Absolute Immunity Case

McGahn Case-Key Excerpts from 2020 En Banc Appeals Court Opinion on Standing

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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. *Comm. on the Judiciary, U.S. House of Representatives v. McGahn*, 415 F. Supp. 3d 148 (D.D.C. 2019). 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 appellate panel, in a 2-1 decision, reversed the district court and found Congress had no standing to bring the lawsuit. *Comm. on the Judiciary, U.S. House of Representatives v. McGahn*, 951 F.3d 510 (D.C. Cir. 2020). On August 7, 2020, in a 7-2 en banc decision, the D.C. Circuit reversed the appellate panel and held Congress had standing to seek enforcement of its subpoenas. *Comm. on the Judiciary, U.S. House of Representatives v. McGahn*, (D.C. Cir. Aug. 7, 2020) (en banc). Here are key excerpts from the 66-page en banc opinion and two dissents; each excerpt consists of a direct quotation taken from the text, with no changes in punctuation but with footnotes largely omitted.

Congress has standing
The question before the *en banc* court is whether the Committee on the Judiciary of the House of Representatives has standing under Article III of the Constitution to seek judicial enforcement of its duly issued subpoena. Upon applying the principles of Article III standing, we hold that it does.

Congress' constitutional responsibilities
The Constitution charges Congress with certain responsibilities, including to legislate, to conduct oversight of the federal government, and, when necessary, to impeach and remove a

President or other Executive Branch official from office. Possession of relevant information is an essential precondition to the effective discharge of all of those duties.

Role of information in carrying out Congress' responsibilities
Congress cannot intelligently legislate without identifying national problems in need of legislative solution and relying on testimony and data that provide a deeper understanding of those problems, their origins, and potential solutions. It likewise cannot conduct effective oversight of the federal government without detailed information about the operations of its departments and agencies. And it cannot undertake impeachment proceedings without knowing how the official in question has discharged his or her constitutional responsibilities.

Summary of ruling
The Committee, acting on behalf of the full House of Representatives, has shown that it suffers a concrete and particularized injury when denied the opportunity to obtain information necessary to the legislative, oversight, and impeachment functions of the House, and that its injury would be redressed by the order it seeks from the court. The separation of powers and historical practice objections presented here require no different result. Indeed, the ordinary and effective functioning of the Legislative Branch critically depends on the legislative prerogative to obtain information, and constitutional structure and historical practice support judicial enforcement of congressional subpoenas when necessary.

Inquiry arose in context of impeachment, legislation, and oversight
The Committee's interest in McGahn's testimony therefore arose in furtherance of the "sole Power of Impeachment" vested in the House of Representatives under Article I, section 2, clause 5 of the Constitution, and included consideration of the amendment or enactment of laws on ethical conduct by Executive Branch officials and oversight of the Department of Justice ("the Department") and the Federal Bureau of Investigation to determine if they were operating with requisite independence. … His testimony would, in turn, inform the Committee's determination of whether President Trump had committed impeachable offenses in obstructing the Special Counsel's investigation and whether to recommend articles of impeachment. McGahn's testimony would also inform House oversight and legislative functions in determining the need for legislation to protect federal law enforcement investigations from improper political interference.

White House asserted absolute immunity to congressional compulsion
On May 20, McGahn's successor as White House Counsel informed the Committee that the President had "directed Mr. McGahn not to appear at the Committee's scheduled hearing" because the OLC had opined that close Presidential advisors were "absolutely immune from compelled congressional testimony." Letter from Pat A. Cipollone, White House Counsel, to Hon. Jerrold Nadler, Chairman, Comm. on the Judiciary, U.S. House of Representatives, at 1–2 (May 20, 2019). McGahn's private counsel confirmed that he would not appear.

Dispute is limited to subpoena for testimony
Although agreement was ultimately reached on the production of the subpoenaed documents, McGahn repeatedly rejected the Committee's continuing offers of accommodations in attempting to secure his testimony. … The complaint sought a declaratory judgment "that

McGahn's refusal to appear before the Committee in response to the subpoena issued to him was without legal justification" and an injunction "ordering McGahn to appear and testify forthwith before the Committee[.]"

Standing inquiry must be especially rigorous
Because "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," the court's standing inquiry must be "especially rigorous." *Raines*, 521 U.S. at 819–20. Our analysis reflects that rigor.

Test to determine standing
"[T]he 'irreducible constitutional minimum' of standing consists of three elements." *Spokeo*, 136 S. Ct. at 1547 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). "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.* At issue is injury in fact, "the '[f]irst and foremost' of standing's three elements." *Id.*

Test to establish injury in fact
"To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 1548 (quoting *Lujan*, 504 U.S. at 560). These are distinct requirements: in addition to being actual or imminent, "an injury in fact must be both concrete and particularized." *Id.* The Supreme Court has confirmed that these general principles of standing apply to institutional injuries claimed by legislative bodies.

Summary of injury in fact analysis
McGahn's disregard of the subpoena, the validity of which he has never challenged, deprived the Committee of specific information sought in the exercise of its constitutional responsibilities. The Committee is the "proper party" to bring this "particular lawsuit," *id.* Because the Committee's injury has been caused by McGahn's defiance of its subpoena and can be cured here only by judicial enforcement of the subpoena, the injury is traceable to McGahn's conduct and judicially redressable. And, contrary to McGahn's positions, the Committee's standing is consistent with the system of separated powers and capable of resolution through the judicial process, *see Allen v. Wright*, 468 U.S. 727, 752 (1984).

Intangible injuries can be concrete
To be judicially cognizable and form the basis of Article III standing, an injury must be concrete, as opposed to abstract. A concrete injury is an injury that is real; it "must actually exist." *Spokeo*, 136 S. Ct. at 1548. "'Concrete' is not, however, necessarily synonymous with 'tangible.' Although tangible injuries are perhaps easier to recognize," the Supreme Court has acknowledged "that intangible injuries can nevertheless be concrete." *Id*. at 1549.

Each house in Congress is entitled to testimony and documents in response to subpoena
As to the concreteness of the Committee's alleged injury, the Supreme Court has acknowledged the essentiality of information to the effective functioning of Congress and

long "held that each House has power 'to secure needed information'" through the subpoena power. *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031 (2020) (quoting *McGrain v. Daugherty*, 273 U.S. 135, 161 (1927)). Because Congress must have access to information to perform its constitutional responsibilities, when Congress "does not itself possess the requisite information — which not infrequently is true — recourse must be had to others who do possess it." *McGrain*, 273 U.S. at 175. Therefore, "the power of inquiry — with process to enforce it — is an essential and appropriate auxiliary to the legislative function." *Id.* at 174. "Without 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." *Quinn v. United States*, 349 U.S. 155, 160–61 (1955); *see Mazars*, 140 S. Ct. at 2031. That constitutional power entitles each House to the testimony of a witness and production of requested documents in response to a lawful subpoena.

Subpoena power is potent

The subpoena power is potent. Each House of Congress is specifically empowered to compel testimony from witnesses and the production of evidence in service of its constitutional functions, and the recipient of a subpoena is obligated by law to comply.

> It is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action. It is their unremitting obligation to respond to subpoenas, to respect the dignity of the Congress and its committees and to testify fully with respect to matters within the province of proper investigation.

Watkins v. United States, 354 U.S. 178, 187–88 (1957); *see Mazars*, 140 S. Ct. at 2036 (quoting *Watkins*, 354 U.S. at 187).

Congress' subpoena power predates Founding and has long been employed

The power of each House of Congress to compel witnesses to appear before it to testify and to produce documentary evidence has a pedigree predating the Founding and has long been employed in Congress's discharge of its primary constitutional responsibilities: legislating, conducting oversight of the federal government, and, when necessary, checking the President through the power of impeachment. Congressional subpoenas have their historical basis in the "emergence of [the English] Parliament." *Watkins*, 354 U.S. at 188. Congress began using its investigative powers from the earliest days of the Republic to investigate national problems and probe for possible federal solutions. *See Mazars*, 140 S. Ct. at 2029–30. … Congress's power to issue subpoenas in conjunction with legislative investigations was confirmed by the Supreme Court in *McGrain*, 273 U.S. 135, and *Sinclair v. United States*, 279 U.S. 263 (1929). "Following these important decisions, . . . there was vigorous use of the investigative process by a Congress bent upon harnessing and directing the vast economic and social forces of the times." *Watkins*, 354 U.S. at 195.

