid. The district court erred in rejecting the Executive Branch's longstanding and consistent position that close advisors to the President may not be compelled to testify before Congress.

A. The House's implied subpoena authority may not be constitutionally extended to compel testimony from a former White House Counsel on matters related to his duties as a close presidential advisor

Whether a close presidential advisor is constitutionally immune from compelled congressional testimony and whether the House has the implied constitutional power to compel that testimony are flip sides of the same coin. *Cf. New York v. United States*, 505 U.S. 144, 159 (1992) (same for scope of Congress's commerce power and States' Tenth Amendment rights). Viewed from either direction, the result is that such testimony may not be compelled. That is why the "Department of Justice has repeatedly" stated "for nearly five decades" that "Congress may not constitutionally compel the President's senior advisers to testify about their official duties." *Testimonial Immunity Op.*,

supra, at *1; *see also, e.g.*, *Immunity of the Assistant to the President & Dir. of the Office of Political Strategy & Outreach from Cong. Subpoena*, 38 Op. O.L.C. ___, 2014 WL 10788678, at *1 (July 15, 2014) (*Assistant Immunity Op.*) (repeating this position with respect to the Director of the White House's Office of Political Strategy and Outreach during the Obama Administration). Although Presidents have occasionally allowed close advisors to testify before Congress in the spirit of accommodation and compromise, *see Testimonial Immunity Op.*, *supra*, at *5, at no time in the Nation's history has an immediate presidential advisor given testimony before Congress pursuant to a subpoena enforced by an Article III court.

As discussed, the Constitution does not expressly grant the House any power to issue subpoenas. Instead, the Supreme Court has held that the subpoena power, in general, "is an essential and appropriate auxiliary to the legislative function," based on longstanding "history" that formed "a practical construction" of Article I. *McGrain*, 273 U.S. at 174; *see id.* at 160-61 (concluding that the general subpoena power "is so far incidental to the legislative function as to be implied"). Because the subpoena power is an implied power, however, courts should exercise caution in determining its scope. Even where Congress as a whole exercises its implied powers under the Necessary and Proper Clause, U.S. Const. art. I, § 8, cl. 18, the legislation it

enacts may not "undermine the authority and independence of one or another coordinate Branch," *Mistretta v. United States*, 488 U.S. 361, 382 (1989), or "impair another [Branch] in the performance of its constitutional duties," *Cheney*, 542 U.S. at 382. Any contrary legislation is "an act of usurpation" that "deserves to be treated as such." *Cf. Printz v. United States*, 521 U.S. 898, 924 (1997). That principle is all the more applicable to the action of a single House, which is not subject to structural checks such as bicameralism and presentment that "protect the Executive Branch from Congress" and ensure "full study and debate." *Chadha*, 462 U.S. at 951.

Here, extending the exercise of this implied general power to the President and his immediate advisors is neither an essential nor an auxiliary function. It has no support in historical or traditional practice. And if the Founders had intended to authorize the House to take the extraordinary step of bringing the President or his immediate advisors before Congress for compelled testimony, they surely would have spelled that out expressly. *Cf. NFIB v. Sebelius*, 567 U.S. 519, 559 (2012) (Roberts, C.J.) (implied powers under the Necessary and Proper Clause are "incidental" and cannot be "great substantive and independent powers"); *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992) (refusing to construe the Administrative Procedure Act to apply to the President absent an "express statement by Congress").

Moreover, judicially enforceable congressional subpoenas demanding testimony from the President or his immediate advisors would encroach on the President's ability to carry out his constitutional prerogatives under Article II. "The President occupies a unique position in the constitutional scheme." *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982). The Constitution itself "entrust[s] [the President] with supervisory and policy responsibilities of utmost discretion and sensitivity." *Id.* at 750. And it is he alone who is vested with the executive power and "charged constitutionally to take Care that the Laws be faithfully executed." *Id.* (quotation marks omitted). Owing to the President's unique constitutional status, the separation of powers protects his office from encroachments on its independence and autonomy, *see Kendall v. United States*, 37 U.S. (12 Pet.) 524, 610 (1838); *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1867); *Cheney*, 542 U.S. at 385, and on the confidentiality of his communications with his close advisors, *see United States v. Nixon*, 418 U.S. 683, 705-06, 708 (1974)*; In re Sealed Case*, 121 F.3d 729, 742 (D.C. Cir. 1997); *Association of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 909-10 (D.C. Cir. 1993).

Congress thus has no ability to compel the President's testimony. "[A]llowing Congress to subpoena the President to appear and testify would 'promote a perception'"—and, eventually, the expectation—"'that the

President is subordinate to Congress, contrary to the Constitution's separation of governmental powers into equal and coordinate branches.'" *Testimonial Immunity Op.*, *supra*, at *3. The President would no longer be the head of "a separate and wholly independent Executive Branch" who "is responsible not to the Congress but to the people." *Bowsher v. Synar*, 478 U.S. 714, 722 (1986). Indeed, the Constitution expressly recognizes only a limited presidential obligation to report to Congress "from time to time" regarding "the State of the Union," U.S. Const. art. II, § 3, which is in significant tension with the notion that Congress is implicitly authorized to compel the President's testimony whenever it pleases.

