Absolute Immunity Case

McGahn Case
Key Excerpts from 2020 Appeals Court Opinion

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On Nov. 27, 2019, former White House counsel Donald McGahn, through the Department of Justice (DOJ), appealed the district court opinion upholding a House subpoena compelling his testimony. A D.C. Circuit 3-judge panel, with Judges Griffith, Henderson, and Rogers, was assigned to Case No. 19-5331. On Feb. 28, 2020, the D.C. Circuit, in a 2-1 decision, reversed the district court, found Congress had no standing to bring the lawsuit, and ordered the case to be dismissed. Judge Griffith wrote the main opinion; Judge Henderson filed a concurrence, and Judge Rogers filed a dissent. *Comm. on the Judiciary, U.S. House of Representatives v. McGahn*, No. 19-5331 (D.C. Cir. Feb. 28, 2020). Here are key excerpts from the panel's 88-page opinion, concurrence, and dissent; each excerpt consists of a direct quotation taken from the text, with no changes in punctuation but with footnotes largely omitted.

Ruling

The Department of Justice (DOJ), on behalf of McGahn, responds that Article III of the Constitution forbids federal courts from resolving this kind of interbranch information dispute. We agree and dismiss this case.

Limitations on judicial branch

When a litigant asks a federal court to resolve a dispute, the Constitution requires that court first to decide whether the matter is a "Case" or "Controversy" within the meaning of Article III. This limitation is essential to the democratic structure of the Constitution enacted by "We the People" in 1789. U.S. CONST. pmbl. Compared to Congress and the President, unelected and unaccountable federal judges sit at the furthest remove from the citizenry. … Article III comes third for a reason; if Congress is "first among equals," the judiciary is last.

To protect the elected branches from undue interference, Article III carefully circumscribes the jurisdiction of the courts. See Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 881 (1983) (Article III prevents the "overjudicialization of the processes of self-governance"). If federal courts had power to answer "every question under the constitution," they could reach "almost every subject proper for legislative discussion and decision." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (quoting 4 PAPERS OF JOHN MARSHALL 95 (C. Cullen ed. 1984) (emphasis omitted)). The separation of powers "could exist no longer, and the other departments would be swallowed up by the judiciary." *Id.* Our government would become one not of laws, but of lawyers.

Case or controversy requirement
Article III grants federal courts "'Power' to resolve not questions and issues but 'Cases' or 'Controversies,'" *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 132 (2011) (quoting U.S. CONST. art. III). We may not disregard this limitation simply to "settle" a dispute "for the sake of convenience and efficiency." *Raines v. Byrd*, 521 U.S. 811, 820 (1997).

Standing to sue
"Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

Especially rigorous review of standing when interbranch dispute
Given the separation-of-powers principles animating Article III, standing analysis is "especially rigorous" when we are asked to decide whether the action of "one of the other two branches of the Federal Government was unconstitutional." *Raines*, 521 U.S. at 819-20. Accordingly, we must ask whether adjudicating the dispute is "consistent with a system of separated powers" and whether the claim is "traditionally thought to be capable of resolution through the judicial process." *Allen v. Wright*, 468 U.S. 737, 752 (1984) (internal quotation marks omitted); *see also Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019); *Raines*, 521 U.S. at 818- 20; *Flast v. Cohen*, 392 U.S. 83, 97 (1968). This interbranch quarrel satisfies neither condition.

Even Congress seems to agree suits like this do not belong in federal court
And even Congress— from the statutes it has passed—seems to agree that suits like this one do not belong in federal court.

Courts can't decide interbranch dispute until harm to non-federal government entity
[A]s Chief Justice Marshall explained, federal courts sit "to decide on the *rights of individuals*." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) (emphasis added). To that end, we lack authority to resolve disputes between the Legislative and Executive Branches until their actions harm an entity "beyond the [Federal] Government." *Raines*, 521 U.S. at 834 (Souter, J., concurring in the judgment). Without such a harm, any dispute remains an intramural disagreement about the "operations of government" that we lack power to resolve.

No bearing here on rights of individuals or entity beyond federal government
In this case, the Committee's dispute with the Executive Branch is unfit for judicial resolution because it has no bearing on the "rights of individuals" or some entity beyond the federal government. *Marbury*, 5 U.S. at 170.

Obstruction of congressional inquiry is not a judicially cognizable injury
[T]he Committee claims that the Executive Branch's assertion of a constitutional privilege is "obstructing the Committee's investigation." Committee Br. 15. That obstruction may seriously and even unlawfully hinder the Committee's efforts to probe presidential wrongdoing, but it is not a "judicially cognizable" injury. *Raines*, 521 U.S. at 819; *Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009) ("[T]he traditional role of Anglo-American courts . . . is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law."); *Raines*, 521 U.S. at 833 (Souter, J., concurring in the judgment) ("[A] dispute involving only officials . . . who serve in the branches of the National Government lies far from . . . the conceptual core of the case-or-controversy requirement."). If the law were otherwise, then the branches' mere assertions of institutional harms would compel us to resolve generalized disputes about the "operations of government." *Id.* at 829 (majority opinion) (internal quotation marks omitted). But as the Supreme Court has repeatedly made clear, the Constitution denies us that role.

Preserving public confidence in the federal courts
The Constitution imposes limitations on the "judicial Power" for good reason. Interbranch disputes are deeply political and often quite partisan. *Compare, e.g., Comm. on Oversight & Gov't Reform v. Holder*, 979 F. Supp. 2d 1 (D.D.C. 2013), with Sandra Hernandez, *Partisan Politics Plague Probe of "Fast and Furious,"* L.A. TIMES (Mar. 29, 2012). By restricting the role of the judiciary, Article III preserves the "public confidence" in the federal courts by preventing "[r]epeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc*., 454 U.S. 464, 474 (1982) (internal quotation marks omitted). If we throw ourselves into "a power contest nearly at the height of its political tension," *Raines*, 521 U.S. at 833 (Souter, J., concurring in the judgment), we risk seeming less like neutral magistrates and more like pawns on politicians' chess boards.

Dangers of judicial involvement
In this case, the dangers of judicial involvement are particularly stark. … The branches are thus locked in a bitter political showdown that raises a contentious constitutional issue: The Committee claims an absolute right to McGahn's testimony, and the President claims an absolute right to refuse it. We cannot decide this case without declaring the actions of one or the other unconstitutional, and "occasions for constitutional confrontation... should be avoided whenever possible." *Cheney v. U.S. Dist. Court for D.C*., 542 U.S. 367, 389-90 (2004) (internal quotation marks and alterations omitted).

Judicial entanglement in branches' political affairs
Judicial entanglement in the branches' political affairs would not end here. If the Committee can enforce this subpoena in the courts, chambers of Congress (and their duly authorized committees) can enforce *any* subpoena. Though momentous, the legal issue in this case is

quite narrow: whether the President may assert absolute testimonial immunity on behalf of McGahn. But future disagreements may be complicated and fact-intensive, and they will invariably put us in the "awkward position of evaluating the Executive's claims of confidentiality and autonomy," *Cheney*, 524 U.S. at 389, against Congress's need for information, *e.g., Trump v. Mazars USA, LLP*, 940 F.3d 710 (D.C. Cir. 2019), *cert. granted*, 140 S. Ct. 660 (2019).

Few authorities to guide us

In such disputes, we would have few authorities to guide us—sparse constitutional text, no statute, a handful of out-of- context cases, and a set of more-or-less ambiguous historical sources. *Cf. Youngstown*, 343 U.S. at 634 (Jackson, J., concurring) ("A judge . . . may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power.").

Courts cannot be an ombudsman for interbranch information disputes

We would be forced to supervise the branches, scrutinize their asserted constitutional interests, and elaborate a common law of congressional investigations. Article III confines us to the "proper—and properly limited—role of the courts in a democratic society," *Summers*, 555 U.S. at 492-93 (internal quotation marks omitted), and that constraint precludes us from becoming an ombudsman for interbranch information disputes.

Walk from the Capitol to our courthouse is a short one

If we order McGahn to testify, what happens next? McGahn, compelled to appear, asserts executive privilege in response to the Committee's questions. The Committee finds those assertions baseless. In that case, the Committee assures us, it would come right back to court to make McGahn talk. *See* Oral Arg. Tr. 60:25-61:1. The walk from the Capitol to our courthouse is a short one, and if we resolve this case today, we can expect Congress's lawyers to make the trip often.

Courts would displace negotiation and accommodation

Extending our jurisdiction beyond the constitutional boundary would also displace the long-established process by which the political branches resolve information disputes. … [T]he political branches have long resolved most of their differences through "negotiation and accommodation[.]" … Sometimes negotiations fail, *see History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress*, 6 Op. O.L.C. 751 (1982), but for almost two centuries, neither branch thought to "submit[] their disputes to the courts," Chafetz, *supra*, at 1146-47.