Congressional subpoenas used to develop legislation and conduct oversight

Congress commonly uses subpoenas not only to develop legislation but also in furtherance of its oversight of the federal government, including the Executive Branch. This subpoena power "comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste." *Watkins*, 354 U.S. at 187. Subject to certain restraints, *see, e.g., id.,* "[a] legislative 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). Indeed, the Court has recently emphasized that "[u]nless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served." *Mazars*, 140 S. Ct. at 2033 (quoting *United States v. Rumely,* 345 U.S. 41, 43 (1953)).

House uses subpoenas in service of its constitutional power of impeachment

The House of Representatives employs its subpoena power in service of its constitutional power of impeachment, as the Committee's investigation illustrates. … To level the grave accusation that a President may have committed "Treason, Bribery, or other high Crimes and Misdemeanors," U.S. CONST. art. II, § 4, the House must be appropriately informed. And it cannot fully inform itself without the power to compel the testimony of those who possess relevant or necessary information. As far back as 1796, George Washington, the Nation's first President, acknowledged that the House may compel the President to turn over some Executive Branch information if sought as part of an impeachment investigation. … Decades later, Congress also issued subpoenas to President Nixon during its impeachment investigation of him. *See Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 726–27 (D.C. Cir. 1974).

House delegates its power of inquiry to its committees

The House, then, has a long-recognized right, based in the Constitution, to have McGahn appear to testify and produce documents. Because each House of Congress delegates its power of inquiry to its Committees, which are "endowed with the full power of Congress to compel testimony," *Watkins*, 354 U.S. at 201; HOUSE RULES X & XI, cl. 2(m)(1), the Committee exercised the House's subpoena power when it issued a subpoena to McGahn.

Deprivation of testimony to which it is legally entitled is concrete injury

By refusing to testify in response to the Committee's concededly valid subpoena, McGahn has denied the Committee something to which it alleges it is entitled by law. And because the Committee has alleged the deprivation of testimony to which it is legally entitled, its asserted injury is concrete.

Supreme Court precedents that denial of information is concrete injury

In other contexts, as well, the Supreme Court has held that when a person seeks to obtain information the government is required to disclose, the denial of the information is a concrete injury for standing purposes. For example, in *FEC v. Akins*, 524 U.S. 11 (1998), the Court held that the plaintiffs had suffered an Article III injury "consist[ing] of their inability to obtain information . . . that, on their view of the law," they were legally entitled to. *Id.* at 21. Similarly, in *Public Citizen v. DOJ*, 491 U.S. 440 (1989), the Court held that plaintiffs incurred an injury sufficient to support standing when they were denied access to agency records to which they were legally entitled. *Id.* at 449. *Akins* and *Public Citizen* thereby support the principle that the denial of information to which the plaintiff claims to be entitled by law establishes a quintessential injury in fact. *See Shays v. FEC*, 528 F.3d 914, 923 (D.C. Cir. 2008). Here, each House of the Congress has a constitutionally grounded entitlement to obtain information, namely McGahn's testimony, in carrying out its constitutional functions.

McGahn's denial of the information to which the Committee alleges it is entitled results in informational injury of the kind that the Supreme Court held supported standing in *Akins* and *Public Citizen*.

Standing has been found in cases involving subpoenas of private parties

By analogy, private parties undeniably have standing to seek judicial enforcement of compliance with subpoenas. And Courts have regularly entertained lawsuits in which a legislative body seeks to enforce a subpoena against a private party. *See, e.g., In re Application of Senate Permanent Subcomm. on Investigations*, 655 F.2d 1232 (D.C. Cir. 1981); *Senate Select Comm*., 498 F.2d 725; *Senate Permanent Comm. v. Ferrer*, 199 F. Supp. 3d 125 (D.D.C. 2016). Further, the OLC, in opinions never withdrawn, has stated that a House of Congress can file a civil action to seek enforcement of its subpoenas. … A legislative body, then, generally has standing to sue to obtain information it claims it has been wrongfully denied, at least when a private party is withholding information. McGahn maintains the result is different when the defendant withholding the information is another branch of government, but the reasons he offers do not explain why the identity of the defendant should make a difference for purposes of standing, which is focused on whether the plaintiff is the proper party to bring the lawsuit.

Test to establish a particularized injury

The Committee's asserted injury must be not only concrete but also particularized. "For an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.'" *Spokeo*, 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560 n.1). An injury is not particularized if it is "undifferentiated" and "'common to all members of the public.'" *United States v. Richardson*, 418 U.S. 166, 177 (1974) (quoting *Ex parte Levitt*, 302 U.S. 633, 634 (1937)). The injury, in short, must be specific to the plaintiff.

Test to establish a particularized injury to a legislature

Virginia House of Delegates v. Bethune-Hill, 139 S. Ct. 1945 (2019), provides some guidance on particularization when a legislative institution seeks to show injury in fact. … What undermined the House of Delegates' attempt to show standing was the "mismatch between the body seeking to litigate and the body to which the relevant [state] constitutional provision allegedly assigned . . . authority." *Id*. Although not explicitly couched in terms of particularization, the Court's focus on "mismatch" is an inquiry into whether the claimed injury is personal to the plaintiff or else shared by a larger group of which the plaintiff is only a component — in other words, whether the injury is particularized.

No mismatch here

The Committee's asserted injury is particularized because the Committee "is an institutional plaintiff asserting an institutional injury," *Ariz. State Legislature*, 135 S. Ct. at 2664. There is no "mismatch" here, *Va. House of Delegates*, 139 S. Ct. at 1953: the body whose informational and investigative prerogatives have been infringed is the body authorized by House Resolution 430 to bring the present lawsuit. … There is no dispute that the House as an institution may unilaterally obtain what its authorized Committee seeks to compel here: McGahn's testimony. The Senate naturally need not sign off on the House's subpoenas; so it need not join efforts to vindicate them in the courts. Because the Committee exercised the

investigative authority of the full House, the Committee was entitled to McGahn's testimony. Denial of his testimony is a deprivation that is a concrete injury and because the plaintiff is the distinctly injured party, the injury is particularized.

Committee's impeachment, legislation, and oversight functions handicapped by defiance of subpoena

The Constitution places in the House sole responsibility to determine whether to file articles of impeachment against the President. U.S. CONST. art. 1, § 2, cl. 5. The subpoena power of the House exercised by the Committee in subpoenaing McGahn relates directly to that responsibility. The House's other constitutional functions of legislation and oversight are also handicapped by McGahn's defiance of the subpoena, as explained in the Nadler Memorandum.

Traceability and redressability requirements readily met

The remaining two prongs of the traditional standing test — that the injury is "fairly traceable to the challenged conduct" and "is likely to be redressed by a favorable [judicial] decision," *Va. House of Delegates*, 139 S. Ct. at 1950 — are readily met. The injury that the Committee asserts has been directly caused by McGahn's conduct that it seeks to have enjoined. McGahn's refusal to testify before the Committee in response to a valid subpoena is responsible for the denial of information to which the Committee claims it is entitled and the resulting handicapping of the House's discharge of its constitutional obligations that the Committee now seeks to remedy in this lawsuit.

The injury is also likely to be redressed by a favorable judicial decision. The Committee's lawsuit seeks "declaratory and injunctive relief" "[d]eclar[ing] that McGahn's refusal to appear before the Committee in response to the subpoena issued to him was without legal justification" and "ordering McGahn to appear and testify forthwith before the Committee." Compl. at 53. If the court grants the Committee that relief, the deprivation that the Committee has suffered will be remedied. The Committee has therefore demonstrated redressability.

Duty of care to ensure no needless disturbance of branches' working arrangements

With notable exceptions dating back at least to the 1970s, Congress and the Executive have "managed for over two centuries to resolve [informational] disputes among themselves." *Mazars,* 140 S. Ct. at 2031. That "longstanding practice . . . imposes on us a duty of care to ensure that we not needlessly disturb 'the compromises and working arrangements that [those] branches . . . themselves have reached.'" *Id.* (second and third alterations in original) (quoting *NLRB v. Noel Canning*, 573 U.S. 513, 524–26 (2014)). Our analysis demonstrates that holding the Committee has Article III standing involves no such disturbance.

