

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHARLES M. KUPPERMAN,

Plaintiff,

JOHN MICHAEL MULVANEY,

Proposed Intervenor-Plaintiff,

v.

UNITED STATES HOUSE OF
REPRESENTATIVES,

Defendant,

THE HONORABLE DONALD J. TRUMP,
in his official capacity as President of the
United States,

Defendant,

THE HONORABLE NANCY PELOSI,
in her official capacity as Speaker of the
United States House of Representatives,

Defendant,

THE HOUSE PERMANENT SELECT
COMMITTEE ON INTELLIGENCE,

Proposed Defendant,

THE HONORABLE ADAM B. SCHIFF,
in his official capacity as Chairman of the
House Permanent Select Committee
on Intelligence,

Defendant,

Civil Action No. 1:19-cv-03224-RJL

THE HOUSE COMMITTEE ON FOREIGN AFFAIRS,)
)
)
 Proposed Defendant,)
)
)
 THE HONORABLE ELIOT L. ENGEL,)
 in his official capacity as Chairman of the)
 House Committee on Foreign Affairs,)
)
 Defendant,)
)
)
 THE HOUSE COMMITTEE ON OVERSIGHT AND REFORM,)
)
)
 Proposed Defendant,)
)
)
 THE HONORABLE CAROLYN B. MALONEY,)
 in her official capacity as Acting Chair of the)
 House Committee on Oversight and Reform,)
)
 Defendant.)
)
 _____)

MOTION TO INTERVENE

John Michael Mulvaney, through undersigned counsel, respectfully moves under Federal Rule of Civil Procedure 24 to intervene as a plaintiff in this matter against (1) the following current Defendants: the United States House of Representatives; Representative Nancy Pelosi, Speaker of the House of Representatives; Representative Adam B. Schiff, Chairman of the House Permanent Select Committee on Intelligence; Representative Eliot L. Engel, Chairman of the House Committee on Foreign Affairs; and Representative Carolyn B. Maloney, Acting Chair of the House Committee on Oversight and Reform; and (2) three entities not currently defendants in this matter: the House Permanent Select Committee on Intelligence; the House Committee on Foreign Affairs; and the House Committee on Oversight and Reform (collectively with the current Defendants, the “House Defendants”).

Mr. Mulvaney, like Plaintiff Charles Kupperman, has been issued a subpoena by the House Permanent Select Committee on Intelligence to give testimony on matters concerning his official duties “as part of the House of Representatives’ impeachment inquiry.” *See* Exhibit 1 (email transmitting subpoena and subpoena) at 1. Also like Mr. Kupperman, Mr. Mulvaney was directed by the President not to comply with the subpoena, after the President obtained an opinion from the Department of Justice’s Office of Legal Counsel (“OLC”) concluding that close personal advisors of the President, like Mr. Mulvaney, are immune from congressional process—a position OLC consistently has maintained, across Democratic and Republican administrations alike, for almost 50 years. *See* Exhibit 2 (Letter of Pat Cipollone to William Pittard and attached OLC opinion).

Despite his unquestioned status as a close and senior advisor to the President, and the longstanding bipartisan position of that branch regarding the compelled congressional testimony of such advisors, the House Defendants threaten to hold Mr. Mulvaney in contempt or otherwise take adverse action against him for obeying the directive of the head of his branch. The question whether the President’s authority must give way in the face of a congressional subpoena—the determination Mr. Kupperman has asked this Court to make—is central to the question whether the House may take adverse action against Mr. Mulvaney, as threatened. For that reason, Mr. Mulvaney seeks to intervene here.

BACKGROUND

Mr. Mulvaney is the Acting White House Chief of Staff and the Director of the Office of Management and Budget. On Thursday, November 7, 2019, at 6:36 p.m., the House Defendants emailed him a subpoena commanding him to testify, fewer than 15 hours later, about his official duties in connection with the United States’ relations with Ukraine. Exhibit 1 at 1 (requiring

testimony at 9:00 a.m. on Friday, November 8, 2019). On the morning of November 8, before the time designated for Mr. Mulvaney's testimony, the White House Counsel transmitted a letter to undersigned counsel asserting the "constitutional immunity of current and former senior advisors to the President" and instructing Mr. Mulvaney not to testify in response to the subpoena, "in order to protect the prerogatives of the Office of the President today and in the future." Exhibit 2 at 2.