Congress is not powerless

The absence of a judicial remedy doesn't render Congress powerless. Instead, the Constitution gives Congress a series of political tools to bring the Executive Branch to heel. *See Goldwater v. Carter*, 444 U.S. 996, 1004 (1979) (opinion of Rehnquist, J.) (noting that the "coequal branches of our Government" have "resources available to protect and assert [their] interests"). Congress (or one of its chambers) may hold officers in contempt, withhold appropriations, refuse to confirm the President's nominees, harness public opinion, delay or derail the President's legislative agenda, or impeach recalcitrant officers. *See* Chafetz, *supra*,

at 1152-53; *see also* H.R. Res. 755, 116th Cong., at 6 (2019) (impeaching President Trump for "obstruction of Congress"). And Congress can wield these political weapons without dragging judges into the fray.

Courts ill-equipped to micromanage interbranch information disputes
Adjudicating these disputes would displace this flexible system of negotiation, accommodation, and (sometimes) political retaliation with a zero-sum game decided by judicial diktat. The Constitution enjoins the branches to conduct their business with "autonomy but reciprocity." *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring). But why compromise when the federal courts offer the tantalizing possibility of total victory? And why would the Executive Branch negotiate if it can force litigation and "delay compliance for years"? Chafetz, *supra*, at 1154. Letting political fights play out in the political branches might seem messy or impractical, but democracy can be a messy business, and federal courts are ill-equipped to micromanage sprawling and evolving interbranch information disputes. … Perhaps that's why these lawsuits were unheard-of for almost two centuries.

Dubious legal basis for 1970s court decisions
To be sure, as the Committee notes, courts in this circuit have agreed to resolve a handful of interbranch information disputes beginning in the 1970s. *See* Committee Br. 17-20; *United States v. AT&T*, 551 F.2d 384, 391 (D.C. Cir. 1976) ("AT&T I"); *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974) ("*Senate Select Comm.*"); *Holder*, 979 F. Supp. 2d at 1; *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008). But as we explain below, the legal basis for that practice is dubious, *see infra* Part III.C; Chafetz, *supra*, at 1154 ("The courts have never offered a persuasive reason why a congressional subpoena to an executive branch official is a matter of which the judiciary can properly take notice."), and the innovations of the 1970s shouldn't displace the established practice of the 1790s.

History cuts decisively against Congress
The Supreme Court has said—time and again—that an Article III case or controversy must be one that is "traditionally thought to be capable of resolution through the judicial process." … In this case, the history cuts decisively against the Committee. Neither interbranch disputes (in general) nor interbranch information disputes (in particular) have traditionally been resolved by federal courts.

***Raines* review of past cases**
In *Raines v. Byrd*, … of special significance here, the Court noted that the Members' attempt to litigate against the Executive Branch was "contrary to historical experience." *Id.* at 829. That historical conclusion is critical. … [T]he branches *never* brought these kinds of suits.

Interbranch disputes that harmed concrete interests of private actors
[T]he Supreme Court only ever resolved these interbranch skirmishes after one branch's allegedly unconstitutional actions harmed the concrete interests of private actors. *See Raines*, 521 U.S. at 826-28. In *INS v. Chadha*, for instance, the Supreme Court found that Chadha, an immigrant, had standing to challenge the one-House legislative veto because success on the merits would entitle him to "cancell[ation]" of a "deportation order against [him]." 462 U.S.

919, 936 (1983); *see also Buckley v. Valeo*, 424 U.S. 1, 12 n.10 (1976) (challenge to the Federal Election Campaign Act by parties raising separation-of-powers problems with "an agency designated to adjudicate their rights" and by organizations asserting unlawful "compelled disclosure" "on behalf of [their] members"); *The Pocket Veto Case*, 279 U.S. 655, 673 (1929) (challenge to President Coolidge's pocket veto by "Indian tribes" that "filed a petition in the Court of Claims setting up certain claims in accordance with the terms of the bill").

Since *Raines*, the Supreme Court has adjudicated other major separation-of-powers cases, but not one of them arose out of a pure interbranch dispute. *E.g., Zivotofsky v. Kerry*, 576 U.S. 1 (2015); *NLRB v. Noel Canning*, 573 U.S. 513 (2014); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010). Instead, every single one of these decisions implicated the concrete rights of private actors. *Raines* reasoned that the abject absence of interbranch lawsuits meant that adjudicating one would be "contrary to historical experience," 521 U.S. at 829, and history hasn't changed since.

First Congressional suit to enforce subpoena against Executive Branch in 1974

Lawsuits to resolve interbranch information disputes, likewise, have few historical antecedents. The Committee's first example of a suit by a chamber of Congress to enforce a subpoena against the Executive Branch comes from 1974. *See Senate Select Comm*., 498 F.2d at 725. And the Committee's earliest case is its *only* appellate precedent for such a suit. *See also* TODD GARVEY, CONG. RESEARCH SERV., R45983, CONGRESSIONAL ACCESS TO INFORMATION IN AN IMPEACHMENT INVESTIGATION 21 (2019) ("[N]either Congress nor the President appears to have turned to the courts to resolve an investigative dispute until the 1970s."); Chafetz, *supra*, at 1083-84 (similar).

But interbranch information disputes long predate *Senate Select Committee*. For instance, in 1794, President Washington withheld papers that "in [his] judgment, for public considerations, ought not to be communicated." *History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress*, 6 Op. O.L.C. 751, 752-53 (1982) (internal quotation marks omitted). Likewise, many other Presidents refused to give information to one of the chambers of Congress. *E.g., id.* at 751-81 (listing refusals of Presidents Adams, Jefferson, Monroe, Lincoln, Theodore Roosevelt, Franklin Roosevelt, Truman, Carter, and Reagan, among others). And yet, as the Committee concedes, none of these refusals resulted in a "suit[] to enforce subpoenas before the mid-1970s." … [A] single appellate precedent from 1974 cannot establish historical bona fides for the Committee's suit.

Past presidents opposed court enforcement of congressional subpoenas

[I]n every litigated information dispute since *Raines*, the Executive Branch has argued that these information disputes have no place in federal court. … Principles and practice thus agree: The Committee may not invoke the jurisdiction of the federal courts to enforce its subpoena.

Congress seems to agree

Congress seems to agree, too. The current statutory regime for enforcement of congressional subpoenas reflects Congress's judgment that information disputes between the political branches do not belong in federal court. Under this regime, only the Senate—and not the House—has statutory authority to enforce a subpoena in federal court. *See* 2 U.S.C. §288d;

In re U.S. Senate Permanent Subcomm. on Investigations, 655 F.2d 1232, 1238 & n.28 (D.C. Cir. 1981). What is more, Congress expressly *excluded* federal jurisdiction over suits involving Executive Branch assertions of "governmental privilege." 28 U.S.C. § 1365(a).

The obvious effect of section 1365(a)'s carve-out is to keep interbranch information disputes like this one out of court. Indeed, the legislative history confirms what the statute's plain text says. As the sponsors of a Senate bill amending section 1365 explained, the law's "purpose is to keep disputes between the executive and legislative branches out of the courtroom." 142 Cong. Rec. 19412 (1996) (statement of Sen. Specter); *see also id*. at 19413 (statement of Sen. Levin) (explaining that the provision "seeks to keep interbranch disputes out of the courtroom"). The Committee asks us to decide this case, but Congress expresses its will through statutes—not through the litigating positions of one part of one half of the bicameral body. We will not second-guess the judgment of Congress at the Committee's behest, and the absence of congressional authorization is the third strike against the Committee's case.

District court ignored the parties' identities

Seeking to minimize the significant separation-of-powers concerns raised by this suit, the Committee—like the district court—describes this matter as nothing more than a "garden-variety" information dispute that "federal courts address routinely." Mem. Op. at 47-48, J.A. 895-96; see also Committee Br. 24-25. Not so. … [The district court] saw no reason to distinguish disputes "between [the] branches of government" from those "between Congress and an individual party." *Id.* at 54, J.A. 902. By focusing on the abstract legal question presented while ignoring the parties' identities, the district court gave short shrift to the separation-of-powers principles at stake.

This congressional subpoena is not like judicial subpoenas in criminal cases

[T]he Committee gestures at instances in which federal courts have resolved disputes over executive privilege. "For more than two hundred years," the Committee argues, "courts have adjudicated the Executive's legal obligations to respond to subpoenas." Committee Br. 24. But those cases arose out of efforts to enforce *judicial* subpoenas in *criminal* cases—not, as here, congressional subpoenas. *See Nixon*, 418 U.S. at 683; *United States v. Burr*, 25 F. Cas. 30, 34 (C.C.D. Va. 1807) (Marshall, C.J.); *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997).

This congressional subpoena doesn't implicate the rights of individuals

[F]ederal courts also have considered the permissibility of congressional subpoenas, but such cases arose in three discrete procedural contexts different from this one: (1) prosecutions for criminal contempt of Congress, *see, e.g., Watkins v. United States*, 354 U.S. 178 (1957); 2 U.S.C. §§ 192-194; (2) applications for writs of habeas corpus, *see, e.g., McGrain v. Daugherty*, 273 U.S. 135 (1927); and (3) civil suits affecting the rights of private parties, *see, e.g., Kilbourn v. Thompson*, 103 U.S. 168 (1880); *Mazars*, 940 F.3d at 710. Like subpoenas issued in the context of a criminal prosecution, and unlike this litigation, all three of these settings directly implicate the "rights of individuals," *Marbury*, 5 U.S. at 170, and thus fall within the heartland of federal jurisdiction.

