[SCHEDULED FOR EN BANC ORAL ARGUMENT ON APRIL 28, 2020]

No. 19-5331

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

COMMITTEE ON THE JUDICIARY OF THE
UNITED STATES HOUSE OF REPRESENTATIVES,

Appellee,

v.

DONALD F. MCGAHN, II,

Appellant.

On Appeal from the United States District Court for the District of Columbia
(Hon. Ketanji Brown Jackson, United States District Judge)

SUPPLEMENTAL BRIEF OF THE COMMITTEE ON THE JUDICIARY OF THE UNITED STATES HOUSE OF REPRESENTATIVES

Annie L. Owens
Joshua A. Geltzer
Seth Wayne
INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION
Georgetown University Law Center
600 New Jersey Avenue NW
Washington, D.C. 20001
(202) 662-9042

Matthew S. Hellman
Elizabeth B. Deutsch
JENNER & BLOCK LLP
1099 New York Avenue NW
Washington, D.C. 20001
(202) 639-6000

Douglas N. Letter
General Counsel
Todd B. Tatelman
Megan Barbero
Josephine Morse
Adam A. Grogg
William E. Havemann
Jonathan B. Schwartz
OFFICE OF GENERAL COUNSEL
U.S. HOUSE OF REPRESENTATIVES
219 Cannon House Office Building
Washington, D.C. 20515
(202) 225-9700
douglas.letter@mail.house.gov

Counsel for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES*

Cases

* Authorities upon which we chiefly rely are marked with asterisks.

U.S. Constitution and Statutes

Legislative Materials

Other Authorities

GLOSSARY

Br.	Brief of Donald F. McGahn on Rehearing En Banc (Mar. 30, 2020)
Comm. Br.	Brief of the Committee (Dec. 16, 2019)
Comm. Supp. Br.	Supplemental Brief of the Committee (Dec. 23, 2019)
Conc.	Concurring opinion by Judge Henderson
Dis.	Dissenting opinion by Judge Rogers
House	United States House of Representatives
OLC	Office of Legal Counsel
Op.	Panel opinion (Feb. 28, 2020)
Pet.	Petition for Rehearing En Banc (Mar. 6, 2020)
Tr.	Transcript of Oral Argument (Jan. 3, 2020)

INTRODUCTION

Information is indispensable to Congress's performance of its constitutional duties. Congress cannot effectively legislate, conduct oversight, or consider impeachment without information, including about Executive misconduct. When an Executive official defies a Congressional committee's subpoena and prevents Congress from obtaining information, the committee suffers a concrete and particularized injury that courts can redress.

The panel majority nevertheless reached the "extraordinary conclusion" (Dis. 1) that a Congressional committee lacks standing to enforce subpoenas against Executive officials. Thus, although federal courts routinely resolve subpoena disputes brought by private parties and the Executive, the panel held that federal courts are closed uniquely to Congress. That conclusion—which no other court has ever reached—is wrong.

The panel relied principally on *Raines v. Byrd*, 521 U.S. 811 (1997), but ignored the limits of that decision. *Raines* was a suit by individual legislators, and the Supreme Court declined to decide how the Constitution would treat cases like this one where an authorized House committee sought information to which it is entitled from the Executive. It is therefore unsurprising that the Supreme Court has instructed that *Raines* held "specifically and only" that individual legislators lack standing to challenge the constitutionality of a statute. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2664 (2015).

The panel also relied on an absence of subpoena-enforcement suits by early Congresses, but history reveals that Congress had no need to bring such suits until more recently. Beginning with President Washington, the Executive for nearly two centuries overwhelmingly recognized Congress's right to information and fully complied with requests or sought to accommodate Congress's interests. By contrast, in the past decades, Congressional committees have on several occasions sought judicial enforcement of their subpoenas where Executive officials have refused to comply. For nearly 50 years—from suits challenging President Nixon's conduct during Watergate to today—this Court and others have uniformly held that committees have standing to do so.

The panel's contrary decision upends separation-of-powers principles. Judicial resolution of subpoena disputes safeguards the separation of powers by ensuring that Congress can obtain information needed to perform its constitutional functions and serve as an effective check on the Executive. Yet the panel's holding would encourage the Executive to defy Congressional subpoenas and refuse accommodation. The panel suggested that Congress could use political tools—such as contempt and even impeachment—to force compliance, but the constitutional brinksmanship envisioned by the panel would heighten interbranch conflict and undermine, not protect, the separation of powers. In any event, recent experience confirms that political tools cannot force an obstinate Executive to cooperate with legitimate Congressional inquiries.

By depriving Congress of the judicial forum available to every other litigant to enforce subpoenas, the panel did not opt out of political disputes, but sided with the Executive. If affirmed, the panel's decision would hamstring the legislative process and effectively eliminate Congressional oversight as we know it.

ARGUMENT

I. THE COMMITTEE HAS ARTICLE III STANDING

Article III standing rests on three requirements: injury-in-fact, causation, and redressability. McGahn challenges only the Committee's claim of injury, but that requirement is easily satisfied here.