The President's direction was backed by a legal opinion issued by OLC, which the White House Counsel attached to his letter. As described more fully in the attached proposed complaint, the OLC opinion explained that, under both Democratic and Republican administrations, OLC consistently has concluded that close personal advisors of presidents are immune from compelled congressional testimony. Exhibit 2 at 3-4. It further concluded that Mr. Mulvaney, as the Acting White House Chief of Staff, qualified as just such an adviser. *Id.*

In their email attaching their subpoena, however, the House Defendants threatened to take action against Mr. Mulvaney if he failed to comply with the demands of that subpoena—even if his refusal came "at the direction or behest of the President," the head of Mr. Mulvaney's branch of government. *See* Exhibit 1 at 1. The House's email specifically threatened to initiate "a contempt proceeding" against him, or to draw some unspecified "adverse inference against" him, if he refused to comply with the subpoena. The House Defendants, in other words, have threatened—and currently do threaten—to take action against a member of a co-equal branch of government for acceding to an order of the head of his branch where that order is one consistently deemed lawful by Democratic and Republican administrations alike.

ARGUMENT

I. MR. MULVANEY IS ENTITLED TO INTERVENE AS OF RIGHT.

Federal Rule of Civil Procedure 24 states that a party may intervene in an existing matter as of right when he or she “claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.” Fed. R. Civ. P. 24(a)(2). The D.C. Circuit, “[p]arsing the language of the rule,” has held “that qualification for intervention as of right depends on the following four factors”:

(1) the timelines of the motion; (2) whether the applicant claims an interest relating to the property or transaction which is the subject of the action; (3) whether the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest; and (4) whether the applicant’s interest is adequately represented by existing parties.

Fund for Animals, Inc. v. Norton, 322 F.3d 728, 731 (D.C. Cir. 2003) (citations and quotation marks omitted). Mr. Mulvaney satisfies all four factors.

First, Mr. Mulvaney’s motion to intervene is timely. Mr. Mulvaney received the subpoena in question yesterday at 6:36 p.m. and was commanded to appear this morning at 9:00 a.m. Exhibit 1 at 1. He files this motion on the same day that he was commanded to appear.

Second, Mr. Mulvaney claims an obvious interest in the “relevant ‘transaction’” here: the House Defendants’ decision, in their ongoing impeachment inquiry, to issue subpoenas to close personal advisors of the President. *Fund for Animals, Inc.*, 322 F.3d at 735 (identifying “the relevant ‘transaction’” supporting intervention as of right as the “decision to permit the importation” of certain animals). Mr. Mulvaney and Mr. Kupperman both were issued

deposition subpoenas as part of the same impeachment inquiry, and both were threatened with adverse action if they chose to obey Presidential direction rather than comply. *See* Exhibit 1 at 1 (Mulvaney); ECF No. 1-1 at 2 (Kupperman).

Third, the disposition of this action clearly “may as a practical matter impair or impede” Mr. Mulvaney’s ability to perform the duties of his job without fear of adverse action by the House Defendants. A ruling that Mr. Kupperman was obligated to comply with the subpoena directed to him, despite the President’s instruction, could subject Mr. Mulvaney to adverse action by the House, precisely as the House Defendants already have threatened.

Fourth and finally, Mr. Mulvaney’s interest is not adequately represented by Mr. Kupperman. Unlike Mr. Kupperman, Mr. Mulvaney is a *current* member of the Executive Branch, and thus remains a subordinate of the President subject to his present direction. Additionally, Mr. Mulvaney is both a closer and a more senior adviser to the President than was Mr. Kupperman. In his capacity as Acting White House Chief of Staff, and in his capacity as Director of the Office of Management and Budget, Mr. Mulvaney occupies Cabinet-level positions in the Executive Branch. And, as the Acting White House Chief of Staff, Mr. Mulvaney is among the most regular advisors of the President. In short, there are reasons unique to Mr. Mulvaney’s position that might form the basis of a judicial ruling against the House Defendants’ threatened actions, reasons that Mr. Kupperman necessarily cannot advance.