No sensible limiting principle

The Committee next asserts that it has suffered an "institutional injury" that gives it standing to pursue this suit. Committee Br. 15. The Committee argues that the House possesses the "sole Power of Impeachment," along with a broad power to investigate. See U.S. CONST. art. I, § 2, cl. 5 (impeachment); *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504-06 (1975) (investigations). In turn, the House delegated to the Committee the authority "to conduct investigations and issue subpoenas." Committee Br. 15-16. McGahn's refusal to appear impedes that investigation, so the Committee concludes that it "has alleged an actual and concrete injury to its right to compel information." *Id.* at 15. The Committee's argument fails. Its seemingly straightforward theory is incompatible with the Supreme Court's case law on legislative standing. Worse, the theory lacks a sensible limiting principle.

Arizona State Legislature case does not establish standing

The Committee claims that *Arizona State Legislature*, 135 S. Ct. at 2652, "puts to rest any notion that a legislative body . . . lacks standing to redress an injury to its rights and powers." Committee Br. 21. … [But] the Court made abundantly clear that its decision did "not touch or concern … whether Congress has standing to bring a suit against the President." *Id.* at 2665 n.12. The Court acknowledged that a suit between components of the federal government would raise "separation-of-powers concerns absent [in suits involving state legislatures]." *Id.* … We decline the Committee's invitation to treat *Raines*'s reasoning as dicta, but to read *Arizona State Legislature* to hold what the Court expressly said it did not.

The Committee's theory of institutional injury is also boundless. If one component of the federal government may assert an institutional injury against another, the Committee's theory sweeps in a huge number of seemingly nonjusticiable claims. *See Barnes v. Kline*, 759 F.2d 21, 44-47 (D.C. Cir. 1985) (Bork, J., dissenting), *vacated sub nom. Burke v. Barnes*, 479 U.S. 361 (1987). Consider some possible suits: The House could sue the Senate for "adjourn[ing] for more than three days" "without [its] Consent," U.S. CONST. art. I, § 5, cl. 4, or for violating the House's prerogative to originate "Bills for raising Revenue," *id.* § 7, cl. 1. Congress could sue the President for failing to "from time to time give . . . Information of the State of the Union," *id.* art. II, § 3, cl. 1, or for engaging in armed conflict in violation of the Declare War Clause, *id.* art. I, § 8, cl. 11. And why stop with the federal government? Congress could sue a State for "lay[ing] any Duty of Tonnage" or "enter[ing] into any Agreement or Compact with Another State" without "the Consent of Congress." *Id.* art. I, § 10, cl. 3. … We reject the Committee's extension of *Arizona State Legislature* to suits between the Legislative and Executive Branches.

***Raines* casts serious doubt on D.C. Circuit precedents**

Beginning in 1974, the D.C. Circuit experimented with an expansive view of legislative standing, permitting even individual Members of Congress to assert institutional injuries against the Executive Branch. *See, e.g., Moore v. U.S. House of Representatives*, 733 F.2d 946, 951 (D.C. Cir. 1984) (suit alleging a violation of the Origination Clause); *Goldwater v. Carter*, 617 F.2d 697, 702 (D.C. Cir. 1979) (en banc) (suit alleging a violation of the Treaty Clause), *vacated*, 444 U.S. 996 (1979); *Kennedy v. Sampson*, 511 F.2d 430, 435-36 (D.C. Cir. 1974) (suit challenging a pocket veto); *see also Raines*, 521 U.S. at 820 n.4

(collecting cases). Since *Raines*, however, we have three times considered and three times rejected efforts to assert congressional standing. *See Blumenthal v. Trump*, No. 19-5237, slip op. (D.C. Cir. Feb. 7, 2020) (per curiam); *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000); *Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999). Although we have never formally overruled our earlier legislative-standing cases, *Raines*'s reasoning casts serious doubt on their continued vitality.

AT&T cases do not establish standing

In AT&T I, a House subcommittee issued a subpoena to AT&T instructing it to turn over certain national-security documents arising out of an executive-branch wiretapping program. 551 F.2d at 385-86. … [T]he entire analysis of the House's standing to intervene in *AT&T I* consists of a single sentence, followed by no citations. "[D]rive-by jurisdictional rulings of this sort" typically "have no precedential effect." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998). Second, *Raines* casts serious doubt on this circuit's line of cases that freely dispensed legislative standing. … As discussed, *Raines*'s emphasis on separation-of-powers issues and "historical practice," 521 U.S. at 826-29, compels the conclusion that we lack jurisdiction to consider lawsuits between the Legislative and Executive Branches. … Although *AT&T I* said that "the House as a whole has standing to assert its investigatory power," 551 F.2d at 391, that wasn't the end of the analysis. The court also considered whether the suit presented a nonjusticiable political question[.] … [In *AT&T II*] we ultimately held that "complete judicial abstention on political question grounds is not warranted" if "it is or may be possible to establish an *effective judicial settlement*." *Id.* at 123, 127 (emphasis added). … Here, by contrast, there is no prospect of a judicially managed settlement. The Committee claims an absolute right to compel McGahn's testimony; the President an absolute right to withhold it.

Senate Select Committee case does not establish standing

First, *Senate Select Committee* did not address standing at all, and "the existence of unaddressed jurisdictional defects has no precedential effect." *Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996). Second, for the reasons already given, *Raines* casts doubt on our prior legislative standing decisions. Finally, and in any event, *Senate Select Committee* is distinguishable. There, Congress passed a statute that expressly authorized the lawsuit. *See* 498 F.2d at 727 n.10; Pub. L. No. 93-190, 87 Stat. 736 (1973). A statute could mitigate the separation-of-powers considerations that counsel against adjudicating interbranch disputes.

Dissent is wrong

The dissent would hold that the Committee has standing. It reasons that (1) *Raines* does not foreclose the Committee's lawsuit, see Dissent at 5-14; that (2) we can and should resolve this interbranch dispute because the federal courts are the Committee's "last resort," *see id.* at 15-19; and that (3) declining to decide this matter will frustrate Congress's capacity to perform its constitutional functions, *see id*. at 1-5, 18-19. Respectfully, each argument is wrong. The dissent misreads *Raines*, and it wrongly assumes that our jurisdiction expands or contracts depending on a legal question's importance or a litigant's alternative remedies. Worse still, the dissent imagines Congress to be politically impotent, then uses that supposed powerlessness to justify intrusive judicial supervision of the elected branches.

Dissent has no answer to history recited in *Raines*

[T]he dissent has no real answer to that history. It protests that interbranch information disputes have been "traditionally" amenable to judicial resolution; for support, the dissent cites the same two pre-*Raines* appellate decisions from 1974 and 1976. Dissent at 8-9 (citing *Senate Select Committee* and *AT&T I*). But the 25 odd years between 1974 and 1997 represent a narrow slice of a constitutional tradition that began over 225 years ago. Unsurprisingly, *Raines* took a broader view of the history, and from that perspective, the legislative-standing doctrine of the 1970s was a blip on the radar. Indeed, the Supreme Court ignored our circuit's pre-*Raines* legislative-standing cases when it surveyed the historical record and found "no suit" had been brought in "analogous confrontations." *Raines*, 521 U.S. at 826. We too decline to rest our decision on a fleeting diversion from otherwise uniform historical experience.

Exhausting political remedies does not make case justiciable

Article III limits us to "Cases" and "Controversies," and an interbranch dispute does not transform into a justiciable suit simply because Congress has exhausted its political remedies and packaged its grievance as a tidy constitutional puzzle. Instead, we must ask whether this lawsuit is the *kind of dispute* that we may resolve. If so, we must answer the legal question "properly before [us]," even if its resolution has significant "political implications." *Zivotofsky v. Clinton*, 566 U.S. 189, 194, 196 (2012).

Case by case determinations on legislative standing would be a mistake

What the dissent articulates instead is an impermissible jurisdictional balancing test: How narrow must the legal issue be? How powerless Congress? And when is a matter too political? This approach would allow federal courts to make "case-by-case" determinations "whether it is 'wise' or 'useful' for us to intervene in a particular dispute." *Moore*, 733 F.2d at 963 (Scalia, J., concurring in the judgment). We took this tack once before. Prior to *Raines*, we developed a doctrine of "circumscribed equitable discretion" that prevented us sometimes (but only sometimes) from resolving legislative-standing cases, and we have abandoned that doctrine since. *See Chenoweth*, 181 F.3d at 114-16. The dissent would replicate that dubious discretionary regime, now under the guise of Article III standing. We should not make the same mistake again.