A. The Committee Has Suffered A Redressable Injury Caused By McGahn

1. "A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change." *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927). Congress's power of inquiry is "broad." *Watkins v. United States*, 354 U.S. 178, 187 (1957). It is "as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution." *Barenblatt v. United States*, 360 U.S. 109, 111 (1959). The power of inquiry encompasses the power to investigate for purposes of legislation, oversight, and impeachment. *See Watkins*, 354 U.S. at 187; *Kilbourn v. Thompson*, 103 U.S. 168, 190 (1880). Each chamber of Congress in turn delegates its power of inquiry to committees "endowed with the full power of the Congress to compel testimony." *Watkins*, 354 U.S. at 201.

The "process to enforce" Congressional inquiries "is an essential and appropriate auxiliary to the legislative function." *McGrain*, 273 U.S. at 174. Where Congress "does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it." *Id.* at 175. Because "mere requests for such information often are unavailing, … some means of compulsion are essential to obtain what is needed." *Id.*

Congress's principal method of compulsory process is the subpoena. "[L]egislative subpoenas are older than our country itself." *Trump v. Mazars USA, LLP*, 940 F.3d 710, 718 (D.C. Cir.), *cert. granted*, 140 S. Ct. 660 (2019). Because all citizens have a "duty" to cooperate with Congressional investigations, witnesses have an "unremitting obligation to respond to [legislative] subpoenas." *Watkins*, 354 U.S. at 187. The legal obligation to comply, backed by a sanction for noncompliance, distinguishes a subpoena from a request. Subpoenas thus give Congress "the authority to compel testimony, either through its own processes or through judicial trial." *Quinn v. United States*, 349 U.S. 155, 160-61 (1955) (footnotes omitted).

2. The Committee has standing to challenge McGahn's defiance of its subpoena. McGahn's testimony will inform oversight and potential legislation designed to protect federal law-enforcement investigations from improper political interference. His testimony will also inform the Committee's determination whether President Trump committed impeachable offenses in obstructing Special Counsel Mueller's investigation and whether to recommend new articles of impeachment. *See*

Comm. Br. 8-9, 16; Comm. Supp. Br. 7-10. Because the subpoena advances the Committee's legislative, oversight, and impeachment functions, defiance of the subpoena undermines the Committee's constitutional "power of inquiry—with process to enforce it." *McGrain*, 273 U.S. at 174.

The "denial of information [the plaintiff] believes the law entitles him to" is a quintessential injury-in-fact. *Shays v. FEC*, 528 F.3d 914, 923 (D.C. Cir. 2008). McGahn's obstruction of the Committee's valid subpoena invades "a legally protected interest." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016). The Committee's injury is "particularized," *id.*, because the Committee is the entity with the right to information and the entity being deprived of it. And the injury is "concrete," *id.*, because the Committee has in fact been denied information.

Private parties undeniably have standing to enforce compliance with subpoenas. That the plaintiff here is a Congressional committee makes the injury more severe, not less. McGahn's defiance of the subpoena has impaired the Committee "in the performance of its constitutional duties." *Loving v. United States*, 517 U.S. 748, 757 (1996). There is no basis to treat "a committee of Congress less favorably than a litigating private citizen when it comes to identifying the appropriate mechanisms for the vindication of established legal rights." JA929.

B. Precedent Confirms The Committee's Standing

1. Congressional committees have occasionally sued to enforce subpoenas against the Executive—particularly after the removal of the amount-in-controversy

requirement from the federal-question statute during the mid-1970s eliminated a potential impediment to such suits. *See* Pet. 12-13. The courts in these cases uniformly recognized that the committees had standing.

In *AT&T I*, a House subcommittee subpoenaed AT&T for documents related to FBI wiretaps. *United States v. Am. Tel. & Tel. Co.*, 551 F.2d 384, 385 (D.C. Cir. 1976). When AT&T signaled that it would comply, the Executive sued to prohibit it from doing so, and the chairman of the House subcommittee intervened. *Id.* Although AT&T was the nominal defendant, the case was "a clash of the powers of the legislative and executive branches of the United States." *Id.* at 388-89. With that understanding, this Court held that "[i]t is clear that the House as a whole has standing to assert its investigatory power." *Id.* at 391.

This Court in *AT&T I* explained that it had previously adjudicated the merits of a similar suit. *Id.* at 390. In *Senate Select Committee on Presidential Campaign Activities v. Nixon*, this Court, sitting en banc, adjudicated a Senate committee's suit seeking a declaration that President Nixon must comply with a subpoena for Oval Office tapes. 498 F.2d 725, 726 (D.C. Cir. 1974). The Court in *AT&T I* understood *Senate Select Committee* to "establish[], 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." 551 F.2d at 390.

McGahn errs in attempting (Br. 25) to distinguish *AT&T I* because the district court there had quashed the subpoena before the House intervened. If the House

suffers a cognizable injury from an order quashing its subpoena, it necessarily suffers a cognizable injury from a refusal to comply with its subpoena in the first place. And, contrary to McGahn's suggestion (Br. 26), this Court in *AT&T I* specifically held that separation-of-powers principles do not render interbranch disputes categorically nonjusticiable. *See* 551 F.2d at 390.