Standing is built on the idea of separation of powers

"[T]he law of Art[icle] III standing is built on a single basic idea — the idea of separation of powers." *Raines*, 521 U.S. at 820 (quoting *Allen*, 468 U.S. at 752). In turn, "federal courts may exercise power . . . only when adjudication is 'consistent with a system of separated powers,'" *Allen*, 468 U.S. at 752 (quoting *Chi. & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339, 345 (1892)). The court's standing analysis has accounted for and ensured the federal

judiciary's limited constitutional role, and the court does not act outside its "properly limited . . . role," *Warth*, 422 U.S. at 498, in holding that the Committee has standing.

Judiciary does not arrogate new power to itself by exercising jurisdiction over lawsuit
McGahn maintains that in exercising jurisdiction over the present lawsuit and resolving whether he is required to testify, the court takes sides in an interbranch dispute, aggrandizes Congress at the expense of the Executive, or otherwise disrupts the balance of powers between the Branches. To the contrary, the judiciary, in exercising jurisdiction over the present lawsuit, does not arrogate any new power to itself at the expense of either of the other branches but rather plays its appropriate constitutional role.

Merely invoking separation of powers principles does not defeat standing
The statement in *Raines*, 521 U.S. at 820, that separation of powers was the "single basic idea" on which standing is based, appropriately reflects the "overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere." It does not mean, as McGahn maintains, that merely invoking separation of powers principles defeats standing in interbranch disputes like this one. … [T]he separation of powers objections McGahn raises do not withstand analysis and are therefore unpersuasive.

Other separation of powers doctrines address whether to reach merits of case
[O]ther separation of powers doctrines not before the *en banc* court, including the non-justiciability of political questions, separately address whether the court should decline to reach the merits of interbranch disputes. *See Baker v. Carr*, 369 U.S. 186 (1962).

Individual legislator suits not implicated here
The separation of powers consideration that the court viewed as being a necessary part of its standing analysis was the need for the judiciary to "avoid 'meddl[ing] in the internal affairs of the legislative branch,'" *id.* at 116 (alteration in original) (quoting *Moore v. U.S. House of Representatives*, 733 F.2d 946, 956 (D.C. Cir. 1984)), by entertaining a lawsuit by an individual legislator whose "rights [could] be vindicated by congressional repeal of the [offending] statute,'" *id.* at 115 (alterations in original) (quoting *Moore*, 733 F.2d at 956). It is this limited separation of powers concern, in the context of individual legislator suits and not implicated here, that *Chenoweth* stated must be part of the standing analysis. … Because the Committee has identified a concrete injury, namely a former Executive Branch official's defiance of a valid subpoena, and is the institution duly authorized to maintain the present lawsuit, the obstacles to suits by individual legislators are inapplicable.

***Mazars* addressed merits of subpoena challenge, not standing**
Mazars addressed the merits of a challenge to the validity of a congressional subpoena, not the plaintiff's standing, but the concerns about the adjudication of such interbranch disputes expressed in *Mazars* may be implicated here. Such concerns do not bar the Committee's standing, however. Much of the Supreme Court's attention was directed to the implications of a "limitless" congressional subpoena power that "would transform the 'established practice' of the political branches." *Id*. at 16 (quoting *Noel Canning*, 573 U.S. at 524). This court explains in responding to McGahn's separation of powers objections, *see* Part III.A.2 *infra*, why allowing the Committee to proceed with the present lawsuit would preserve,

rather than disrupt, that historical practice of accommodation. Furthermore, McGahn has never challenged the validity of the Committee's subpoena.

No disruption of accommodation practices
Courts must take care not to disrupt the "longstanding practice" of accommodation between the political branches. *Mazars*, 140 S. Ct. at 2031. But there is no congressional "arrogation" of power here and no threat that the court's decision will disrupt the historical practice of accommodation. To the contrary, permitting Congress to bring this lawsuit preserves the power of subpoena that the House of Representatives is already understood to possess. Rather, it is McGahn's challenge to the Committee's standing that seeks to alter the *status quo ante* and aggrandize the power of the Executive Branch at the expense of Congress.

Congress and Executive Branch have long assumed court enforcement of subpoenas
For more than forty years this circuit has held that a House of Congress has standing to pursue a subpoena enforcement lawsuit in federal court. *See Comm. on Oversight & Gov't Reform v. Holder*, 979 F. Supp. 2d 1, 20–22 (D.D.C. 2013); *Comm. on the Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 68–78 (D.D.C. 2008); *United States v. AT&T*, 551 F.2d 384, 391 (D.C. Cir. 1976); *Senate Select Comm*., 498 F.2d at 728; *see also* Part III.B.2 *infra*. McGahn does not suggest that any court, prior to the vacated panel majority in the present case, has ever ruled to the contrary. Congress and the Executive Branch have long operated under the assumption that Congress may, if necessary, seek enforcement of a subpoena in federal court.

Lack of standing would upset settled expectations and bargaining positions
Accepting McGahn's position that the Committee lacks standing would significantly curtail the possibility of accommodation. That outcome would upset settled expectations and dramatically alter bargaining positions in the accommodation process over informational disputes in the future.

Without subpoena enforcement, Executive Branch faces little incentive to negotiate
Without the possibility of enforcement of a subpoena issued by a House of Congress, the Executive Branch faces little incentive to reach a negotiated agreement in an informational dispute. Indeed, the threat of a subpoena enforcement lawsuit may be an essential tool in keeping the Executive Branch at the negotiating table. For example, President Clinton and a Senate subcommittee "[e]ventually . . . reached an agreement" over an informational dispute only after "a Senate threat to seek judicial enforcement of the subpoena." *Mazars*, 140 S. Ct. at 2030. Without that possibility, Presidents could direct widescale non-compliance with lawful inquiries by a House of Congress, secure in the knowledge that little can be done to enforce its subpoena — as President Trump did here.

Without subpoena enforcement, congressional oversight and impeachment powers would be diminished
Traditional congressional oversight of the Executive Branch would be replaced by a system of voluntary Presidential disclosures, potentially limiting Congress to learning only what the President wants it to learn. And the power of impeachment, the "essential check . . . upon the encroachments of the executive," FEDERALIST NO. 66 (A. Hamilton), would be

diminished because a President would be unlikely to voluntarily turn over information that could lead to impeachment.

Holding House has standing does not displace practice of accommodation
Neither does holding that the Committee has Article III standing displace the historical practice of accommodation, as McGahn maintains. Litigation, as the General Counsel to the Committee emphasized to this court during oral argument, is not a preferred option of politicians. *See* En Banc Oral Arg. Tr. at 121–22. The subpoena to McGahn was issued over 15 months ago and litigation over its enforcement continues. A Congress lasts for only two years, *see* U.S. CONST. art. I, § 2, cl. 1; *id.* amend. XX, § 1, and the current Congress may expire before the House of Representative can complete the present litigation and obtain judicial enforcement of its subpoena. … The parties' historical responsibility to engage in negotiations to resolve their interbranch informational disputes, *see United States v. AT&T*, 567 F.2d 121, 127 (D.C. Cir. 1977), remains unaffected by holding that the Committee has Article III standing.

Resolving interbranch dispute would not enlarge powers of judiciary
"In order to remain faithful to [the federal government's] tripartite structure, the power of the Federal Judiciary may not be permitted to intrude upon the powers given to the other branches." *Spokeo*, 136 S. Ct. at 1547. But by permitting the Committee to bring a lawsuit in federal court to enforce its subpoena, the court is not enlarging the power or prerogatives of the federal judiciary. To the contrary, subpoena enforcement is a "familiar judicial exercise," *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012), a not unusual corollary to civil litigation.