Dissent undervalues Congress' political tools

The dissent's real concern seems to be that our decision will "dramatically undermin[e]" Congress's capacity to "fulfill its constitutional obligations." Dissent at 19. But the dissent undervalues the political tools at Congress's disposal. … The Executive Branch cannot spend a dime without Congress's consent, U.S. CONST. art. 1, § 9, cl. 7, and that's a powerful incentive to follow Congress's instructions. … The dissent likewise discounts the Senate's appointment power, the impeachment power, and the informal power to "publicly embarrass executive branch officials." Devins, *supra*, at 134. … [M]any of the remedies *can* be exercised without majorities in both chambers: Most appropriations must be approved by the House and Senate every year. A censure vote takes a bare majority from either chamber. And Members of Congress can denounce the Executive Branch from their own bully pulpits. With this range of political tools, Congress can tailor its sanctions to the gravity of the Executive Branch's offense.

Dissent would eliminate dynamic, flexible resolutions of disputes

The dissent's approach would eliminate this dynamic system of escalating political sanctions and flexible settlements. When a lawsuit is the end-game of any interbranch dispute, the response to an overbroad subpoena isn't "Let's talk" but "We'll see you in court." And the resolution of such a dispute isn't a negotiated compromise—one that leaves everyone a little dissatisfied—but a rigid judicial judgment. No doubt, leaving these disputes to the political process is *messy*. Sometimes, the Executive Branch will seem recalcitrant, or a congressional act of retaliation will seem disproportionate. But the messiness and flexibility of the political process come as a package deal. Judicial involvement might resolve a few interbranch disputes more cleanly, but it would also eliminate the process's flexibility.

Far from obvious judicial resolution is better for Congress

The dissent also suggests that the political process will systematically favor the Executive Branch, *e.g.,* Dissent at 1, 24-25, but it's far from obvious that judicial resolution is better even for Congress. Litigation takes a long time, and Congress turns over every two years. … And in some information disputes, the Executive Branch may wind up "giving up the information and caving in because those who hold the information are not up to the fight." Devins, *supra*, at 133 (quoting Theodore Olson, former Assistant Attorney General for the Office of Legal Counsel). A win for the Committee today may only hamstring Congress in the future.

Congress' remedy is politics or the ballot box

What about the President's blatant refusal to cooperate with the Committee's investigation into his alleged wrongdoing? To the dissent, that this obstruction should go unredressed seems unimaginable. *See* Dissent at 17. Nevertheless, the inevitable consequence of Article III's case-or-controversy requirement is that Congress will obtain only the concessions it can wrest from the Executive Branch with the ample but imperfect tools at its disposal. Sometimes, those tools will yield fewer concessions than Congress might wish, but the remedy for that perceived wrong is in politics or at the ballot box. If federal courts were to swoop in to rescue Congress whenever its constitutional tools failed, it would not just *supplement* the political process; it would replace that process with one in which unelected judges become the perpetual "overseer[s]" of our elected officials. *Youngstown*, 343 U.S. at 594 (Frankfurter, J., concurring). That is not the role of judges in our democracy, and that is why Article III compels us to dismiss this case.

Decision does not address congressional subpoena to private parties

We conclude by noting a few limitations on the scope of this decision: First, we do not address whether a chamber of Congress may bring a civil suit against private citizens to enforce a subpoena. At oral argument, DOJ asserted that Article III precludes a chamber of Congress from *ever* enforcing its subpoena in civil litigation—even against private parties. See Oral Arg. Tr. 30:2-10. If adopted, DOJ's position would render unconstitutional the statutes authorizing the Senate to enforce subpoenas in federal court. *See* 2 U.S.C. § 288d(a); 28 U.S.C. § 1365(a); *see also Senate Permanent Subcomm.*, 655 F.2d at 1238 n.28. Of course, such a lawsuit would not be an interbranch dispute, so it would present very different separation-of-powers concerns. We see no reason to address—let alone to adopt—DOJ's expansive argument here.

Decision does not address congressional lawsuit authorized by statute
Second, we do not decide whether a congressional statute authorizing a suit like the Committee's would be constitutional. Congress may sometimes "elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law," *Spokeo,* 136 S. Ct. at 1549 (internal quotation marks and alterations omitted), and a statute authorizing suit would reflect Congress's (and perhaps the President's) view that judicial resolution of interbranch disputes is "consistent with a system of separated powers," *Allen*, 468 U.S. at 752. Perhaps that statute would render suits to enforce subpoenas "judicially cognizable," *Raines*, 521 U.S. at 819, though of course Congress could not "erase Article III's standing requirements," *id.* at 820 n.3. We leave that issue for another day.

Decision does not bar suits historically within courts' jurisdiction
Third, we do not question the federal courts' authority to adjudicate disputes historically recognized to be within our jurisdiction. For example, in criminal prosecutions, we can adjudicate executive-privilege claims arising out of criminal subpoenas, as in *Nixon*, 418 U.S. at 683. Likewise, we may adjudicate cases concerning congressional subpoenas if they implicate the rights of private parties, as in *Mazars*, 940 F.3d at 723 (noting that the Committee's subpoena was issued to a "*non-governmental* custodian[] of the President's financial information" (emphasis added)). Such cases ask us to "decide on the rights of individuals," *Marbury*, 5 U.S. at 170, and we "cannot avoid" resolving difficult constitutional questions "merely because the issues have political implications," *Zivotofsky*, 566 U.S. at 196.

Decision does not address merits of this dispute
Finally, we express no view on the merits, except to emphasize a crucial aspect of our constitutional design. Even when *courts* have no role policing the boundaries of the branches' prerogatives in a dispute about the operations of government, the branches have a duty to conduct themselves with "autonomy but reciprocity" and to "integrate the[ir] dispersed powers into a workable government." *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring). Heeding Justice Jackson's injunction, the branches have long resolved their differences through negotiation and compromise. That is to be encouraged.

Lower court judgment is vacated, and case is to be dismissed
The judgment is vacated, and the case is remanded with instructions to direct that the complaint be dismissed.

Henderson Concurrence

Scope of concurrence
I join Judge Griffith in concluding that, under United States Supreme Court precedent, the Committee lacks standing. I am reluctant, however, to endorse what I view as McGahn's categorical stance. In his swing for the fences, McGahn has passed up a likely base hit. First, McGahn urges us to foreclose Article III standing when the Congress, or a House thereof, asserts *any* institutional injury in *any* interbranch dispute; I do not believe, however, Supreme Court precedent supports a holding of that scope. Second, McGahn's

assertion of absolute testimonial immunity against compelled congressional process is, in my opinion, a step too far, again, under Supreme Court precedent.

> **Footnote:** McGahn's counsel went further, arguing that "the broadest formulation of our argument would be that Congress, when it's asserting its institutional prerogatives, *never* ha[s] standing." Oral Arg. Tr. 13:14–16 (emphasis added).

***Raines* does not foreclose all congressional standing**

[T]he issues are far from being on all fours with *Raines.* Indeed, whereas it was "importan[t]" in *Raines* that the individual legislators, despite alleging an institutional injury, "ha[d] not been authorized to represent their respective Houses of Congress," 521 U.S. at 829, the Committee on the Judiciary (Committee) *has* been authorized by the House of Representatives to litigate the enforceability of the Committee's duly issued subpoena, see H.R. Res. 430, 116th Cong. (2019). Thus, although *Raines* may have sounded the death knell for individual legislators asserting an institutional injury at the hand of the Executive, it may not necessarily follow that legislative standing no longer exists in all circumstances. *Cf. Campbell v. Clinton*, 203 F.3d 19, 32 (D.C. Cir. 2000) (Randolph, J., concurring in the judgment) ("If the Supreme Court had meant to do away with legislative standing [in *Raines*], it would have said so and it would have given reasons for taking that step.").

Concurrence with majority opinion

But lest there be any doubt, I join the holding of the majority opinion as well as its rationale: namely, the Committee lacks standing under Supreme Court precedent.

Test to find standing

Article III of the Constitution confines the federal judicial authority to "Cases" or "Controversies." U.S. CONST. art. III, § 2, cl. 1. In turn, "[s]tanding to sue is a doctrine rooted in the traditional understanding of a case or controversy" and "limits the category of litigants empowered to maintain a lawsuit in federal court." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). "[T]he 'irreducible constitutional minimum' of standing consists of three elements. The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.*

Alleged injury especially important when separation-of-powers considerations

The Supreme Court has "also stressed that the alleged injury must be legally and judicially cognizable," which "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*, 521 U.S. at 819 (citation omitted) (first quoting *Lujan*, 504 U.S. at 560; then quoting *Flast v. Cohen*, 392 U.S. 83, 97 (1968)). Although this familiar formulation is a prerequisite to federal jurisdiction in all instances, it is especially important here, where the dispute implicates the separation-of-powers considerations underpinning our standing doctrine.

Standing serves to prevent judiciary from usurping powers of political branches
"The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013); *see Raines*, 521 U.S. at 820 (Article III is "about keeping the Judiciary's power within its proper constitutional sphere").

Standing analysis magnified in interbranch dispute
To guard against the expansion of judicial power at the expense of the coequal branches, "our standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines*, 521 U.S. at 819–20; *cf. Chenoweth v. Clinton*, 181 F.3d 112, 114 (D.C. Cir. 1999) (separation-of-powers considerations "are particularly acute . . . when a legislator attempts to bring an essentially political dispute into a judicial forum"). It is unclear just how much rigor is mandated by *Raines*'s "especially rigorous" instruction. … [T]he separation-of-powers element magnifies, rather than modifies, our standing analysis.