Nor may Congress circumvent that limit on its implied investigative authority and compel the President's close advisors to appear and testify instead. "[T]he President alone and unaided could not execute the laws," *Myers v. United States*, 272 U.S. 52, 117 (1926), and must rely on the advice and assistance of close advisors in the formulation of policy and execution of his constitutional duties, *Assistant Immunity Op.*, *supra*, at *2; *see also Sealed Case*, 121 F.3d at 750. Unlike Cabinet Secretaries who administer agencies created and regulated by Congress, close presidential advisors are unique because they exclusively assist the President in exercising his Article II functions. *Cf. Kissinger v. Reporters Comm. For Freedom of the Press*, 445 U.S. 136, 156 (1980)

("agency" under the Freedom of Information Act does not encompass "the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President"); *AAPS*, 997 F.2d at 909-10 (construing the requirements of the Federal Advisory Committee Act not to apply to a task force chaired by the First Lady because doing so could encroach on the President's right to confidential communications).

Precluding Congress from compelling testimony from immediate advisors is therefore necessary to preserve the autonomy and confidentiality of presidential decisionmaking that are essential to the effective functioning of the Presidency. Allowing Congress to compel close advisors' testimony would provide congressional committees with the ability to harass advisors in an effort to influence their conduct, retaliate against the President and his advisors for actions the committee disliked, or embarrass and weaken the President for partisan gain. *Testimonial Immunity Op.*, *supra*, at *2. Committees could also attempt to exert undue influence over the President's decisionmaking by using questioning to expose sensitive ongoing matters or to demand justifications for Executive actions and decisions, thus risking significant congressional interference with the President's ability to discharge his duties and promoting a perception of presidential subordination to Congress. *Assistant Immunity Op.*, *supra*, at *2.

In these respects, as Attorney General Reno explained, "[s]ubjecting a senior presidential advisor to the congressional subpoena power would be akin to requiring the President himself to appear before Congress on matters relating to the performance of his constitutionally assigned executive functions." *Assertion of Executive Privilege with Respect to Clemency Decision*, 23 Op. O.L.C. 1, 5 (1999). Congress's implied subpoena power does not permit it to wield such authority and influence over the President's exercise of his constitutional duties.

The threat of compelled testimony also would impede the President's access to the sound and candid advice required for effective decisionmaking. "If presidential advisors must assume they will be held to account publicly for all approaches that were advanced, considered but ultimately rejected, they will almost inevitably be inclined to avoid serious consideration of novel or controversial approaches to presidential problems," *Sealed Case*, 121 F.3d at 750, to the detriment of "the effectiveness of the executive decision-making process," *id.* at 742. Subjecting the President's closest advisors to a "wide range of unanticipated and hostile questions about highly sensitive deliberations" would also create a substantial risk of inadvertent or coerced disclosure of confidential information. *Assistant Immunity Op.*, *supra*, at *3.

These same considerations led the Supreme Court to extend Speech or Debate Clause immunity, U.S. Const. art. I, § 6, cl. 1, to congressional aides to ensure that Members can effectively perform their legislative duties. *Gravel v. United States*, 408 U.S. 606, 616-17 (1972). Similarly, the Court has suggested that, for presidential aides "entrusted with discretionary authority in such sensitive areas as national security or foreign policy, absolute immunity [from civil damages suits] might well be justified to protect the unhesitating performance of functions vital to the national interest." *Harlow v. Fitzgerald*, 457 U.S. 800, 812 & n.19 (1982). The reasoning of *Gravel* and *Harlow* confirms that the President's immediate advisors share in his absolute immunity from compelled congressional testimony.

The White House Counsel plainly counts as a close presidential advisor. He advises the President "on all aspects of Presidential activity," including national security and foreign policy, and his responsibilities also include coordinating the President's agenda with the rest of the Executive Branch and negotiating with Congress on the President's behalf. JA712-713; *see Miers*, 558 F. Supp. 2d at 105 (acknowledging that the White House Counsel is a "senior presidential advisor[]").

It makes no difference that McGahn no longer serves as White House Counsel. Even after service as an immediate presidential advisor ends, "the

risk to the separation of powers and to the President's autonomy posed by" the advisor's compelled testimony continues. *Testimonial Immunity Op.*, *supra*, at *11. Just as with current advisors, a former advisor could be compelled to disclose, or inadvertently disclose, privileged information, and the spectacle of haling a President's former advisor before Congress to answer questions about his duties could promote a perception of Executive subservience to the Legislature. *Id.* Likewise, the knowledge of future hostile questioning would surely exert influence over the quality and candor of the counsel the advisor provides while serving the President. *Id.* at *10. "The confidentiality necessary" to a President's receipt of "full and frank submissions of facts and opinions" from his advisors "cannot be measured by the few months or years between the submission of the information and the end of the President's tenure," *Nixon v. GSA*, 433 U.S. 425, 449 (1977), much less his advisors' tenure.