Court does not impermissibly take sides in interbranch dispute by finding standing
[T]he court does not impermissibly take sides in an interbranch dispute by holding that the Committee has standing and resolving whether or not McGahn is required to appear and testify. What the Committee seeks through its subpoena enforcement lawsuit is resolution of a discrete and limited legal issue: whether McGahn must appear before it to testify, absent invocation of a valid privilege that would excuse his refusal to answer specific questions. … [I]t is plausible that Executive privilege could be properly asserted in response to at least some of the Committee's questions …. A court is not normally understood to be taking sides when it enforces a subpoena in civil litigation, and McGahn points to nothing to support a contrary conclusion here.

Argument against circumventing Executive prosecutorial power is misplaced
McGahn also maintains that exercising jurisdiction would impede the Executive in the performance of its constitutional responsibilities because only the Executive Branch is constitutionally empowered to "conduct[] civil litigation in the courts of the United States for vindicating public rights," *Buckley v. Valeo*, 424 U.S. 1, 140 (1976). The traditional means of enforcing congressional subpoenas, according to McGahn, has been through the criminal contempt statute … McGahn asserts that by attempting to enforce its subpoena directly in federal court and circumventing the Executive's prosecutorial role, the House infringes on the Executive's exclusive authority to enforce the law. Yet the OLC has repeatedly opined that the criminal contempt statute does not and could not apply to a close Presidential

advisor. … So understood, the Department almost certainly would not pursue prosecution of McGahn. Moreover, although the Supreme Court in *Buckley* pointed to the constitutional principle that law enforcement is the exclusive province of the Executive Branch, the Court distinguished between the Executive Branch's law enforcement authority and Congress's "powers . . . essentially of an investigative and informative nature." *Buckley*, 424 U.S. at 137. The argument that the present lawsuit would circumvent the President's performance of his constitutional law enforcement responsibilities is misplaced.

Risk of damage to judicial branch is minimal

Judicial "intervention" in an "interbranch dispute," he argues, could "risk damaging the public confidence that is vital to the functioning of the Judicial Branch." Appellant Supp. Br. at 2 (quoting *Raines*, 521 U.S. at 833 (Souter, J., joined by Ginsburg, J., concurring in the judgment)). That risk is minimal here not only because the Committee is a proper plaintiff, but also because the issue that the Committee asks the court to decide can be answered by applying established legal doctrines without the court weighing in on the political dispute between the House and the President. … Once the Committee has met its burden to show that it has Article III standing to seek judicial enforcement of its subpoena, the court may not avoid its responsibility to decide the case because of its political context or consequences.

Legislature's standing not limited to cases where an individual right is implicated

In *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652, the Supreme Court held that the Arizona State Legislature had incurred an institutional injury where it sought to challenge as unconstitutional a ballot provision vesting redistricting authority in an independent agency. Again, the Court's holding precludes the view that there is standing only when an individual right is implicated.

Court may not disregard clear limit on *Raines* precedent

The Supreme Court has given clear direction that *Raines* is a narrow case about the standing only of individual legislators. Nevertheless, McGahn relies on *Raines* to argue that the present dispute is not one "traditionally thought to be capable of resolution through the judicial process," *Raines*, 521 U.S. at 819. The history of judicial adjudication of such disputes undermines McGahn's conclusion. … *Arizona State Legislature* and *Virginia House of Delegates* as well as this court's precedent confirm that *Raines* stands for the proposition that whereas a legislative institution may properly assert an institutional injury, an individual member of that institution generally may not. McGahn would have this court disregard the clear limit that the Supreme Court itself has placed on *Raines*'s reach, something this lower court may not do.

Alternatives to judicial subpoena enforcement are not practicable

[T]he OLC has twice opined that a civil enforcement suit is the only practicable way that a House of Congress may enforce a subpoena against a current or former Executive Branch official asserting Executive privilege, because neither subpoena enforcement alternative — prosecution by the Department for violation of the criminal contempt statute or detention by the House pursuant to its inherent contempt authority — is practicable. *See* Cooper Opinion, 10 Op. O.L.C. at 83; Olson Opinion, 8 Op. O.L.C. at 140, 142. The criminal contempt statute is not available to vindicate the House's injury because the "contempt of Congress statute

does not require and could not constitutionally require a prosecution" of an Executive Branch official who defies a congressional subpoena on the basis of Executive privilege "or even . . . a referral to a grand jury of the facts relating to the alleged contempt." Olson Opinion, 8 Op. O.L.C. at 142. The alternative, detaining McGahn pursuant to the House's inherent contempt authority, is similarly impracticable. Because Congress has not exercised its inherent contempt authority against an Executive Branch official since 1917, "it seems most unlikely that Congress would dispatch the Sergeant-at-Arms to arrest and imprison an Executive Branch official who claimed executive privilege." Cooper Opinion, 10 Op. O.L.C. at 86. 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.

Historical practice supports judicial remedy

Nor does the relevant historical practice support McGahn's position. For more than forty years this circuit has acknowledged that defiance of a subpoena issued by a House of Congress constitutes an institutional injury in fact that is judiciary remediable. … Contrary to McGahn's position that the relative recency of this historical practice renders it irrelevant, historical practice is constitutionally significant even when it does not extend as far back into the past as the Founding. … "[P]recedent[] show[s] that this Court has treated practice as an important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era." *Id*. at 524–26; *see id*. at 525–26 (collecting cases). McGahn's narrow view of relevant history is at odds with this recent pronouncement of the Supreme Court in the context of the constitutional separation of powers.

History of presidential cooperation; Trump direction against cooperation

In fact, the relevant history includes a long tradition of Presidential cooperation with the Legislative Branch exercising its constitutional responsibilities. …[T]he history of Presidential cooperation has meant that there have been few occasions necessitating resort to the courts. The Committee explains: "[E]arly Presidents overwhelmingly complied with Congressional inquiries, reflecting their understanding that they had a constitutional obligation to cooperate." Appellee Supp. Br. at 14; *see Mazars*, 140 S. Ct. at 2031. … Even in pitched disputes between the branches, each branch traditionally has displayed respect for the constitutional prerogatives of the other branch and responded accordingly. … The apparently unprecedented categorical direction by President Trump that no member of the Executive Branch shall cooperate with the Committee's impeachment investigation, *see* Cipollone Letter of Oct. 8, 2019, to Speaker Pelosi, at 7, likely explains the infrequency of subpoena enforcement lawsuits such as the present one.

Holding Congress has standing would safeguard separation of powers

Holding that the Committee has standing would safeguard the separation of powers. It would ensure the continuation of the "established practice" of accommodation by preserving the legal background against which the political branches have historically negotiated their informational disputes. It would ensure that in the rare case — here in the course of no less than an impeachment investigation — when the political branches have reached an impasse despite repeated attempts to resolve an informational dispute themselves, a congressional Committee can seek judicial enforcement of its duly issued subpoena. Preserving the power

of a House of Congress to ensure compliance with its subpoena, in turn, enables it to carry out its constitutional responsibilities, which include serving as an essential check on the President and the Executive Branch, Federalist No. 66 (A. Hamilton); *see* Federalist No. 69 (A. Hamilton).

Lower court judgments
[W]e affirm the judgment of the district court in part. Consideration of McGahn's other contentions — including threshold pre-merits objections that there is no subject matter jurisdiction and no applicable cause of action, and potential consideration of the merits if reached — remain to be decided and are remanded to the panel to address in the first instance.

Henderson Dissent

Standing requires the kind of controversy courts traditionally resolve
"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), which, "[i]n the constitutional sense, . . . means the kind of controversy courts traditionally resolve," *United States v. Nixon*, 418 U.S. 683, 696 (1974). … This suit is not one of them.

Supreme Court precedents make Circuit's theory of legislative standing untenable
For over two hundred years, the coordinate branches did not enlist the Judiciary in their fights. But our court did not leave well enough alone and, roughly forty years ago, set about to "umpire disputes between th[e] branches regarding their respective powers." *Moore v. U.S. House of Representatives*, 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia, J., concurring in the judgment). This approach started to collapse under its own weight, however, as "the Supreme Court began to place greater emphasis upon the separation of powers concerns underlying the Article III standing requirement," *Chenoweth v. Clinton*, 181 F.3d 112, 114 (D.C. Cir. 1999), and after *Raines v. Byrd*, 521 U.S. 811 (1997), our "broad theory of legislative standing" became untenable, *see Chenoweth*, 181 F.3d at 117 n.*.