Careful inquiry into claimed injury
[T]he existence of an interbranch dispute does not by itself determine whether the traditional requisites of standing are satisfied. Instead, we must conduct a "careful[] inquir[y]" to determine whether the "claimed injury is personal, particularized, concrete, and otherwise judicially cognizable." *Raines*, 521 U.S. at 820. At the same time, exercising extra care does not *require* us to find the dispute beyond our ken. "Proper regard for the complex nature of our constitutional structure requires neither that the Judicial Branch shrink from a confrontation with the other two coequal branches of the Federal Government, nor that it hospitably accept for adjudication claims of constitutional violation by other branches of government where the claimant has not suffered cognizable injury." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc*., 454 U.S. 464, 474 (1982).

No blanket ban on suits brought by units of government
Although early American courts articulated that the Article III case-or-controversy limitation contemplated suits brought by individuals, and strict adherence to this tenet would seem to preclude "suits between units of government regarding their legitimate powers," *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2694 (2015) (Scalia, J., dissenting), the Supreme Court has yet to impose such a blanket application. To the contrary, recent Supreme Court precedent leaves open the possibility of legislative standing in an intragovernmental dispute, at least where a state legislature asserts an institutional injury. … Applying the familiar Article III standing analysis, the Court required the Arizona Legislature to "'show, first and foremost,' injury in the form of 'invasion of a legally protected interest that is concrete and particularized and actual or imminent.'" … And, importantly, *Raines* was not dispositive there. *Id.* at 2664.

Legislative plaintiff must be same body to which power at stake is entrusted
It is requisite, then, that the legislative plaintiff is the same body to which the institutional power at stake is entrusted. *Cf. Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953 (2019) ("[I]n Arizona State Legislature there was no mismatch between the body seeking to litigate and the body to which the relevant constitutional provision allegedly assigned exclusive redistricting authority.").

Committee's standing may not be dead on arrival, but it is flatlining
Because the alleged institutional injury infringes, at least in part, on a power vested exclusively in the House and, in turn, delegated to the Committee, the Supreme Court's post-*Raines* precedent does not categorically foreclose the possibility that the Committee's asserted injury could support Article III standing. Competing constitutional prerogatives and the potential availability of alternative legislative remedies do not paralyze federal courts from acting when confronting an otherwise justiciable case. That said, the Committee's standing argument may not be dead on arrival but it is certainly flatlining. Assuming the Committee can survive to this point by relying on *Arizona State Legislature* and *Bethune-Hill*, I believe those cases take it no further. Most notably, neither implicated the separation-of-powers concerns animating both *Raines* and this dispute.

Case involves a controversy but not the kind courts traditionally resolve
Although this case involves a controversy—the Executive and Legislative Branches' divergent positions have brought the parties and perhaps even the country to a constitutional standstill—even that is not enough for Article III standing. "In the constitutional sense, controversy means more than disagreement and conflict; rather it means the kind of controversy courts traditionally resolve." *United States v. Nixon*, 418 U.S. 683, 696 (1974). And on this point, "historical practice appears to cut against" the Committee. *Raines*, 521 U.S. at 826. In *Raines*, the Supreme Court declared that in past "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.*, and the majority opinion here ably expounds on this point, see Majority Op. 14–16; *see also Ariz. State Legislature*, 135 S. Ct. at 2695 (Scalia, J., dissenting) ("[W]e have never passed on a separation-of-powers question raised directly by a governmental subunit's complaint.").

Summary of rationale why Committee lacks standing
In sum, the Supreme Court has made clear that: first, legislators lack Article III standing to remedy an institutional injury, subject to extremely narrow exceptions, *see Raines*, 521 U.S. at 829; and, second, its lead decision finding standing in a legislative body asserting an institutional injury does not implicate separation-of-powers concerns, *see Ariz. State Legislature*, 135 S. Ct. at 2665 n.12. Nor does this suit resemble a "case" or "controversy" traditionally contemplated as within our Article III power. Accordingly, judicial restraint counsels that we find the Committee lacks standing for want of a cognizable injury.

Caution before deviating from historical practice

[T]he continued functioning of our constitutional system requires that we exercise abundant caution before deviating from historical practice, especially when the underlying dispute is inextricably intertwined with "a power contest nearly at the height of its political tension." *Raines,* 521 U.S. at 833 (Souter, J., concurring in the judgment). This credo has guided our country since its birth. Again, in his farewell address, Washington implored that "[t]owards the preservation of your government . . . it is requisite . . . that you resist with care the spirit of innovation upon its principles." Farewell Address, at 15. Indeed, "time and habit are at least as necessary to fix the true character of governments as of other human institutions" and "experience is the surest standard by which to test the real tendency of the existing constitution of a country." *Id.* Heeding this solemn counsel, I, like my colleague, believe we must refrain from expanding the federal judicial power to encompass a suit never before deemed cognizable. If federal legislative standing is to be given new life, it must be the Supreme Court—not an inferior court—that resuscitates it.

Issue is of utmost importance, but best left to political struggle

Make no mistake, the merits question at issue here is of the utmost importance. Although neither the congressional subpoena power nor the President's interest in withholding information is expressly provided for, each is impliedly grounded in the Constitution. *See Nixon*, 418 U.S. at 708 ("[A] presumptive privilege for Presidential communications . . . is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution."); *Watkins v. United States*, 354 U.S. 178, 187 (1957) ("The power of the Congress to conduct investigations is inherent in the legislative process."). When these constitutional components collide, which should prevail? The Committee presses us to cast the crucial vote in this contest of competing prerogatives but "much of the allocation of powers is best left to political struggle and compromise." *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). And, indeed, although informational disputes between the Legislative and Executive Branches have existed since Washington's administration, *see Nixon v. Sirica*, 487 F.2d 700, 778–79 (D.C. Cir. 1973) (en banc) (Wilkey, J., dissenting) (historical background), the Judiciary was not asked to settle them until the Watergate years. … Now, breakdowns in the time-honored process of negotiation and accommodation have embroiled this court in a fight we are ill-suited to referee.

McGahn's claimed absolute immunity rests on somewhat shaky legal ground

Although the Committee's lack of standing eliminates the need to reach the merits, I also write separately to highlight the narrower defense against congressional overreach provided by well-settled privileges. … [U]nlike an assertion of privilege to specific questions, which encourages the parties to use accommodation and other political tools, McGahn's absolutist stance has prevented their use and prematurely involved the courts. … I believe McGahn's claimed immunity rests on somewhat shaky legal ground. … In *United States v. Burr*, 25 F. Cas. 30 (No. 14692D) (C.C.D. Va. 1807), "Chief Justice Marshall squarely ruled that a subpoena may be directed to the President," *Sirica*, 487 F.2d at 709 (en banc) (per curiam). Granted, judicial subpoenas in criminal cases reflect

unique interests—the defendant's constitutional protections and the "'longstanding principle' that the grand jury 'has a right to every man's evidence'"—that are not implicated by congressional process. *Id.* at 712 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972)). But that distinction does not suggest congressional subpoenas are less deserving of compliance. Indeed, "[a] subpoena has never been treated as an invitation to a game of hare and hounds;" otherwise, "the great power of testimonial compulsion, so necessary to the effective functioning of courts and legislatures, would be a nullity." *United States v. Bryan*, 339 U.S. 323, 331 (1950) (emphasis added).

Presidential immunity does not necessarily apply to close advisors

[E]ven if the President himself is absolutely immune from compelled congressional process, it does not necessarily follow that his close advisors are too. … In *Butz v. Economou*, 438 U.S. 478, 507 (1978), the Court held that Cabinet members were entitled to only qualified immunity in a civil damages suit. And although certain federal officials—the President, legislators, judges and federal prosecutors—can invoke absolute immunity for actions taken pursuant to the unique functions of their respective offices, "[t]he undifferentiated extension of absolute 'derivative' immunity to the President's aides . . . could not be reconciled with the 'functional' approach that has characterized the immunity decisions of" the Supreme Court. *Harlow v. Fitzgerald*, 457 U.S. 800, 811 (1982). Accordingly, former senior White House aides could not claim derivative absolute immunity, id. at 809, although the Supreme Court left open the possibility that absolute immunity may be justified for "aides entrusted with discretionary authority in such sensitive areas as national security or foreign policy," *id* at 812.

> **Footnote:** Subsequent cases, however, declined to recognize national security as a basis for functional absolute immunity of the Attorney General, *see Mitchell v. Forsyth*, 472 U.S. 511, 520 (1985), and the National Security Advisor, *see Halperin v. Kissinger*, 807 F.2d 180, 194 (Scalia, Circuit Justice, D.C. Cir. 1986).

… Given that absolute immunity from personal liability is considered unnecessary to foster candid advice and maintain effective decisionmaking, it is not obvious that testimony before the Congress—protected by applicable privileges—would have such an effect.