II. ALTERNATIVELY, MR. MULVANEY SHOULD BE GRANTED PERMISSION TO INTERVENE.

Federal Rule of Civil Procedure 24 also allows a court to “permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact.” Fed. R. Civ. P. 24(b)(1)(b). Permissive intervention under Rule 24(b) “‘is an inherently discretionary enterprise’ that affords the Court ‘wide latitude.’” *Sault Ste. Marie Tribe of*

Chippewa Indians v. Bernhardt, 331 F.R.D. 5, 9 (D.D.C. 2019) (quoting *E.E.O.C. v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998)).

Mr. Mulvaney respectfully requests that the Court exercise its discretion to allow him to intervene here. Mr. Mulvaney asserts the same “claim” as Mr. Kupperman, and he “shares with the main action” not just one, but several “common question[s] of law or fact.” Fed. R. Civ. P. 24(b)(1)(B). Both men have been subpoenaed in connection with the same impeachment inquiry. Both have received the same type of subpoena, for deposition testimony. Both are subpoenaed in connection with work at the White House, and specifically as close personal advisers to the President there. Both received Presidential direction to act as they did, which direction was supported by OLC opinions describing a longstanding bipartisan position on the issue. And both are now faced with an assertion from an equally powerful branch that they must ignore that longstanding bipartisan position or suffer consequences. These “issues,” furthermore, are of a “time-sensitive nature,” as this Court recognized in setting its first status conference in this matter. *See* Minute Order (Oct. 28, 2019). Allowing Mr. Mulvaney to intervene in an action that already is underway, and proceeding on an appropriately aggressive briefing schedule, affords him the greatest chance to obtain timely resolution of these issues.

III. ALLOWING MR. MULVANEY TO JOIN THE HOUSE COMMITTEES AS DEFENDANTS WILL NOT UNDULY PREJUDICE THE EXISTING PARTIES OR DELAY RESOLUTION OF THEIR CLAIMS.

In addition to intervening against the current House Defendants, Mr. Mulvaney seeks to join the three House committees conducting the impeachment inquiry, whose chairs already are Defendants here. He moves to do so now, rather than separately at a later time after the Court has granted him leave to intervene (should it so grant), because of the speed at which this matter is rightly progressing. Allowing him to join those three committees now, at the time that he

intervenes against the current House Defendants, will do nothing to prejudice the existing parties or delay adjudication of the claim at issue. The chair or acting chair of each committee already appears as a defendant, and it is the committees' actions in issuing the subpoenas that is the focus of the claims of Mr. Kupperman and Mr. Mulvaney. The committees will be represented by the same attorneys who are representing their chairs and the other House Defendants.

Mr. Mulvaney, furthermore, does not expect to ask the Court to extend the currently-imposed briefing schedule. He therefore respectfully requests, should this motion be granted, permission to join as Defendants the House Permanent Select Committee on Intelligence, the House Committee on Foreign Affairs, and the House Committee on Oversight and Reform.

CONCLUSION

The issues implicated by this motion are significant for the country generally and for Mr. Mulvaney personally. They go to the heart of our representative government and its promise to secure individual liberty by dividing the awesome power of government amongst itself. Mr. Mulvaney, like Mr. Kupperman, finds himself caught in that division, trapped between the commands of two of its co-equal branches—with one of those branches threatening him with contempt. He turns to this Court for aid and respectfully requests that his motion be granted. His proposed Complaint, *see* Exhibit 3, and a proposed order, are attached.

Respectfully submitted,

DATED: November 8, 2019

/s/ William Pittard
William Pittard (DC Bar No. 482949)
Christopher C. Muha (DC Bar No. 987116)
KAISERDILLON PLLC
1099 14th Street NW – 8th Floor West
Washington, DC 20005
T: (202) 640-2850

F: (202) 280-1034
wpittard@kaiserdillon.com
cmuha@kaiserdillon.com

Attorneys for John Michael Mulvaney