2. Since *AT&T I*, every district court to consider the question has concluded that a Congressional committee has standing to sue the Executive over an informational injury. JA852; *Comm. on Oversight & Gov't Reform v. Holder*, 979 F. Supp. 2d 1, 20 (D.D.C. 2013); *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 68 (D.D.C. 2008); *see U.S. House of Representatives v. U.S. Dep't of Commerce*, 11 F. Supp. 2d 76, 86 (D.D.C. 1998) (three-judge panel) (it is "well established that a legislative body suffers a redressable injury when that body cannot receive information necessary to carry out its constitutional responsibilities").

3. In Office of Legal Counsel opinions that have never been withdrawn, the Executive itself has acknowledged that Congress can sue to enforce subpoenas against Executive officials.

In 1984, OLC relied on this conclusion when it determined that the Executive should not prosecute an Executive official for contempt for defying a Congressional subpoena at the President's instruction. *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). OLC acknowledged that "Congress has a legitimate and powerful interest in

obtaining any unprivileged documents necessary to assist it in its lawmaking function," but explained that "Congress could obtain a judicial resolution of the underlying privilege claim … *by a civil action for enforcement of a congressional subpoena*." *Id.* at 137 (emphasis added). OLC found "little doubt" that such suits were justiciable. *Id.* at 137 n.36.

OLC later confirmed that "a civil suit brought by the House" would be appropriate and would "avoid [the] constitutional confrontation" that would occur if the House were to seek to prosecute an Executive official for contempt. *Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act*, 10 Op. O.L.C. 68, 88 (1986). OLC explained that Supreme Court precedent dispelled "[a]ny notion that the courts may not or should not review" such disputes. *Id.* at 88 n.33.

II. THE PANEL ERRED IN HOLDING THAT THE COMMITTEE LACKS STANDING

The panel recognized (Op. 9) that McGahn's "obstruction may seriously and even unlawfully hinder the Committee's efforts to probe presidential wrongdoing." But the panel concluded (Op. 2, 9) that the Committee's injury is not "judicially cognizable" because it is an "interbranch information dispute." That conclusion is wrong. Neither *Raines*, nor history, nor any other reason invoked by McGahn or the panel bars this suit.

A. *Raines* Does Not Bar This Suit

The panel principally relied on *Raines*, which it understood (Op. 26) to "compel[] the conclusion that [courts] lack jurisdiction to consider lawsuits between the Legislative and Executive Branches." This is a dramatic overreading of *Raines* at odds with the Supreme Court's reasoning.

Raines did not involve a suit by an authorized Congressional committee to vindicate its power of inquiry. *Raines* instead held that individual legislators lacked standing to challenge a statute that they maintained would diminish Congress's abstract legislative power. The Court stressed that the legislators "ha[d] not been authorized to represent their respective Houses of Congress" and that its "conclusion neither deprive[d] Members of Congress of an adequate remedy … nor foreclose[d] the Act from constitutional challenge." 521 U.S. at 829. The Court made clear that "[w]hether the case would be different if any of these circumstances were different, we need not now decide." *Id.* at 829-30. The factors that weighed against standing in *Raines* support the Committee's standing here.

1. The Court in *Raines* emphasized the mismatch between the plaintiffs there and the injured entity. *Raines* was brought by *individual Members* to challenge a statute that they claimed diminished *Congress's* power. The plaintiffs "alleged no injury to themselves as individuals" as opposed to the body in which they served. 521 U.S. at 829. And the plaintiffs could not sue on behalf of Congress because they were not

authorized to represent the House or Senate—indeed, "both Houses actively oppose[d] their suit." *Id.*

The Supreme Court accordingly has instructed that *Raines* held "specifically and only" that "six *individual Members* of Congress lacked standing" where neither chamber had authorized them to sue. *Ariz. State Legislature*, 135 S. Ct. at 2664. Because the injury in *Raines* "scarcely zeroed in on any individual Member," none of the plaintiffs "could tenably claim a 'personal stake' in the suit." *Id.*; *accord Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953 n.4 (2019).

Here, by contrast, the Committee sued with the full House's authorization. H. Res. 430, 116th Cong. (2019). This distinction is critical, as reflected by the Supreme Court's more recent holding that "an institutional [state legislative] plaintiff asserting an institutional injury" had standing. *Ariz. State Legislature*, 135 S. Ct. at 2664. Indeed, in *Raines* itself, Justice Souter noted in concurrence that "the impairment of certain official powers may support standing for Congress, or one House thereof, to seek the aid of the Federal Judiciary." 521 U.S. at 831 n.2.

2. The injury alleged in *Raines* was "wholly abstract and widely dispersed." *Id.* at 829. The *Raines* plaintiffs alleged that the Line Item Veto Act altered the balance of powers by allowing the President to cancel certain individual appropriations after signing them into law. The claimed injury was thus an "abstract dilution of institutional legislative power." *Id.* at 826.

Here, by contrast, the Committee's injury is "specific and acute." Dis. 6. The Committee requires McGahn's testimony, but he refuses to testify. The Committee challenges not an abstract dilution of power by a hypothetical future act, but McGahn's concrete refusal to testify.