Privileges could adequately protect executive branch interests

[I]t seems likely that the invocation of well-settled privileges could adequately protect the Executive Branch's undeniably critical interests. … [T]he necessity of protecting Executive decisionmaking "justif[ies] a presumptive privilege for Presidential communications," *id.* at 708, but, critically, this presumption can be overcome by a satisfactory demonstration of specific need for the information, *see Dellums*, 561 F.2d at 249. Thus, a qualified executive privilege would seem, at least to me, the most appropriate mechanism to govern a dispute like the one now before us.

Privileges in an impeachment inquiry

The lack of clarity surrounding the exercise of privilege is especially acute in the shadows of an impeachment inquiry. *See, e.g., In re Lindsey*, 158 F.3d at 1277

("Impeachment proceedings . . . cannot be analogized to traditional legal processes . . . . How the policy and practice supporting the common law attorney-client privilege would apply in such a political context thus is uncertain."). Indeed, even as early Presidents asserted a power to withhold information from the Congress, they simultaneously recognized that the balance of competing constitutional interests may be different when the House acts pursuant to its impeachment power. In an 1846 message to the House of Representatives, President James K. Polk declined to provide requested information regarding the State Department's contingent fund but acknowledged that had the demand been made pursuant to an impeachment inquiry, "the power of the House, in the pursuit of this object, would penetrate into the most secret recesses of the Executive Departments." … This view of executive privilege stands in stark contrast to the expansive immunity now pushed by McGahn.

Qualified privilege can adequately protect Executive Branch interests
And a qualified—rather than absolute—privilege can still adequately protect the undeniably important Executive Branch interests at stake when the Congress attempts to pry open the lid of presidential confidentiality. *See Comm. on the Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 102 (D.D.C. 2008) ("[A]ssert[ing] executive privilege on a question-by-question basis as appropriate . . . should serve as an effective check against public disclosure of truly privileged communications, thereby mitigating any adverse impact on the quality of advice that the President receives."). … [I]f the President himself cannot rely on the supremacy of his position to postpone the required submission of testimony in civil litigation, *see Clinton*, 520 U.S. at 692, the imposition that a congressional hearing places on his advisors would presumably not be enough to warrant absolute privilege from process. This is especially true of a former advisor like McGahn, who is no longer "presumptively available to the President 24 hours a day." Rehnquist Memorandum, at 7.

Categorical refusal is blow to compromise and accommodation
Even setting aside the shaky foundation of testimonial immunity, a categorical refusal to participate in congressional inquiries strikes a resounding blow to the system of compromise and accommodation that has governed these fights since the republic began. Political negotiations should be the first—and, it is hoped, only—recourse to resolve the competing and powerful interests of two coequal branches of government. And even if one is skeptical of this rosy projection, I believe the applicable privileges provide a narrower starting point and, should the parties reach an impasse, frame the issue in a manner more suitable—and, indeed, more familiar—to judicial resolution.

Rogers Dissent

Dissent rationale
Today the court reaches the extraordinary conclusion that the House of Representatives, in the exercise of its "sole Power of Impeachment," U.S. CONST. art. I, § 2, cl. 5, lacks standing under Article III of the Constitution to seek judicial enforcement of a subpoena in connection with an investigation into whether to impeach the President. The House comes to the court in light of the President's blanket and unprecedented order that no

member of the Executive Branch shall comply with the subpoena duly issued by an authorized House Committee. Exercising jurisdiction over the Committee's case is not an instance of judicial encroachment on the prerogatives of another Branch, because subpoena enforcement is a traditional and commonplace function of the federal courts. The court removes any incentive for the Executive Branch to engage in the negotiation process seeking accommodation, all but assures future Presidential stonewalling of Congress, and further impairs the House's ability to perform its constitutional duties. I respectfully dissent.

Impeachment is vital check on Executive Branch; power of inquiry is critical

The Founding Fathers understood impeachment to be a vital check on the Executive Branch and essential to the preservation of the system of democratic self- governance against possible overreaching by a powerful President. … The circumstances that culminated in the impeachment inquiry illustrate the singular role that the impeachment power plays in checking possible Presidential excesses. Special Counsel Robert S. Mueller, III identified "multiple acts" of the President that were "capable of exerting undue influence over law enforcement investigations." … The Special Counsel's Report also acknowledged that the Department of Justice's understanding is that, as a constitutional matter, a sitting president may not be criminally indicted. Thus, as the Special Counsel noted, impeachment would be the only available mechanism through which to address potential Presidential misconduct identified in the Report. The House's power of impeachment thus serves as a critical check upon the President. … In turn, the power of inquiry, including the power to issue a subpoena and thereby compel a witness to appear before the House, is critically important to the efficacy of the impeachment power.

Courts have consistently held Congress can compel information

The courts have consistently held that Congress has a constitutional right in the ability to acquire information, including by compulsory process. In *McGrain v. Daugherty*, 273 U.S. 135 (1927), the Supreme Court stated, "We are of opinion that the power of inquiry — with process to enforce it — is an essential and appropriate auxiliary to the legislative function." Id. at 174. So too the Court stated in *Quinn v. United States*, 349 U.S. 155 (1955), that "[w]ithout the power to investigate — including of course the authority to compel testimony, either through its own processes or through judicial trial — Congress could be seriously handicapped in its efforts to exercise its constitutional function wisely and effectively." *Id.* at 160–61. That right of inquiry "may be as broad, as searching, and as exhaustive as is necessary to make effective the constitutional powers of Congress." *Townsend v. United States*, 95 F.2d 352, 361 (D.C. Cir. 1938); *see also Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 n.15 (1975); *Barenblatt v. United States*, 360 U.S. 109, 111 (1959); *Watkins v. United States*, 354 U.S. 178, 188 (1957).

House's need for information at its zenith in impeachment inquiry

When the House has determined that the President may have committed "high Crimes and Misdemeanors," U.S. CONST. art. I, § 2, cl. 5, it has a constitutional obligation to investigate further and to decide whether to exercise its tremendous power of impeachment. The question of whether to impeach or not is a grave and solemn decision

upon which turns whether a duly elected President may be removed from office. It is not a decision taken lightly and, for that reason, must be made on an informed basis. In the context of impeachment, when the accuracy and thoroughness of the investigation may well determine whether the President remains in office, the House's need for information is at its zenith.

President's sweeping resistance to impeachment inquiry is unprecedented
For the first time in our history, the President has met the House's attempt to perform its constitutional responsibility with sweeping categorical resistance, instructing all members of the Executive Branch not to cooperate with the House's impeachment inquiry. *See* Letter from Pat A. Cipollone, Counsel to the President, to Hon. Nancy Pelosi, Speaker of the House, et al., at 7 (Oct. 8, 2019). He has denounced the impeachment investigation as without "[l]egitimate [b]asis," *id.* at 6, and an "unconstitutional effort[] to overturn the democratic process," *id.* at 2. Indeed, at oral argument, McGahn's Department of Justice ("Department") counsel acknowledged that he was unaware of any instance in history in which the President instructed the Executive Branch "not to cooperate in any form or fashion" with a Congressional inquiry. Oral Arg. Tr. at 21.

Parties unlikely to reach a mutually acceptable resolution of their dispute
The President and Congress have traditionally been able to resolve disputes over Congressional desire for Executive Branch documents and testimony. The President's reticence to turn them over here through informal processes of negotiation and give-and-take, as repeatedly proposed by the House Committee, makes clear that the likelihood of the parties privately reaching a mutually acceptable resolution of their dispute over McGahn's testimony seems remote at best. Consequently, the specific injury that the Committee seeks to vindicate before the court is limited to McGahn's defiance of its subpoena by refusing to appear.

House has standing under *Raines* factors
Under the Supreme Court's analysis in *Raines v. Byrd*, 521 U.S. 811 (1997), there are four factors that the court must consider in determining whether the House of Representatives has standing under Article III of the Constitution to bring the instant suit. As explained in Part I, *infra*, all four of those factors indicate that the House has standing here.

House has stated a cause of action and court has jurisdiction
The House also has a cause of action to enforce its subpoena in federal court, in view of the essentiality of the subpoena power to the House's performance of its constitutional functions. There is a cause of action directly under Article I of the Constitution; alternatively, the House may proceed under the Declaratory Judgment Act, as it meets the Act's requirements, and none of its limitations apply. This court has subject matter jurisdiction over the House's lawsuit under 28 U.S.C. § 1331, as the House seeks to vindicate its constitutional power, namely compulsory process in the exercise of its power of inquiry.

District court order enforcing congressional subpoena should be affirmed
Because the House has established that it has standing and a cause of action, and that there is federal subject matter jurisdiction over its lawsuit, the district court order enforcing the subpoena by directing McGahn to appear before the Committee should be affirmed.

***Raines* factors on standing do not control outcome of this case**
In *Raines* … [t]he Court relied on four considerations: (1) the individual plaintiffs alleged an institutional injury that was "wholly abstract and widely dispersed"; (2) plaintiffs' "attempt to litigate th[eir] dispute at this time [wa]s contrary to historical experience"; (3) the plaintiffs "ha[d] not been authorized to represent their respective Houses of Congress . . . , and indeed both Houses actively oppose[d] their suit"; and (4) dismissing the lawsuit "neither deprive[d] Members of Congress of an adequate remedy . . . , nor foreclose[d] the Act from constitutional challenge." *Id.* at 829. … [E]ach factor that in *Raines* counselled against the existence of standing is absent here. *Raines* thus does not control the outcome of this case.