Circuit court should not alter the balance of powers
Notwithstanding our court's past ill-advised effort to mediate battles between the political branches, the fact remains that the High Court has yet to sanction such an intrusion and we, an inferior court, should not take it upon ourselves to alter the balance of powers. The majority "opinion is like a pirate ship. It sails under a [separation-of-powers] flag," *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1755 (2020) (Alito, J., joined by Thomas, J., dissenting); *see, e.g.,* Majority Op. at 36–37, but in fact undermines the calibrated system of interbranch conflict resolution the Constitution requires.

Judiciary must keep its power within proper constitutional sphere
The "separation of powers concerns" that arise in an "interbranch conflict" over "[c]ongressional demands for the President's information," *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2035 (2020), do not necessarily place a suit beyond our ken, *see NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014) ("[I]t is the 'duty of the judicial department'—in a

separation-of-powers case as in any other—'to say what the law is.'" (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). But there is also the "time-honored concern about keeping the Judiciary's power within its proper constitutional sphere," *Raines*, 521 U.S. at 820, and this separation-of-powers element, indivisible from Article III standing, "confines the federal courts to a properly judicial role," *Spokeo*, 136 S. Ct. at 1547.

Injury must be judicially cognizable

[T]he majority … gives short shrift to the fact that an injury must therefore be "personal, particularized, concrete, and *otherwise judicially cognizable*," *Raines*, 521 U.S. at 820 (emphasis added), "to ensure that federal courts do not exceed their authority as it has been traditionally understood," *Spokeo*, 136 S. Ct. at 1547. Legislative bodies are not exempt from the requirement that "an injury must be 'legally and judicially cognizable,'" *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953 (2019) (quoting *Raines*, 521 U.S. at 819), and Article III standing may be wanting if, after "consult[ing] history and judicial tradition," *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2695 (2015) (Scalia, J., joined by Thomas, J., dissenting), the dispute is not "of the sort traditionally amenable to, and resolved by, the judicial process," *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998). Simply put, we must consider whether the Committee's "attempt to invoke the power of a federal court . . . is consistent with the structure created by the Federal Constitution" and "[a]n interest . . . that is inconsistent with that structure may not be judicially cognizable." *Bethune-Hill,* 139 S. Ct. at 1959 (Alito, J., joined by Roberts, C.J., Breyer, J., and Kavanaugh, J., dissenting).

Interbranch disputes should be resolved without judicial intervention

I continue to believe the longstanding practice of resolving political disputes without judicial intervention counsels against the Committee's standing here. … Just last month, the Supreme Court emphasized that interbranch disputes like this one "have not ended up in court. Instead, they have been hashed out in the 'hurly-burly, the give-and-take of the political process between the legislative and the executive.'" *Mazars*, 140 S. Ct. at 2029.

Congress has alternatives to keep Executive Branch at negotiating table

In suggesting that the Judiciary is needed to "keep[] the Executive Branch at the negotiating table," Majority Op. at 24, the majority largely ignores "the wide variety of means that the Constitution puts at [the House's] disposal," *Mazars*, 140 S. Ct. at 2035, if a recalcitrant President orders "widescale non-compliance with lawful inquiries by a House of Congress," Majority Op. at 25. The House may, for example, withhold appropriations or, as it did here, impeach the President for "[d]irecting the . . . def[iance of] a lawful subpoena." H.R. Res. 755, 116th Cong., at 6 (2019). Thus, even if the House is unlikely to invoke its inherent contempt authority or pursue a criminal prosecution, see Majority Op. at 33–34, it is untrue that "no practicable alternative to litigation exists," *id.* at 26. The political process may be messy, subject to the pitfalls of supercharged partisanship, but "we must put aside the natural urge . . . to 'settle' [this dispute] for the sake of convenience and efficiency," *Raines*, 521 U.S. at 820, no matter how tantalizing a "judicial alternative" appears, Majority Op. at 34.

Holding enlarges judiciary's power
By holding that the Committee has standing, the majority enlarges the Judiciary's power to intervene in battles that should be waged between the Legislature and the Executive and opens the door to future disputes between the political branches. *Cf. Warth v. Seldin*, 422 U.S. 490, 498 (1975) ("[Standing] is founded in concern about the proper—and properly limited—role of the courts in a democratic society."). Even if "the precise function" we perform in this case— subpoena enforcement—"is a traditional feature of civil litigation in federal court," Majority Op. at 27, "congressional subpoenas directed at" the Executive Branch "differ markedly" because they "unavoidably pit the political branches against one another," *Mazars*, 140 S. Ct. at 2034. This distinction matters.

Ruling invites interbranch disputes over statutes
If the interbranch character of the dispute was of no consequence, any President could presumably challenge in court laws that he believes infringe upon Article II powers. And statutory interpretation, like subpoena enforcement, is also a "familiar judicial exercise." Majority Op. at 26 (quoting *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012)). Although "[t]here would be nothing irrational about a system that granted standing in" such a case, "it is obviously not the regime that has obtained under our Constitution to date." *Raines*, 521 U.S. at 828. "In limiting the judicial power to 'Cases' and 'Controversies,' Article III of the Constitution restricts it to the traditional role of Anglo-American courts," *Summers v. Earth Island Inst*., 555 U.S. 488, 492 (2009), which did not hear suits between coordinate branches of government. The majority's broad conception of legislative standing, however, disregards this limitation. Accordingly, I respectfully dissent.

Griffith Dissent

Majority opinion relegates separation of powers to an afterthought
Today the court relegates the separation of powers from a core component of Article III to an afterthought. The court severs the standing analysis from its separation-of-powers roots and treats a direct dispute between the Legislative and Executive Branches as if it were any old case. The result is an anemic Article III jurisprudence that flouts a long line of Supreme Court precedent, ignores the basic structure of the Constitution, and resuscitates long-discredited case law from this circuit.

No one benefits from today's decision
Who benefits from today's decision? Not Congress. The majority's ruling will supplant negotiation with litigation, making it harder for Congress to secure the information it needs. And the Committee likely won't even get what it wants in t*his* case. Because the majority declines to decide whether the Committee has a cause of action and whether it should prevail on the merits, the chances that the Committee hears McGahn's testimony anytime soon are vanishingly slim. The federal courts won't benefit, either. The majority's decision will compel us to referee an interminable series of interbranch disputes, politicizing the Judiciary by repeatedly forcing us to take sides between the branches. Most importantly, the decision does grave harm to the Constitution's system of separated powers, which constrains federal courts to the narrow task of resolving concrete "Cases" and "Controversies" so that elected

representatives call the political shots. I cannot join the court's expedition into an area where we do not belong and can do no good.

Majority opinion treats Congress like a private party enforcing a subpoena
The most puzzling aspect of today's decision is the court's disregard for the relationship between Article III and the separation of powers. Heedless of the interbranch nature of this dispute, the majority trots through the three-part standing test from *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), as if the Committee were just like a private party enforcing a subpoena in a breach-of-contract suit. The majority returns this circuit to the prudential approach to standing that we experimented with decades ago and that the Supreme Court rejected in *Raines v. Byrd*, 521 U.S. 811 (1997). And the court fails to offer any limits to its revived doctrine of congressional standing, leaving future panels to struggle to find a coherent stopping point.

Standing is built on idea of separation of powers
Time and again, the Court has said that standing "is built on a single basic idea—the idea of separation of powers." *Raines*, 521 U.S. at 820 (internal quotation marks omitted). For that reason, "questions... relevant to the standing inquiry must be answered by reference to the Art[icle] III notion that federal courts may exercise power . . . only when adjudication is consistent with a system of separated powers."

Concrete injury imbues standing with separation of powers significance
The "concrete injury" requirement imbues standing doctrine with its "separation-of-powers significance." *Lujan*, 504 U.S. at 577. That requirement is also "grounded in historical practice," and we must ask whether an alleged harm "has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016).

Judiciary has never resolved direct disputes between political branches
The Judiciary does not and never has resolved direct disputes between the political branches. The "traditional role" of the federal courts "is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law." *Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009). Interbranch disputes thus "lie[] far from the . . . conceptual core of the case-or-controversy requirement." *Raines*, 521 U.S. at 833 (Souter, J., concurring in the judgment); *see also Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2665 n.12 (2015) (noting that lawsuits between the Legislative and Executive Branches raise "separation-of-powers concerns").