McGahn notes (Br. 7) that *Raines* stressed the need for "*personal injury*." But *Raines* did so because the plaintiffs were individual legislators who lacked authority to assert an institutional injury—not because only individuals have standing to sue. *See* 521 U.S at 822 (distinguishing legislators in *Coleman v. Miller*, 307 U.S. 433 (1939) because they sued "as a bloc"). The claimed injury in *Raines* "necessarily damage[d] all Members of Congress and both Houses of Congress equally," *id.* at 821, whereas McGahn's refusal to testify injures the Committee specifically.

3. McGahn errs (Br. 4) in contending that *Raines* added a new "element of Article III standing"—that the dispute must be "'traditionally thought to be capable of resolution through the judicial process.'" To the contrary, "the irreducible constitutional minimum of standing consists of three elements"—injury, causation, and redressability. *Spokeo*, 136 S. Ct. at 1547 (quotation marks omitted). *Raines* did not add a fourth.

The Court in *Raines* looked to history not as an independent element of standing, but to test its assessment that the plaintiffs' claimed injury—the "abstract dilution of institutional legislative power"—did not satisfy the traditional three standing elements. 521 U.S at 826. No similar resort to history is necessary here

because the Committee's injury—noncompliance with its subpoena—easily satisfies the three standing elements. And, unlike in *Raines*, the Committee seeks to vindicate its own Article I power rather than to interfere with any Executive function in implementing a statute. There is a stark difference between a suit like this one by Congress "to vindicate its own institutional powers to act" and a suit "to correct a perceived inadequacy in the execution of [Congress's] laws." *United States v. Windsor*, 570 U.S. 744, 788-89 (2013) (Scalia, J., dissenting).

The language in *Raines* on which McGahn relies describes the *function* of standing's three elements: They limit the exercise of the judicial power to cases presented with "clear concreteness" in "a clash of adversary argument," rather than cases "of a hypothetical or abstract character." *Flast v. Cohen*, 392 U.S. 83, 96, 100 (1968). In *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, the Court described the "irreducible minimum" elements necessary to establish standing, then explained: "*In this manner* does Art. III limit the federal judicial power to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process." 454 U.S. 464, 472 (1982) (emphasis added) (quotation marks omitted); *accord United States v. Nixon*, 418 U.S. 683, 696-97 (1974).

McGahn invokes *Flast*, but that case confirms that the purpose of the three standing elements is to "assure that the constitutional challenge will be made in a form traditionally thought to be capable of judicial resolution." 392 U.S. at 106. The

Court added that "the implicit policies embodied in Article III, and not history alone," inform the standing inquiry. *Id.* at 96. While historical practice sheds light on the Constitution's meaning, if history had been dispositive in *Flast*, the Court could not there have recognized taxpayer standing for the first time. *Id.* at 88.

4. Finally, McGahn concedes (Br. 12-13) that, "strictly speaking," *Raines* does not control this case, but insists that this Court "lacks the power" to depart from *Raines*'s "essential rationale." McGahn then cherry-picks language from *Raines* regarding "the traditional dearth of interbranch suits" (Br. 13) and skips over the rest of the opinion.

That is not how Supreme Court opinions are to be construed. *See Armour & Co. v. Wantock*, 323 U.S. 126, 132-33 (1944) ("[W]ords of our opinions are to be read in the light of the facts of the case under discussion."). McGahn provides no basis to single out one feature of *Raines*—its historical discussion—while dismissing as mere "additional factual circumstances" (Br. 13) the context of that discussion and the other factors the Court addressed. The *Raines* Court identified multiple considerations necessary to its holding and stressed that it was not deciding whether that holding "would be different if any of these circumstances were different." 521 U.S. at 829-30. Indeed, the conclusion that McGahn argues *Raines* compels is one that Justice Scalia later advanced in a *dissent* that only one other Justice joined. *Ariz. State Legislature*, 135 S. Ct. at 2694-95 (Scalia, J., dissenting). The authorities that

McGahn cites (Br. 13-14) certainly do not require this Court to accept McGahn's answer to a question the Supreme Court itself reserved.

B. History Supports The Committee's Standing

McGahn assumes that because Congress did not sue to enforce its subpoenas to the Executive early in American history, Congress lacked the power to do so. The relevant history, however, shows that early Congresses generally had no need to sue because the Executive traditionally cooperated with Congressional inquiries—either in full or after a compromise that gave Congress much or all of the necessary information. The prospect that a President would entirely defy a Congressional subpoena—particularly one informing impeachment—would have been inconceivable to the Founding generation. Several historical points bear emphasis.

First, early Presidents overwhelmingly complied with Congressional inquiries, reflecting their understanding that they had a constitutional obligation to cooperate. Hence, during Congress's first oversight investigation of the Executive in 1792—into the disastrous St. Clair military expedition—President Washington explained that "he could readily conceive there might be papers of so secret a nature, as that they ought not to be given up," but he and his Cabinet concluded "in this case, that there was not a paper which might not be properly produced."[1] Washington provided the requested records in their entirety, and two of his close aides (Secretaries Hamilton and Knox)

[1] 1 *The Writings of Thomas Jefferson* 303-05 (Lipscomb & Bergh eds., 1903).