Judges agree injury is not widely dispersed
In defying the Committee's subpoena, McGahn has flaunted the House's "power of inquiry" and "process to enforce it," *McGrain*, 273 U.S. at 174. That injury is specific and acute, not "wholly abstract." Nor is the injury widely dispersed. By virtue of McGahn's defiance of the subpoena, the full House has incurred an institutional injury. And in view of House authorization of the instant lawsuit, the House is the plaintiff seeking to remedy that institutional injury. Thus, the very entity that has suffered the injury is suing to vindicate the injury. As such, the Committee's injury is not "widely dispersed." The court is in agreement that Raines is not dispositive on this issue. See Op. at 35 (Griffith, J.); Op. at 5-7 (Henderson, J.).

Institutional injuries can confer standing
The suggestion that Article III standing is satisfied only when an individual right is at stake, Op. at 8–9 (Griffith, J.), is foreclosed by *Raines* itself. … If the Court in *Raines* had been of the view that no institutional injury to a legislative body could be adequate to confer standing, it would not have bothered to identify problems with the specific institutional injury alleged. The Court would have stated that the alleged injury was an institutional one incurred by a legislative body and left it at that. Furthermore, in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015), the Supreme Court distinguished *Raines* and held that the Arizona State Legislature *qua* legislature had incurred an institutional injury in its loss of redistricting authority where the authority was vested, by a ballot initiative, in an independent entity. The Court's holding thus precludes the view that there is standing only when an individual right is implicated. *See also Sixty- Seventh Minn. State Senate v. Beens*, 406 U.S. 187 (1972).

Relevant history is presidential cooperation in impeachment inquiries
[T]he *Raines* plaintiffs' attempt to litigate the dispute was "contrary to historical experience." *Raines*, 521 U.S. at 829. History is different here than it was in *Raines*, for

the relevant history is Presidential cooperation with the legislative Branch exercising its constitutional responsibilities with respect to impeachment. Although there have been relatively few instances of interbranch subpoena-enforcement litigation in the federal courts, the history of Presidential cooperation means that there have been few occasions necessitating resort to the courts. The degree of Presidential interference with the constitutional responsibilities of Congress, giving rise to the instant lawsuit, *see, e.g.,* Oral Arg. Tr. at 21, is a dramatic break with past Presidential practice of acknowledging the gravity of Congress's constitutional responsibilities, including impeachment, and responding with requested information. Although there may have been isolated instances of Presidential nondisclosure of requested Executive Branch documents or testimony, this broad and indiscriminate defiance flouts the "respect due to coequal and independent departments" of the federal government, *Marshall Field & Co. v. Clark*, 143 U.S. 649, 672 (1892), and "disregards that coequal position in our system of the three departments of government," *id.* at 676, and the "reciprocity" each branch owes to each other, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). Indeed, the fact that the Supreme Court has not squarely addressed the question presented here is unsurprising, given the long history of Presidential cooperation with congressional investigations.

1974 D.C. Circuit case held Senate subpoena dispute was justiciable

This court, sitting en banc in *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974), unanimously enforced a Senate Committee subpoena duces tecum served on the President for production of the "Nixon tapes." The court did not independently analyze jurisdiction, including Article III standing, observing without critique that the district court had addressed and rejected the President's contention that the lawsuit was non-justiciable because it was an interbranch conflict. *See id.* at 728. "Finding the reasoning of this court in *Nixon v. Sirica*, which concerned a grand jury subpoena, 'equally applicable to the subpoena of a congressional committee,' the [d]istrict [c]ourt held that, under that case and the relevant Supreme Court precedent, the issues presented to it were justiciable." *Id.* (emphasis added) (quoting *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 370 F. Supp. 521 (D.D.C. 1974)). This court was satisfied with that analysis and so proceeded to address the merits of the case. *See id.* at 728–29.

AT&T case held House had standing to assert investigatory power

[I]n *United States v. AT&T*, 551 F.2d 384 (D.C. Cir. 1976) … the House of Representatives had intervened as a defendant to represent its interest in AT&T's compliance with the subpoena. As such, the court characterized the case as a "portentous clash between the executive and legislative branches," *id.* at 385, and undertook a more extensive jurisdictional analysis than in *Senate Select Committee*. The court reasoned that "*Senate Select Committee* establishes, at a minimum, that the mere fact that there is a conflict between the legislative and executive Branches over a congressional subpoena does not preclude judicial resolution of the conflict," *id.* at 390, and held that "[i]t is clear that the House as a whole has standing to assert its investigatory power, *id.* at 391.

Other cases held courts have jurisdiction over interbranch subpoena disputes
More recently, courts have likewise held that the federal courts have jurisdiction to decide a Congressional subpoena-enforcement action against a former White House Counsel and one of the highest-ranking members of the Executive Branch, the Attorney General. *See Comm. on the Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008); *Comm. on Oversight & Gov't Reform v. Holder*, 979 F. Supp. 2d 1 (D.D.C. 2013). *AT&T* and *Senate Select Committee* are our precedent for the proposition that the Committee has standing here and demonstrate, as *Raines* requires, that these interbranch disputes have been amenable to judicial resolution. The Supreme Court has acknowledged that historical practice is constitutionally significant even when it does not extend as far back into the past as the Founding. … *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014)[.]

Committee meets *Raines* factor requiring it to be authorized by House
Third, in *Raines* the plaintiff Members of Congress had "not been authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose[d] their suit." *Raines*, 521 U.S. at 829. Not so here. The Committee's lawsuit was authorized by the House of Representatives in H. Res. 430, 116th Cong. (2019). Subsequent Supreme Court treatment of *Raines* has reaffirmed that the key feature of that case, which was fatal to the plaintiffs' standing, was that there was a mismatch between the individual legislators filing suit and the institutional injury, to the entire Congress, that they sought to vindicate. In *Arizona State Legislature,* 135 S. Ct. 2652, the Supreme Court rejected the argument that *Raines* stood for the proposition that the Arizona State Legislature lacked standing and characterized *Raines* as "holding specifically and only that 'individual members of Congress [lack] Article III standing.'" *Id.* at 2664[.]

Congress has no other adequate remedy
Significantly, on two occasions, the Department's Office of Legal Counsel ("OLC") has concluded that there is no other adequate remedy for the House's injury. A 1984 OLC Opinion authored by Acting Assistant Attorney General Theodore Olson analyzed the methods available to Congress to enforce a subpoena and concluded that there was no constitutionally viable alternative to a civil subpoena-enforcement action in federal court, that is, the very mechanism that the House pursues here. *See Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101 (1984) ("Olson"). … [C]iting McGahn for contempt and referring the citation to the Department of Justice for prosecution would be ineffective because the Department would decline to pursue the prosecution. … [D]etaining McGahn pursuant to the House's inherent contempt authority, is similarly impracticable. … The OLC has focused not on the unseemliness and undesirableness of physical confrontation between the Branches but rather on the concern that subjecting close presidential advisors to Congressional detention would unduly chill such advisors in the exercise of their duties in service of the President's performance of his constitutional functions. … It suffices here to note that the prospect that the House will direct its Sergeant at Arms to arrest McGahn is vanishingly slim, so long as a more peaceable judicial alternative remains available.

***Raines* does not dictate finding that House lacks standing here**
Significantly, in *Raines*, the Supreme Court stated that if any of the four considerations it relied upon had been different, the outcome of the standing analysis might have been different. *See Raines*, 521 U.S. at 829. Here, not just one but all four factors are different than they were in *Raines*. Consequently, *Raines* does not support, much less dictate, that the Committee lacks standing here.

Courts should resolve such disputes only as a last resort
The court undoubtedly must proceed with caution given the separation of powers principles implicated when a House of Congress files a lawsuit against a former close presidential advisor. Courts should resolve such disputes only as a "last resort," *Raines*, 521 U.S. at 833 (Souter, J., concurring) (quoting *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc*., 454 U.S. 464, 474 (1982)).

Appropriate to exercise jurisdiction here
Here, it is appropriate for the court to exercise jurisdiction for two reasons. First, subpoena enforcement is a "familiar judicial exercise," *Zivotofsky ex rel. Zivotofsky v. Clinton*, 556 U.S. 189, 196 (2012), with which courts are well-acquainted, because judicial enforcement of a subpoena is an ordinary corollary to civil litigation. *See, e.g.*, *Miers* 558 F. Supp. 2d 53. … Furthermore, what the Committee seeks here is quite narrow: a declaration that McGahn is required by law to appear before it. … Given McGahn's role as a close presidential advisor, it is plausible that he could properly assert the executive privilege, state secrets privilege, or attorney-client privilege in response to at least some of the Committee's questions. … Potentially available privileges are powerful protections of the President's interest in Executive Branch confidentiality, and they remain unaffected by an order compelling McGahn to appear before the Committee.