Question is whether interbranch injury is legally and judicially cognizable
[T]he Committee on the Judiciary of the United States House of Representatives is suing the former White House Counsel to compel him to divulge information obtained during the course of his duties, and the Committee seeks that information to effectuate its institutional prerogatives to conduct oversight of the Executive Branch and to impeach the President. The question is whether *that* injury to the Committee is "legally and judicially cognizable," and whether *that* claim is "traditionally thought to be capable of resolution through the judicial process." *Raines*, 521 U.S. at 819 (internal quotation marks omitted). Yet the majority

breezes through the injury-in-fact analysis with scarcely a word about the interbranch nature of this dispute.

Analogy to private party standing breaks down
Because "private parties undeniably have standing to seek judicial enforcement of compliance with subpoenas," the majority reasons, the Committee must also have standing to enforce the Executive Branch's compliance with a congressional subpoena. *Id.* at 14. But that analogy breaks down twice over. First, the fact that we may resolve similar information disputes between private parties does not answer whether we can resolve an *interbranch* information dispute. Second, although enforcement of a subpoena issued under the auspices of our own Article III power is a "familiar judicial exercise," *id*. at 26 (quotation marks omitted), there is nothing "[]usual" or "traditional," *id*., about the Committee's request that Article III judges enforce an Article I subpoena against an Article II officer.

Role of separation of powers in rigorous standing analysis
The majority justifies its neglect of the interbranch nature of this dispute by arguing that separation-of-powers concerns require its standing analysis to be "'especially rigorous,'" not that those "separation of powers concern[s] . . . must be part of [its] standing analysis." *Id*. at 21 (quoting *Raines*, 521 U.S. at 819-20). I confess I do not know what it means to conduct the "rigorous" standing analysis that the separation of powers requires without considering the separation of powers as part of that analysis. The majority makes no substantive mention of the separation of powers until eighteen pages into the opinion, and even then, it asks only whether "separation of powers principles defeat[]" the outcome of its standing analysis. *Id.* at 20. The court cannot cure its initial error with a belated and half-hearted discussion of the separation-of-powers considerations that should have informed its injury-in-fact analysis.

Two-step approach was rejected by Supreme Court
The Supreme Court has already rejected the majority's two-step approach, in which it considers standing first and the separation of powers later. … After *Raines*, we recognized that the Supreme Court was "unmoved by [our] concern" that "consideration of separation of powers issues would distort our standing analysis." *Id.* at 115 (internal quotation marks omitted). We then concluded that *Raines* "require[d] us to merge our separation of powers and standing analyses." *Id.* at 116. In other words, we rejected the circuit's bifurcated approach that asked (1) whether "[congressional] plaintiffs [would have] had standing to sue" if they were a private party, and then (2) whether the "separation of powers problems [the lawsuit] created" demanded that we dismiss the suit anyway. *Id.* at 115.

Majority opinion rejects separation of powers as necessary part of standing analysis
The majority dutifully recites *Chenoweth*'s command to integrate separation-of-powers concerns into the standing analysis, but then goes on to reject the proposition that the separation of powers is a "necessary part of [the] standing analysis." Maj. Op. at 21. The majority treats the Executive Branch's separation-of-powers concerns as free-floating objections, asking whether they negate the outcome of a standing analysis conducted oblivious to these concerns. But that approach is backwards, and it replicates this circuit's discredited pre-*Raines* effort to consider congressional standing in isolation from the separation of powers. … Just a few short weeks ago, the Supreme Court vacated and

remanded our decision in a different congressional subpoena case for failing to "take[] adequate account of the separation of powers principles at stake." *Trump v. Mazars USA, LLP*, No. 19-715, slip op. at 18, 20 (U.S. July 9, 2020). Still, the court once again expresses "skepticism" that separation-of-powers principles should guide its analysis. Maj. Op. at 20.

No limitations on Congress' ability to haul Executive Branch into court

The majority's return to the D.C. Circuit's old way—a check-the-box approach to standing coupled with desultory review of the lawsuit's separation-of-powers implications—places effectively no limitations on Congress's ability to haul the Executive Branch into court. The majority concludes that the Committee suffered a "concrete" injury because McGahn "denied the Committee something to which it alleges it is entitled by law," *id.* at 13, but that reasoning is boundless. Any claim that Congress might bring against the Executive Branch alleges a deprivation of something to which Congress is entitled by law.

Consider other lawsuits Congress could bring

Under the majority's reasoning, why couldn't Congress (or the House or the Senate or a committee) challenge any Executive Order that allegedly violated the Bicameralism and Presentment Clause? *See Chenoweth*, 181 F.3d at 113. Or any military action that allegedly violated the Declare War Clause? *See Campbell v. Clinton*, 203 F.3d 19, 19 (D.C. Cir. 2000). Or one of the Executive Branch's spending decisions that allegedly violated the Appropriations Clause? *See U.S. House of Representatives v. Mnuchin*, No. 19-5176 (D.C. Cir. Aug. 7, 2020) (Griffith, J., dissenting). Just as in this case, each hypothetical suit involves allegations that Congress has been denied something to which it is entitled by law—the prerogative to enact statutes, or to declare war, or to appropriate funds. The majority's stripped-down conception of standing authorizes Congress to bring all these suits and more.

Consider lawsuits the president could bring

Worse, if Congress or one of its chambers may sue the Executive Branch, "it must follow that the President may, by the same token, sue Congress." *Barnes v. Kline*, 759 F.2d 21, 46 (D.C. Cir. 1984) (Bork, J., dissenting),*vacated sub nom.Burke v. Barnes*, 479 U.S. 361 (1987). Under the majority's reasoning, whenever Congress passes a statute that the President believes invades his constitutional prerogatives, he could come into court to obtain a judicial declaration on that statute's constitutionality. And why stop at suits between the Legislative and Executive Branches? The D.C. Circuit could sue Congress for stripping its habeas jurisdiction over Guantanamo Bay by alleging that Congress deprived it of its jurisdiction. *Cf. id.*

Serious floodgates problem

Once the courthouse doors are open, there's no reason to expect the branches to be judicious about the suits they bring. Even the General Counsel for the House conceded that allowing such interbranch suits poses a serious "floodgates problem." Oral Arg. Tr. 100:13; *see also id.* at 103:23. Given the majority's conclusion that a deprivation of a legal right satisfies Article III, I see no reason to exclude any of these cases from our jurisdiction. After all, each involves an institutional plaintiff alleging a deprivation of a constitutional prerogative. And because our standing analysis requires us to assume the plaintiff's success on the merits, we would have to entertain any claim alleging such a deprivation, no matter how outlandish. In

short order, we could be forced to interpret constitutional provisions that have traditionally been interpreted by the political branches and "never before . . . by the federal courts," *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221 (1974), and that courts should consider only "in the last resort, and as a necessity," *Raines*, 521 U.S. at 819 (internal quotation marks omitted). That cannot be right.

No standing in interbranch disputes alleging abstract dilution of institutional power
If "the concrete injury requirement has the separation-of-powers significance" that the Supreme Court has "always said" it has, *Lujan*, 504 U.S. at 577, then the answer to whether these injuries suffice for Article III standing must be a resounding "No." Components of the government cannot bring suit alleging that another branch has caused the "abstract dilution of institutional . . . power." *Raines*, 521 U.S. at 826. When a branch "asserts a 'right' that consists of the exercise of (or participation in the exercise of) a political power, *the business of the political branches is the very object of the dispute,* no matter with what degree of particularity the 'right' has been conferred." *Moore v. U.S. House of Representatives*, 733 F.2d 946, 958 (D.C. Cir. 1984) (Scalia, J., concurring in the judgment). If the political branches were deemed to have a judicially cognizable interest in the "powers that have been conferred upon them (whether specifically or vaguely) by Constitution or statute," our system of separated powers would be reduced to a system of "judicial refereeship."