"appeared before the Committee for two hours."[2] Full compliance with Congressional subpoenas was the norm throughout early American history, and refusals to disclose information were "infrequent."[3]

Second, even when early Presidents did not fully comply with Congressional inquiries, their withholdings were generally narrow and often invited by Congress itself. To a striking degree, the historical examples invoked by the panel (Op. 17) and McGahn (Br. 9-10) reveal a history of substantial compliance with Congress's inquiries.

When Congress sought diplomatic correspondence with France, for example, President Washington disclosed the bulk of the requested material and withheld only certain "particulars," without objection from Congress.[4] When Congress sought information regarding the Burr conspiracy, Congress's request invited President Jefferson to exempt materials that he "may deem the public welfare to require not to be disclosed."[5] Jefferson complied with the request and withheld only the names of suspects who might be prejudiced by public disclosure.[6] President Monroe similarly

---

[2] Stephen Stathis, *Executive Cooperation: Presidential Recognition of the Investigative Authority of Congress and the Courts*, 3 J.L. & Pol. 183, 205 (1986).

[3] *History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress*, 6 Op. O.L.C. 751, 751-52 (1982).

[4] *Id.* at 753; 1 James Richardson, *Messages and Papers of the President* (Richardson), H. Doc. No. 53-210 pt. 1, at 152 (1896).

[5] H. Journal, 9th Cong., 2d Sess. 533 (1807).

[6] 6 Op. O.L.C. at 755.

withheld information in only two of 149 Congressional inquiries—both times after Congress invited him to do so.[7] President Lincoln withheld information in three of about 80 Congressional inquiries—all three times at Congress's invitation.[8]

President Trump, by contrast, has broken with his early predecessors and declared McGahn absolutely immune from testifying. And although McGahn maintains (Br. 9) that an accommodation was reached regarding the documents the Committee seeks, the Executive has disclosed nothing to date.

Third, even as the Executive has occasionally withheld limited information from Congress, it has recognized that Congress's right to information is at its apex during an impeachment inquiry.

When President Washington declined to provide material to the House regarding the Jay Treaty (having already provided this material to the Senate during the advice-and-consent process), he noted that disclosure would nevertheless be required in the case of "an impeachment."[9] President Polk likewise explained that "the authority of the House in an impeachment investigation 'would penetrate into the most secret recesses of the Executive Department' and would include the

---

[7] Stathis, *Executive Cooperation* at 209; 2 Richardson at 138-39 (1896); H. Journal, 18th Cong., 2d Sess. 102-03 (1825).

[8] Stathis, *Executive Cooperation* at 218; 6 Op. O.L.C. at 765-66; 6 Richardson at 33, 74, 147-49 (1897); S. Journal, 37th Cong., 2d Sess. 412-13 (1862); H. Journal, 37th Cong., 1st Sess. 138 (1861).

[9] 5 Annals of Cong. 760-61 (1796).

authority to 'command the attendance of any and every agent of the Government, and compel them to produce all papers, public or private, official or unofficial, and to testify on oath to all facts within their knowledge.'"[10]

When President Buchanan objected to a House inquiry, he complained that the House possessed no power to issue an accusatory resolution "except as an impeaching body."[11] Contrary to McGahn's assertion (Br. 10), Buchanan did not then block the inquiry; instead, the committee "proceeded for months … to examine … every subject which could possibly affect [Buchanan's] character."[12]

Throughout his impeachment, President Andrew Johnson cooperated fully with Congress's inquiry.[13] President Nixon, too, disclosed substantial material to Congress during his impeachment inquiry and instructed his high-level aides to testify.[14] When Nixon refused to disclose Oval Office tapes to a Senate committee, the committee sued to obtain them, and this Court adjudicated that claim on the merits. *Senate Select Comm.*, 498 F.2d at 726.

The absence of interbranch suits concerning Congress's right to information in the early Republic thus says more about Executive cooperation than whether such

---

[10] Todd Garvey, Cong. Research Serv., *Congressional Access to Information in an Impeachment Investigation* 17 (2019) (quoting 4 Richardson at 434-35 (1897)).

[11] 5 Richardson at 615 (1897).

[12] *Id.* at 620-21.

[13] Stathis, *Executive Cooperation* at 218-20.

[14] *See Remarks by President Nixon* (Apr. 17, 1973), *reprinted in Statement of Information: Hearings Before the H. Comm. on the Judiciary: Book IV—Part 2*, at 1011 (1974).

suits were capable of judicial resolution. And during the last half-century, when the Executive retreated from its constitutional obligation to cooperate, committees on occasion filed suit and courts uniformly found standing.

C. The Additional Arguments Against Standing Lack Merit

1. The panel believed (Op. 6) that courts lack authority to resolve any "intramural disagreement about the 'operations of government'" that do not involve "rights of individuals." That claim is overstated.