Rejection of civil subpoena enforcement dramatically undermines Congress' ability to fulfill its constitutional obligations
Analyzing *Senate Select Committee*, among other precedent, OLC concluded that "although the civil enforcement route has not been tried by the House, it would appear to be a viable option." *Id.* at 88. So, in acknowledgement of the impracticability of alternatives, OLC has concluded that Congress may file a subpoena-enforcement action in federal court. The majority's rejection of that conclusion leaves the House unable to enforce its subpoena, dramatically undermining its ability to fulfill its constitutional obligations now and going forward.

Precluding civil enforcement of congressional subpoenas will disrupt status quo
[T]he suggestion that a civil subpoena-enforcement suit in federal court is a "new" weapon in Congress's arsenal is unwarranted. Federal courts have consistently permitted Congress to bring civil subpoena-enforcement actions, going back to 1974. McGahn can point to no federal court that has accepted the argument that Congress lacks standing to file a subpoena-enforcement action in federal court against an Executive Branch official; to the contrary, every court to have taken up the question has determined that there is standing in such a case. Thus, the better understanding is that the current balance of power between the two political Branches includes Congress's power to vindicate in

federal court its constitutional right to compulsory process. So understood, what would disrupt the present balance of power is not a holding that such lawsuits are permissible but the decision that they are not. … In precluding Congress's resort to the courts to enforce a subpoena, the court encourages increased Presidential non-cooperation with Congressional subpoenas and thereby substantially undermines the ability of Congress to acquire information from the Executive Branch necessary to the performance of its constitutional responsibilities. That outcome will have broad disruptive consequences for relations between Congress and the President going forward and substantially upset the status quo.

Resolving interbranch dispute would not hurt public confidence in judiciary
Judicial "intervention" in an "interbranch controversy" could "risk damaging the public confidence that is vital to the functioning of the Judicial Branch," *Raines*, 521 U.S. at 833 (Souter, J., concurring), but that risk is minimal here. As discussed, the scope of the legal question that the Committee asks this court to decide is narrow and offers no occasion for the court to weigh in on the political dispute between the House and the President. This is not a case that risks "embroiling the federal courts in a power contest nearly at the height of its political tension." *Id*. Although there is a dramatic backdrop of a highly charged political battle over the impeachment of the President, there is nothing political about the case itself. And speculation that Congress or the President might attempt to politicize a decision of this court does not justify a refusal to exercise jurisdiction over the Committee's lawsuit, for "the judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky*, 566 U.S. at 194[.]

Declaring one branch's acts unlawful does not make case non-justiciable
Nor does the fact that the court would necessarily declare one Branch's actions unlawful render this subpoena-enforcement suit non-justiciable. Courts regularly review the actions of Congress or the Executive Branch for compliance with the Constitution, and indeed doing so is a bedrock feature of judicial review, *see Marbury*, 5 U.S. (1 Cranch) 137. Although courts should do so only as a "last resort," *see Raines*, 521 U.S. at 833 (Souter, J., concurring) (quoting *Valley Forge Christian College*, 454 U.S. at 474), the fact that deciding the case would require the court to declare unlawful the action of one Branch does not, standing alone, justify dismissing the Committee's lawsuit. The Supreme Court has developed a robust doctrine for determining when a lawsuit presents a non-justiciable political question, designed to keep courts out of political disputes. *See Baker v. Carr*, 369 U.S. 186 (1962). Tellingly, McGahn does not argue that this dispute presents a political question within the meaning of *Carr.*

President's counsel argued in impeachment inquiry in favor of court jurisdiction
The President's personal counsel argued to the Senate: "We're acting as if the courts are an improper venue to determine constitutional issues of this magnitude . . . . That is why we have courts. That is why we have a federal judiciary." Senate Trial Tr., Day 2, pt.1, at 1:07:08–32, *In re Impeachment of President Donald J. Trump* (Jan. 21, 2020). The suggestion was thus that the President ought not be impeached for obstructing Congress's investigation because the House could have acquired the documents and testimony it wanted by pursuing its case in federal court. Of course, that is not what McGahn has

argued. More broadly, it illustrates that regardless of how the court decides the limited question before it, it has, as in any subpoena-enforcement litigation, no power to control comments about it. Because the political Branches will likely attempt to bolster their positions in the impeachment fight using the court's decision, regardless of the disposition, this cannot be a reason for the court to abstain.

Case would not open courts to a deluge of political lawsuits
[T]he infrequency of Congressional lawsuits against the Executive in the aftermath of *Senate Select Committee*, *AT&T*, and *Miers* belies that exercising jurisdiction here will open the courts to a deluge of political lawsuits between the other two Branches of the federal government. The paucity of such cases instead suggests that Congress generally has preferred not to resort to the courts in order to obtain information for the discharge of its constitutional duties.

Court decision effectively dismantles the accommodation process
At least since the 1970s, the political Branches have negotiated their informational disputes against the backdrop of possible resort to the courts. By foreclosing that possibility going forward, the court now diminishes the incentive the Executive Branch might have to reach an accommodation. Future Presidents may direct widescale non-compliance with lawful Congressional inquiries, secure in the knowledge that Congress can do little to enforce a subpoena short of directing a Sergeant at Arms to physically arrest an Executive Branch officer. By encouraging Presidential stonewalling, the court effectively dismantles the accommodation process.

Long history of parties asking courts to enjoin unlawful Executive Branch action
[T]he House of Representatives has appropriately sought judicial enforcement of its subpoena of McGahn in the face of the unprecedented degree of Presidential non-cooperation. … There is a long history of parties resorting to the courts to enjoin unlawful, and specifically unconstitutional, Executive Branch action. *See, e.g., Ex parte Young*, 209 U.S. 123 (1908). That is precisely what the House asks the court to do here, given that the object of its lawsuit is to compel McGahn to appear before its duly authorized Committee in compliance with its subpoena, and its right to have him do so is rooted in Article I of the Constitution.

Declaratory Judgment Act provides cause of action
Even if a cause of action directly under the Constitution were inadequate, the Declaratory Judgment Act provides a cause of action for Congress to enforce its subpoena. The Act requires that there be "a case of actual controversy" over which a federal court may exercise jurisdiction; it then authorizes the court to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). Those two requirements — (1) an actual case or controversy, and (2) federal court jurisdiction — are met here. First, this is an actual case or controversy, with antagonistic parties who have separate sincere interests in the outcome. … 28 U.S.C. § 1331 supplies federal jurisdiction over this lawsuit.

House has independent right needed to proceed under Declaratory Judgment Act
The various limits that the Supreme Court and this court have placed upon lawsuits brought under the Declaratory Judgment Act do not preclude the House from proceeding under the Act. … The Supreme Court has long recognized Congress's broad power of inquiry and the concomitant right to compel witnesses to appear before it. *See, e.g., McGrain*, 273 U.S. at 174. Thus, because the Committee here asserts a right based on its constitutional duty, the requirement that a Declaratory Judgment Act plaintiff rely on an independent substantive right is satisfied.

Court has jurisdiction under 28 U.S.C. § 1331
[T]he federal courts have subject matter jurisdiction over the Committee's lawsuit pursuant to 28 U.S.C. § 1331, which grants statutory jurisdiction over "all civil actions arising under the Constitution . . . of the United States." Because the House seeks to vindicate its right of compulsory process, and because that power flows from Article I of the Constitution, *see, e.g., McGrain*, 273 U.S. at 174, the Committee's lawsuit arises under the Constitution. This conclusion is bolstered by the analysis in *AT&T*, 551 F.2d at 389, which recognized that there is federal-question jurisdiction over such an interbranch dispute because of the "constitutional powers" that the dispute implicates.

§ 1365 did not repeal jurisdiction provided by § 1331
To the extent McGahn maintains that 28 U.S.C. § 1365 amounts to an implied repeal of federal jurisdiction under § 1331, that argument is unpersuasive. … [W]hen Congress enacted § 1365 in 1978, § 1331 contained an amount-in-controversy requirement for suits against private parties and officials acting in the individual capacities. The Senate had good reason to believe that this requirement would be an obstacle to subpoena-enforcement suits; the district court in *Senate Select Committee* had originally dismissed the Senate's lawsuit for failure to meet the requirement. *See Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 366 F. Supp. 51, 59–61 (D.D.C. 1973). Congress addressed this problem in 1978 with the enactment of § 1365, which granted federal courts subject matter jurisdiction over Senate subpoena-enforcement actions without regard to the amount in controversy. *See* S. Rep. No. 95-170, at 20–21 (1978). … With § 1365, Congress was responding to a particular problem: the amount in controversy requirement that, until it was eliminated in 1980, prevented federal courts from exercising jurisdiction over Congressional subpoena-enforcement suits under § 1331. Given the specific obstacle Congress overcame in enacting § 1365, there is no basis to conclude the statute bears on federal jurisdiction over House subpoena-enforcement actions. The inference that § 1365 has repealed such jurisdiction is therefore unwarranted. … [G]iven the jealousy with which each House of Congress guards its constitutional prerogatives, it would be inappropriate in the absence of a clear statutory directive to conclude § 1365 also restricted the power of the House to file a federal subpoena-enforcement action.

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