Denial of information is not concrete injury
The majority hints (but never says) that the denial of Congress's right to information is somehow more concrete than other deprivations of institutional rights. But as the majority opinion emphasizes, the reason that McGahn's refusal to testify harms the House is that it subverts the House's ability "to legislate, to conduct oversight," and "to impeach and remove a President." Maj. Op. at 3. Those injuries are allegations that the House's institutional prerogatives have been frustrated by the Executive Branch's assertion of absolute testimonial immunity. And those injuries are no more concrete than any other assertion that the Executive Branch has taken power from Congress, or that Congress has taken power from the President.

Refusal to resolve companion case
[B]y refusing to resolve the companion case in *Mnuchin*, the full court passes on the chance to offer guidance about the outer limits of its reasoning. *See Mnuchin*, No. 19- 5176, slip op. at 3-4 (Griffith, J., dissenting). Today's decision will leave future panels to assess these suits on a case-by-case basis, deciding whether the constitutional power that has allegedly been diluted strikes them as specific enough (or important enough) to intervene. All the while, the branches' ability to settle matters on their own will grind to a halt as they submit themselves to the D.C. Circuit's superintendence.

Majority opinion establishes Circuit as continuous monitor of congressional oversight
Even assuming that informational injuries are uniquely "concrete" and the majority's decision can be cabined to just these disputes, the opinion still opens the courthouse doors to unending litigation. The court deems the dispute in today's litigation "discrete and limited," Maj. Op. at 27, but the Committee admitted before the panel that—if McGahn testified and the Committee disagreed with his assertions of executive privilege—it would seek further

relief, perhaps through emergency motions, to compel him to talk. *See Comm. on the Judiciary v. McGahn*, 951 F.3d 510, 518 (D.C. Cir. 2020) (*McGahn I*), *reh'g en banc granted sub nom. U.S. House of Representatives v. Mnuchin*, No. 19-5176, 2020 WL 1228477 (D.C. Cir. Mar. 13, 2020). Today's decision invites that litigation, establishing the D.C. Circuit as the continuous monitor of congressional oversight hearings.

Judiciary will repeatedly have to choose winner in interbranch contests

Because "congressional subpoenas for [executive-branch] information unavoidably pit the political branches against one another," *Mazars*, slip op. at 15, entertaining these suits will invariably put us in the "awkward position" of choosing a winner in repeated contests of power and privilege, *Cheney v. U.S. Dist. Court for D.C.,* 542 U.S. 367, 389 (2004). We will be forced to balance "the Executive's claims of confidentiality and autonomy" against Congress's asserted need for information. *Id.* And we will have to make such decisions about records and testimony "of intense political interest for all involved." *Mazars*, slip op. at 17. Resolving these disputes will not just threaten the neutrality of the Judiciary; it will require the branches to submit to our views of their constitutional prerogatives on our timeline. Nobody wins when we place "the Constitution's entirely anticipated political arm wrestling into permanent judicial receivership." *United States v. Windsor*, 570 U.S. 744, 791 (2013) (Scalia, J., dissenting).

Courts primarily resolve disputes on rights of individuals

[T]he Judiciary cannot resolve pure interbranch disputes. Federal courts primarily sit "to decide on the rights of individuals," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803), and our core function is "to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law," *Summers*, 555 U.S. at 492. To be sure, that task sometimes requires us to resolve deeply controversial political disputes. But we resolve those disputes "only in the last resort, and as a necessity in the determination of [a] real, earnest, and vital controversy between individuals." *Chicago & G.T. Ry. v. Wellman*, 143 U.S. 339, 345 (1892). Because we address such disputes only "in the course of carrying out the judicial function" of resolving cases or controversies, *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340 (2006), we cannot intervene in an interbranch dispute unless and until the actions of one of the branches harms an entity "beyond the [Federal] Government," *Raines*, 521 U.S. at 834 (Souter, J., concurring in the judgment). It is no accident that every major separation-of-powers case to reach the Supreme Court in the Nation's history fits exactly that pattern.

No precedent in which direct interbranch dispute resolved by Supreme Court

Neither the Committee nor the court identifies a single example of a direct interbranch dispute—on any issue—resolved by the Supreme Court. Ever. The Supreme Court's explanation in *Raines* remains true today: History is replete with "confrontations between one or both Houses of Congress and the Executive Branch," but until recently, "no suit was brought on the basis of claimed injury to official authority or power." *Raines*, 521 U.S. at 826. If a chamber of Congress could sue the Executive Branch to enforce its institutional prerogatives—be it the right to participate in appointments, or the right to vote to go to war—the U.S. Reports should be littered with these claims. They are not.

No Supreme Court precedent on interbranch dispute involving information
The same is true of the subset of interbranch disputes at issue here: conflicts about *information*. Since the Founding, "congressional demands for [executive-branch] information have been resolved by the political branches without involving [the] [c]ourt[s]." *Mazars*, slip op. at 9. The only remotely similar dispute that the Supreme Court has ever addressed involved the rights of private parties; *Mazars* was brought by "the President in his personal capacity" and "his children and affiliated businesses" against a third-party accounting firm. *Id.* at 5 (emphasis added). Altogether, the direct intermediation of the courts in disputes between the President and the Congress[] ought to give us pause." *Barnes*, 759 F.2d at 41 (Bork, J., dissenting).

History plays important role in establishing injury in fact
[I]n determining whether a "harm constitutes [an] injury in fact," "history . . . play[s an] important role[]." *Spokeo*, 136 S. Ct. at 1549. The Supreme Court has repeatedly emphasized that Article III limits us to adjudicating claims "traditionally thought to be capable of resolution through the judicial process." ... How else could we identify the "traditional" limits on our jurisdiction without consulting that history?

History of interbranch disputes in the courts
[T]he best history that the majority can muster is four decisions all within the last forty-five years—two in this circuit, two in the district court. See Maj. Op. at 23-24. But "[t]hese few scattered examples . . . shed little light" on the constitutionality of judicial resolution of interbranch disputes. *Seila Law*, slip op. at 19 (internal quotation marks omitted). The majority professes itself untroubled by the rarity and recency of these historical examples, speculating that perhaps a "long tradition of Presidential cooperation" minimized the need for such suits in the past. Maj. Op. at 36. But Presidents of all stripes—including Washington, Adams, Jefferson, Monroe, Lincoln, Theodore Roosevelt, Franklin Roosevelt, Truman, Carter, Reagan, Bush, and Obama—withheld information from Congress during their presidencies. … [T]he Bush and Obama Administrations both resisted judicial resolution of these disputes. … Congress has also long agreed that these disputes are not fit for judicial resolution. During the Watergate impeachment investigation of President Nixon, for instance, the Committee on the Judiciary concluded that it "would be inappropriate to seek the aid of the courts to enforce its subpoenas against the President." H.R. REP. NO. 93-1305, at 210 (1974). "The Committee's determination not to seek to involve the judiciary reflected not only an intent to preserve the constitutional structure, but also the high probability that the courts would decline to rule on the merits of the case because it is . . . *not the kind of controversy courts traditionally resolve*." *Id.* at 210-11 (emphasis added) (internal quotation marks omitted).

Statutory regime on Senate subpoenas does not apply to interbranch disputes
The statutory regime for judicial enforcement of congressional subpoenas reflects this same judgment. Only the Senate has express 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), but not if the suits involve executive-branch assertions of "governmental privilege," 28 U.S.C. § 1365(a). As the law's sponsors explained, the statute'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) (similar). This case is just such a controversy; McGahn's sole argument on the merits is that "Congress may not constitutionally compel the President's senior advisers"— like McGahn—"to testify about their official duties."

Majority opinion needlessly disturbs interbranch working arrangements

By privileging four recent lower-court decisions over 200 years of tradition, the majority "needlessly disturb[s] the compromises and working arrangements that [the] branches themselves have reached." *Mazars*, slip op. at 11 (cleaned up). … The majority protests that its decision actually "preserv[es]" "the *status quo ante* between the branches," Maj. Op. at 30, but that assertion is doubly wrong. The paucity of historical analogues to this suit belies the claim that the majority's decision reflects the status quo. And the majority's defense of congressional standing does not preserve but displaces the system of accommodation that is the status quo. With litigation on the table, neither side has an incentive to cooperate. "Instead of negotiating over information requests," Congress or the Executive Branch "could simply walk away from the bargaining table" and force a resolution by judges. *Mazars*, slip op. at 16. The inevitable result is that we will become courts not of last but of first resort.