Article III extends the judicial power "to Controversies between two or more States" and "to Controversies to which the United States shall be a Party"—including suits by or against States. U.S. Const. art. III, § 2; *e.g.*, *Arizona v. United States*, 567 U.S. 387 (2012). These suits frequently involve disputes about the allocation of power between governmental entities. To the extent the panel sought to treat intergovernmental suits involving "some entity beyond the federal government" as justiciable (Op. 8), it is not clear why, under the panel's individual-rights theory, Article III would permit interstate disputes but not interbranch disputes.

Article III likewise extends to suits between federal government entities. In *United States v. ICC*, for example, the Court explained that, although "this case is *United States* v. *United States, et al.*, it involves controversies of a type which are traditionally justiciable"—there, railroad-fee disputes. 337 U.S. 426, 428, 430 (1949). Similarly here, the Committee's suit involves traditionally justiciable controversies—subpoena-enforcement disputes.

Courts, moreover, routinely adjudicate informational disputes between federal entities in the criminal context. *E.g.*, *Nixon*, 418 U.S. at 687; *Gravel v. United States*, 408 U.S. 606, 608 (1972); *In re Sealed Case*, 121 F.3d 729, 734 (D.C. Cir. 1997); *United States v. Burr*, 25 F. Cas. 30, 34 (C.C.D. Va. 1807) (Marshall, C.J.). *Nixon*, for example, involved an intra-branch informational dispute between President Nixon and a special prosecutor. 418 U.S. at 687-88. The Court rejected the argument that the suit was "not subject to judicial resolution" because it was an "intra-branch dispute between a subordinate and superior officer of the Executive Branch." *Id.* at 692.

As the panel noted (Op. 36), individual rights are undisputedly at stake in criminal prosecutions. Nevertheless, courts adjudicate informational disputes in that context even when the subpoena is directed not to the defendant whose "individual liberty" is at stake (Op. 8), but to a third party with no right at stake other than whether he must comply. *E.g.*, *Nixon*, 418 U.S. at 686.

The facts of this case illustrate the futility of attempting to distinguish cases involving "the rights of private actors" from "interbranch disputes." The Committee issued a subpoena to McGahn, an individual no longer employed by the Executive Branch, and this Court must determine whether he is required to testify.

2. McGahn relies on *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), to argue (Br. 15, 17-18) that the Committee is impermissibly "arrogat[ing] … executive power" to enforce the law. This misunderstands *Buckley* and the nature of Congress's powers.

The Committee sued to obtain information to fulfill its legislative, oversight, and impeachment functions. By contrast, *Buckley* addressed whether officials appointed by Congress rather than the President could enforce federal laws, including by suing violators. *Id.* at 124-42. The Court held that these law-enforcement powers were executive in nature and could not be carried out by officials appointed by Congress. The Court, however, reaffirmed that Congress's Article I powers "of an investigative and informative nature," *id.* at 137, differ in kind from executive law-enforcement functions. And *Buckley* confirmed that Congress possesses "the power of inquiry, with enforcing process." *Id.* at 138 (quoting *McGrain*, 273 U.S. at 175).

McGahn also mistakenly relies (Br. 15) on *Reed v. County Commissioners*, 277 U.S. 376 (1928), which involved the interpretation of a jurisdictional statute, not Article III standing. After a Senate committee sued to obtain evidence from local election officials, the Court held that the relevant statute required a Senate resolution authorizing suit. *Id.* at 388-89. One day after *Reed* was decided, the Senate passed such a resolution—showing a century ago that the Senate understood itself to have authority to seek judicial enforcement of its inquiries. S. Res. 262, 70th Cong. (1928).

3. The panel opined (Op. 7) that Congress "agree[s] that suits like this one do not belong in federal court" because it has not enacted a statute expressly authorizing House subpoena-enforcement suits. That reasoning is incorrect. As this Court held in *AT&T I*, the federal-question statute, 28 U.S.C. § 1331, provides subject-matter jurisdiction over House subpoena-enforcement suits. *See* 551 F.2d at 388-89. For the

reasons explained in the Committee's prior brief (Comm. Br. 28-34), 28 U.S.C. § 1365—which governs only *Senate* enforcement suits—did not impliedly repeal federal-question jurisdiction over *House* enforcement suits.

McGahn's theory of standing would render Section 1365 unconstitutional—as McGahn's counsel acknowledged at oral argument (Tr. 30-31). But that provision has been repeatedly invoked over the last four decades to secure judicial enforcement of Senate subpoenas. *E.g.*, *Senate Permanent Subcomm. on Investigations v. Ferrer*, 199 F. Supp. 3d 125 (D.D.C. 2016), *vacated as moot*, 856 F.3d 1080 (D.C. Cir. 2017); *In re Application of the U.S. Senate Permanent Subcomm. on Investigations*, 655 F.2d 1232 (D.C. Cir. 1981). This is another reason to reject McGahn's theory.

The panel's statement (Op. 28) that a statute "expressly authoriz[ing]" House subpoena-enforcement suits might create Article III standing is a "remarkable suggestion" (Dis. 20) at odds with Supreme Court precedent. "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines*, 521 U.S. at 820 n.3. Indeed, the Line Item Veto Act expressly authorized "[a]ny Member of Congress" to challenge the statute's constitutionality, *id.* at 815-16, but the *Raines* plaintiffs nonetheless lacked standing.