Nor would the possibility of a close advisor invoking executive privilege on a question-by-question basis protect the presidential prerogatives at stake. Even apart from privilege concerns, compelled testimony would still threaten presidential autonomy and independence by allowing congressional committees to harass the President and his immediate advisors through demands to testify, would still promote the appearance of Executive

subservience to the Legislature, and would still act as a deterrent to advisors providing the full and frank advice the President needs. *Testimonial Immunity Op.*, *supra*, at *3, 10. Preparing for and participating in such examinations would also force current advisors "to divert time and attention from their duties to the President at the whim of congressional committees." *Id.* at *3.

Moreover, even privilege concerns would not be eliminated, due to the risk of inadvertent disclosure from "a wide range of unanticipated and hostile questions," with Congress asserting for itself the authority to decide whether a witness properly invoked privilege. *Testimonial Immunity Op.*, *supra*, at *3. At a minimum, the likely privilege disputes that would result when a close advisor testifies and Congress seeks judicial resolution would be in serious tension with the basic principle that such confrontations "should be avoided whenever possible." *Cheney*, 542 U.S. at 389-90.

Given these structural separation-of-powers concerns and the lack of historical support, the Committee's subpoena cannot plausibly be characterized as "an essential and appropriate auxiliary to the legislative function." *McGrain*, 273 U.S. at 174. Accordingly, McGahn is immune from being compelled to testify pursuant to this unconstitutional subpoena.

B. The district court's contrary reasoning is flawed

The district court gave various reasons for ordering McGahn to comply with the Committee's subpoena. They are all flawed.

Most oddly, the district court objected that there was a lack of judicial precedent supporting the Executive Branch's longstanding position that Congress may not compel testimony from close presidential advisors. JA941-947. But there could hardly be precedent on point, because judicial intrusion into such interbranch disputes is virtually unprecedented. The court instead emphasized cases raising fundamentally different issues—namely, federal judicial subpoenas seeking production of records, not congressional subpoenas seeking testimony. JA940-941. 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. *See Chadha*, 462 U.S. at 947 (noting "the profound conviction of the Framers that the powers conferred on Congress were the powers to be most carefully circumscribed").

The court also relied (JA938-939) on *Harlow*'s holding that presidential advisors generally are entitled only to qualified immunity in damages suits. 457 U.S. at 808-09. But as discussed, *Harlow* recognized that certain "aides entrusted with discretionary authority" in particularly "sensitive areas"—

surely a description of the White House Counsel—may well be entitled to absolute immunity "to protect the unhesitating performance of functions vital to the national interest." *Id.* at 812. In addition, the question in this case is whether a single House exceeds its implied constitutional authority when it purports to regulate the conduct of presidential advisors by forcing them to testify. That is fundamentally different from the issue in *Harlow* whether presidential advisors could be subjected to damages liability even for clearly established violations of constitutional and statutory rights. *Id.* at 802, 818.

The district court also ignored or minimized the serious separation-of-powers issues that arise when a single House seeks to invoke the Judiciary to compel close presidential advisors to testify, even suggesting that the President himself might be compelled to testify before Congress. JA948 & n.29. For example, the court discounted concerns about the threat to frank communications as "contradict[ing] the lived experience" of close advisors "who have testified before Congress." JA957. But such testimony has historically only been voluntary rather than compelled, and in some instances there was no risk of inadvertent disclosure because the President had already "determined that he would not claim executive privilege over the subject matters of the testimony." *Testimonial Immunity Op.*, *supra*, at *6 n.2. The court also viewed compelled testimony as a "public duty of giving authorized

legislators the means of performing their own constitutional functions," JA957-958, without acknowledging that the legislative interest is limited in this context—given that close advisors are assisting the President in exercising inherent Article II functions—while the burden on the Presidency is commensurately more substantial.

Nor did the district court give any credence to the possibility that each chamber of Congress would use this newfound power to harass the Presidency. It merely stated that "no such parade of horribles has happened" since *Miers*. JA959. But this Court issued a published order staying the district court's ruling and the dispute was then settled before this Court could definitively resolve the question. *Miers* thus provided scant reason for the House to have confidence that it could vigorously press an otherwise-unprecedented view of its subpoena powers. And the Executive Branch after *Miers* adhered to position that Congress cannot compel testimony of close advisors. *Assistant Immunity Op.*, *supra*.

Although the district court here noted that, as a former advisor, McGahn's testimony would not distract him from his duties, JA956, it did not grapple with whether he should be treated the same as current advisors because of the other threats to presidential independence and autonomy and the confidentiality of presidential decisionmaking described above. But those

concerns must be central to any analysis of whether the House's attempt to compel testimony from close presidential advisors exceeds its implied powers.

In sum, the district court erred in giving dispositive weight to the interests of the Legislative Branch and disregarding those of the Executive Branch, contrary to both the separation of powers and our Nation's history and tradition. The Committee's subpoena of McGahn cannot be enforced.

CONCLUSION

This Court should order that the case be dismissed.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,998 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 Calisto MT 14-point font, a proportionally spaced typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2019, I electronically filed the foregoing brief 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.

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