Court fails to resolve the case on the merits

[H]ere, the full court hurdles over Article III's barriers only to decline to resolve the case. The majority remands the case to the panel to decide whether the Committee has a cause of action and whether it should prevail on the merits. Congress has already waited over fourteen months for a resolution; the court tells it to hurry up and wait some more. As in *Mnuchin*, I cannot agree with my colleagues' decision to force the political branches to wait patiently while we work our way through these important cases. *See Mnuchin*, slip op. at 3-4 (Griffith, J., dissenting). I would hold that the Committee lacks a cause of action to prosecute its case against McGahn.

No cause of action against McGahn

In addition to demonstrating standing, the Committee must also show that it has a cause of action that supports an injunction compelling McGahn to testify. Our case law forecloses that argument.

Only three ways to enforce congressional subpoenas

By my count, that comes to just three "means of enforcing compliance with [congressional] subpoenas"—a criminal contempt proceeding, an inherent contempt proceeding, and a civil suit authorized by statute. *Id.* But the statute that Congress passed in 1978 "does not . . . include civil enforcement of subpoenas by the House of Representatives." *Id.* at 1238 n.28. And Congress has passed no further statutes authorizing the House to bring such suits. Because the D.C. Circuit has identified only these three ways for Congress to enforce compliance with its subpoenas, that precedent forecloses the Committee's efforts to litigate this case.

No cause of action under Constitution, judicial equity, or Declaratory Judgment Act
The Committee argues that it has an implied cause of action under Article I, that it can invoke the traditional power of courts of equity to enjoin unlawful executive action, and that the Declaratory Judgment Act provides a separate basis for this suit. None suffices.

No implied cause of action under Constitution
[T]he Supreme Court has warned federal courts to hesitate before implying causes of actions— whether from a congressional statute or from the Constitution. … In this case, Congress has declined to authorize lawsuits like the Committee's twice over. First, Congress has granted an express cause of action to the Senate—but not to the House. See 2 U.S.C. § 288d. Second, the Senate's cause-of-action statute expressly excludes suits that involve executive-branch assertions of "governmental privilege." 28 U.S.C. § 1365(a). The expression of one thing implies the exclusion of the other, and authorizing the Committee to bring its lawsuit would conflict with two separate limitations on civil suits to enforce congressional subpoenas. We should not read these carefully drafted limitations out of the statute books.

No cause of action available under courts' equitable powers
"[T]raditional equitable powers" to grant relief … remain "subject to express and implied statutory limitations," *Armstrong v. Exceptional Child Ctr., Inc*., 575 U.S. 320, 327 (2015), and are further limited to relief that was "traditionally accorded by courts of equity," *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc*., 527 U.S. 308, 319 (1999). Again, "implied statutory limitations" foreclose suits by the House and suits that implicate a governmental privilege; this one checks both boxes. Anyway, there's nothing "traditional" about the Committee's claim. The Committee cannot point to a single example in which a chamber of Congress brought suit for injunctive relief against the Executive Branch prior to the 1970s. Interbranch suits "lie[] far from the model of the traditional common-law cause of action at the conceptual core of the case-or-controversy requirement." *Raines*, 521 U.S. at 833 (Souter, J., concurring in the judgment). While equity may be "flexible," "that flexibility is confined within the broad boundaries of traditional equitable relief." *Grupo Mexicano*, 527 U.S. at 322. We cannot simply reference "equity" to justify a vast expansion of our authority to enforce congressional subpoenas.

No cause of action under Declaratory Judgment Act
The Declaratory Judgment Act does not itself "provide a cause of action," as the "availability of declaratory relief presupposes the existence of a judicially remediable right." *Ali v. Rumsfeld*, 649 F.3d 762, 778 (D.C. Cir. 2011) (cleaned up); *see also C&E Servs., Inc. of Wash. v. D.C. Water & Sewer Auth*., 310 F.3d 197, 201 (D.C. Cir. 2002). That statute is "procedural only" and simply "enlarge[s] the range of remedies available in the federal courts." *Skelly Oil Co. v. Phillips Petroleum Co*., 339 U.S. 667, 671 (1950) (internal quotation marks omitted). Because Article I does not create a "judicially remediable right" to enforce a congressional subpoena, the Committee cannot use the Declaratory Judgment Act to bootstrap its way into federal court.

Without cause of action, case must be dismissed
[E]ven if the Committee could establish the standing necessary to "get[] [it] through the courthouse door, [that] does not keep [it] there." *Make the Road N.Y. v. Wolf*, 962 F.3d 612, 631 (D.C. Cir. 2020). Without a cause of action to sustain it, the Committee's suit must be dismissed.

Pyrrhic victory for Congress
The majority's opinion is a Pyrrhic victory for Congress. Courts have many virtues, but dispatch is not one of them. "To the extent that enforcement of congressional subpoenas is left to the courts, future administrations [will] now know that they can delay compliance for years," all while avoiding the traditional political cost associated with refusing to negotiate with Congress in good faith. Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHI. L. REV. 1083, 1154 (2009). … The fact is that Congress has never successfully obtained information from an executive-branch official in a lawsuit. Indeed, our circuit previously declined to expedite the appeal of a legislative subpoena case because it could not be "fully and finally resolved by the Judicial Branch—including resolution by a panel and possible rehearing by this court en banc and by the Supreme Court—before [that] Congress end[ed]" and its subpoenas "expir[ed]." *Comm. on the Judiciary of U.S. House of Representatives v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008).

Litigation option blunts Congress' impeachment power
[T]he majority's decision to open the courthouse doors to these futile lawsuits comes at a serious cost. The option of litigation weakens Congress's ultimate lever of accountability: its impeachment power. In the past, the House Judiciary Committee has treated the Executive Branch's failure to cooperate in an investigation as grounds for an impeachment. See H.R. REP. NO. 116-346, at 155 & n.906 (2019) (President Trump); H.R. RES. NO. 93-625 (1973) (President Nixon). But once litigation is a viable option, the President can always defend against accusations of executive-branch stonewalling by turning around and reproaching Congress for bypassing the courts—just as the President did here. *See Trial Memorandum of President Donald J. Trump, In Proceedings Before the United States Senate* 49, 53 (Jan. 20, 2020). Today's decision thus grants Congress the sluggish remedy of judicial superintendence only to blunt the most potent weapon in its arsenal.

Congress has other tools to deal with recalcitrant Executive Branch
Congress has powerful and varied tools to deal with a recalcitrant Executive Branch. It may withhold appropriations, refuse to confirm presidential nominees, prevent the President from implementing his legislative agenda, and wield public opinion against the President. At the extreme, the Legislative Branch may hold uncooperative officers in contempt of Congress or even impeach them. The majority worries that these political remedies are "impracticable," Maj. Op. at 34, and it offers judicial enforcement as a supplement. But judicial involvement cannot solve Congress's problems when political tools fail. Courts cannot ensure that the Legislative Branch gets timely access to information from a dilatory Executive Branch; we take too long. Courts also cannot intervene without displacing the centuries-old system of negotiation, accommodation, and (sometimes) political retaliation; one party or the other—likely an Executive Branch that benefits from delay—will walk away from the bargaining table and force litigation. And even if Congress eventually prevails in court, we cannot be

sure that a "President [who] loses the lawsuit"—having already defied Congress and withstood political pressure—will "faithfully implement the [c]ourt's decree." *Windsor*, 570 U.S. at 791 (Scalia, J., dissenting).

Judiciary will lose public confidence

Worst of all, we cannot offer the political branches the remedy of judicial enforcement without squandering the precious reserve of public confidence that makes our judgments efficacious in the first place. Article III's limitations are for the other branches' protection, but they are for our protection too. Parties respect neither our "force" nor our "will" but our "judgment." FEDERALIST NO. 78 (Alexander Hamilton). If we venture into this increasingly politicized territory, we risk undermining that neutrality and losing the public's trust. We do neither ourselves nor the parties any favors by embarking down this path, and I would leave the political branches to resolve their disputes through the political process—as the Constitution demands. Respectfully, I dissent.