4. The panel emphasized (Op. 9) that this dispute is "deeply political." But when (as here) the political-question doctrine does not apply, the political nature of a dispute provides no basis for dismissal: "the Judiciary has a responsibility to decide

cases properly before it, even those it would gladly avoid." *Zivotofsky v. Clinton*, 566 U.S. 189, 194-95 (2012) (quotation marks omitted). That conclusion holds particularly true when the political branches are at loggerheads. Courts must ensure that each branch may exercise the powers the Constitution accords it, so that political battles occur on the playing field the Constitution establishes.

Even under the panel's reasoning, courts could adjudicate similar disputes—with similar political implications—in different postures.

First, the House has exercised its inherent contempt power to detain contemnors for refusing to testify, with the validity of its subpoenas litigated in challenges brought by the contemnors. The courts have adjudicated such disputes in cases dating back two centuries, including cases involving investigations of the Executive. *E.g.*, *McGrain*, 273 U.S. at 150-51; *Marshall v. Gordon*, 243 U.S. 521, 532 (1917); *Kilbourn*, 103 U.S. at 199-200; *Anderson v. Dunn*, 19 U.S. 204, 224-25 (1821).

Second, the Executive and private parties have sued to enjoin subpoena recipients' compliance. *See Mazars*, 940 F.3d at 717-18; *AT&T I*, 551 F.2d at 388; *Ashland Oil, Inc. v. FTC*, 548 F.2d 977, 979 (D.C. Cir. 1976) (per curiam). Congressional parties have then intervened to defend their subpoenas.

Third, the House has referred cases for prosecution under the contempt-of-Congress statute, with the validity of the subpoena raised as a defense to prosecution. *See Barenblatt*, 360 U.S. at 111; *Watkins*, 354 U.S. at 181. Even OLC's guidance not to

prosecute Executive officials for contempt is predicated on Congress's ability to bring "a civil action for enforcement of a congressional subpoena." 8 Op. O.L.C. at 137.

Accordingly, a system where Congressional committees cannot sue will prevent them from obtaining necessary information but will not prevent the courts from deciding the same legal questions with the same political implications. "It would be strange indeed if the Constitution made judicial consideration available to one who defies the legislature outright, but not to one … who seeks an orderly resolution of a disputed question." *United States v. Am. Tel. & Tel. Co.* (*AT&T II*), 567 F.2d 121, 129 (D.C. Cir. 1977).

III. THE PANEL'S DECISION WOULD UPEND THE SEPARATION OF POWERS

1. The panel maintained (Op. 12) that adjudicating subpoena-enforcement disputes would "displace the long-established process by which the political branches resolve information disputes." That reasoning "is backward." Dis. 24. The panel's decision "effectively dismantles the accommodations process" by "encouraging Presidential stonewalling" and limiting the Executive Branch's incentive to reach an accommodation. Dis. 24-25.

When faced with a request for information that would reveal misconduct, an Executive who ignores his constitutional obligations has no incentive to cooperate if the request cannot be enforced. In such situations—where negotiation is impossible because one party "has no need to compromise"—"judicial abstention does not lead

to orderly resolution of the dispute" but instead has a "detrimental effect on the smooth functioning of government." *AT&T II*, 567 F.2d at 126.

The panel worried that adjudicating subpoena-enforcement disputes would lead to routine litigation between Congress and the Executive. It asked (Op. 13): "why compromise when the federal courts offer the tantalizing possibility of total victory?" The reason is the same one that motivates private-party settlements: Litigation is time-consuming and uncertain, and parties often negotiate based on an evaluation of their likelihood of success in court. Indeed, the Committee's suit in this case was informed by the fact that McGahn's "absolute immunity" claim is uncompromising and clearly wrong—as two members of the panel (Conc. 12-13; Dis. 31) evidently recognized. This Court, moreover, has held that "mutual accommodation [is] required by the Separation of Powers" in interbranch disputes, *AT&T II*, 567 F.2d at 133, imposing a constitutional obligation to compromise before suing.

The proof is in 50 years of precedent. Judicial subpoena-enforcement has been the law in this Circuit since Watergate, and informational disputes between Congress and the Executive have been common since then. Even so, Congress has resorted to litigation rarely, and only in extraordinary circumstances.

The significance of the panel's decision cannot be overstated. President Trump entirely refused to cooperate with Congress—maintaining that he is "fighting all the

subpoenas."[15] As the dissent explained, his "broad and indiscriminate defiance flouts the respect due to coequal and independent departments of the federal government." Dis. 7 (quotation marks omitted). The panel's decision legitimizes this defiance and will result in exactly the dysfunction that the majority sought to avoid.

2. The panel assured itself (Op. 13) that Congress has other "political tools to bring the Executive Branch to heel." But those tools are ineffective at obtaining information and can be damaging to the Nation. The panel contemplated constitutional brinksmanship that—unlike subpoena-enforcement litigation—would seriously undermine the separation of powers.

The panel suggested (Op. 32) that the Committee might obtain testimony from a defiant Executive through "a polite request." But the Committee requested McGahn's voluntary testimony, *see* JA542, and he refused. The panel suggested Congress could "escalate" by issuing a subpoena. But if a subpoena is not judicially enforceable there is no reason to believe it would yield better results than a request. The panel's decision disregards the distinction between a request and a subpoena: A subpoena is enforceable.

The panel suggested (Op. 32) that Congress could obtain information by "threatening to withhold appropriations." Its unstated corollary was that Congress must be willing to shut down all or part of the government until the Executive

[15] *Remarks by President Trump Before Marine One Departure*, White House (Apr. 24, 2019), https://perma.cc/W7VZ-FZ3T.

complies. Government shutdowns are national catastrophes that should not be necessary to enforce the Executive's obligation to comply with Congressional subpoenas. And if the panel were correct that interbranch disputes are nonjusticiable, it is unclear whether Congress's appropriations power could in fact check the Executive. As the Executive's position in *U.S. House of Representatives v. Mnuchin*, No. 19-5176, reveals, McGahn's theory would allow the President unconstitutionally to spend funds that Congress refused to appropriate, knowing that Congress would lack standing to stop him in court.

The panel proposed (Op. 32) "passing articles of impeachment" to obtain information. But the House recently impeached President Trump for failing to provide information to Congress, and the House still has not received the information it seeks. Indeed, President Trump's lawyers defended him against obstruction-of-Congress charges in the Senate by arguing that the House should have first sought judicial enforcement of its subpoenas—even as the Executive told this Court that judicial enforcement of subpoenas would be unconstitutional.

In any event, the House should have access to full information *before* taking the drastic step of impeaching the President. As John Quincy Adams explained, it would make a "mockery" of impeachment for the House to have the power to impeach but not "the power to obtain the evidence and proofs on which their impeachment was based." Cong. Globe, 27th Cong., 2d Sess. 580 (1842). The routine use of impeachment as a tool to obtain information is not a recipe for effective government.

That leaves the panel's suggestion (Op. 13) that Congress "may hold officers in contempt"—which Congress has historically enforced by "imprisonment … until the recalcitrant witness agrees to testify." *Watkins*, 354 U.S. at 206. But the panel offered no reason to require Congress to risk a physical altercation with Executive officials to manufacture a case or controversy—which would involve disputes between the same parties regarding the same legal questions that the panel deemed nonjusticiable. The Constitution does not require Congress to resort to radical self-help.

Moreover, McGahn now declares (Br. 22) that "Congress lacks any inherent contempt power to arrest individuals for actions within the scope of their duties as executive officials." This is incorrect. Congress has long asserted the power to arrest and detain contemnors, *Dunn*, 19 U.S. at 234, and it has exercised that power against Executive officials—in 1879, *see* 8 Cong. Rec. 2138 (1879), and again in 1916, *see Marshall*, 243 U.S. at 532. While the Supreme Court ultimately granted habeas relief in *Marshall*, it did so not because an Executive official was involved, but because inherent contempt could not be used for pure "punishment." *Id.* at 542. Given McGahn's emphasis on history, his attempt to denigrate these precedents (Br. 22) as dating back "more than a century" is mystifying.

McGahn's argument reflects a pattern of nonaccountability. Time and again, the Executive resists Congressional oversight by insisting that Congress may hold it accountable using other tools. But when Congress invokes those tools—the contempt power, the appropriations power, or even the impeachment power—the

Executive insists that those tools are likewise improper. The system McGahn envisions is one that leaves Congress effectively powerless to hold the Executive accountable and would be unrecognizable to the Framers who designed our system of checks and balances.

CONCLUSION

The Court should affirm the district court's judgment for the Committee.

Respectfully submitted,

/s/ Douglas N. Letter

Douglas N. Letter
General Counsel
Todd B. Tatelman
Megan Barbero
Josephine Morse
Adam A. Grogg
William E. Havemann
Jonathan B. Schwartz

OFFICE OF GENERAL COUNSEL
U.S. HOUSE OF REPRESENTATIVES
219 Cannon House Office Building
Washington, D.C. 20515
(202) 225-9700
douglas.letter@mail.house.gov

Counsel for Appellee

Annie L. Owens
Joshua A. Geltzer
Seth Wayne

INSTITUTE FOR
CONSTITUTIONAL ADVOCACY
AND PROTECTION
Georgetown University Law Center
600 New Jersey Avenue NW
Washington, D.C. 20001
(202) 662-9042
ao700@georgetown.edu

Matthew S. Hellman
Elizabeth B. Deutsch

JENNER & BLOCK LLP
1099 New York Avenue, NW
Washington, D.C. 20001
(202) 639-6000

April 16, 2020

CERTIFICATE OF COMPLIANCE

1. This brief complies with the en banc Court's order of March 13, 2020, because it contains 6,500 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word Professional Plus 2016 in 14-point Garamond type.

/s/ Douglas N. Letter
Douglas N. Letter

CERTIFICATE OF SERVICE

I certify that on April 16, 2020, I filed the foregoing supplemental brief of the Committee on the Judiciary of the U.S. House of Representatives via the CM/ECF system of the United States Court of Appeals for the District of Columbia Circuit, which I understand caused service on all registered parties.

/s/ Douglas N. Letter
Douglas N. Letter