[ORAL ARGUMENT SCHEDULED FOR JANUARY 3, 2020]

No. 19-5331

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

COMMITTEE ON THE JUDICIARY,
UNITED STATES HOUSE OF REPRESENTATIVES,

Plaintiff-Appellee,

v.

DONALD F. MCGAHN, II,

Defendant-Appellant.

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

REPLY BRIEF FOR DEFENDANT-APPELLANT

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SUMMARY OF ARGUMENT

The Committee's brief illustrates the fundamental separation-of-powers problems presented here. In defending this virtually unprecedented suit to compel the congressional testimony of a former close presidential advisor, the Committee at every turn disregards the Constitution's text, history and tradition, Supreme Court precedent, and Congress's own legislative judgments.

On Article III standing, the Committee adopts an overly fact-bound reading of *Raines v. Byrd*, 521 U.S. 811 (1997), that is irreconcilable with the Court's reasoning and contrary to its holding that interbranch suits asserting institutional prerogatives are not traditional cases or controversies properly resolved in Article III courts. On subject-matter jurisdiction and cause of action, the Committee insists that it can invoke general statutes and equitable practices in novel ways, notwithstanding that Congress has enacted detailed statutes that purport to authorize some legislative suits to enforce subpoenas, but expressly carve out suits like this one. And on the merits, the Committee ignores the basic principle that it must have constitutional authority to act; it instead assumes without explanation that the House's implied and incidental power to compel testimony may be significantly extended to reach the President and his close advisors despite the substantial burdens that would impose on presidential autonomy and confidentiality.

The net effect is a radical distortion of the balance of powers. Rather than allow the political branches to resolve disputes over their institutional prerogatives through the political process as they have done for over two centuries, the Committee envisions a world in which the Legislative Branch may simply file complaint after complaint against the Executive Branch, with the Judicial Branch stuck in the middle of legally and politically fraught battles over congressional authority and presidential privileges and other prerogatives. Although Article III properly forecloses this state of affairs, at the very least principles of constitutional avoidance and equitable discretion require Congress to clearly provide statutory authority before courts enter the fray. And in all events, the subpoena to McGahn exceeds the House's constitutional authority. The Committee's suit should be dismissed.

ARGUMENT

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

The Supreme Court in *Raines* made clear that, in light of the "separation of powers" principles underlying Article III standing, a plaintiff must identify *both* a dispute "traditionally thought to be capable of resolution through the judicial process" and a "concrete and particularized" injury. 521 U.S. at 819-20. The Committee fails to satisfy either element, and this suit would undermine the separation of powers among all three branches.

A. Under *Raines*, interbranch informational disputes are not traditionally amenable to judicial resolution

1. The Committee contends (Br. 20-21) that *Raines* "rested on the fact" that there was a mismatch because the "*individual legislators*" suing were advancing an "*institutional* interest" belonging to Congress as a whole. But *Raines*'s reasoning swept far more broadly than that.

Raines reaffirmed that, for an injury to be "legally and judicially cognizable" under Article III, it must be "concrete and particularized" *and* arise in a dispute "traditionally thought to be capable of resolution through the judicial process." 521 U.S. at 819; *see id.* at 818-19 (emphasizing as "key" the need for "*personal injury*"). Yet the Committee never even mentions the "tradition" requirement, which forecloses even suits by Congress itself asserting its institutional prerogatives. Opening Br. 16-19.

Indeed, *Raines*'s extensive discussion of "historical practice" did not focus on individual legislators, but rather on the fact that "no suit was brought on the basis of claimed injury to official authority or power" "in analogous confrontations between one or both Houses of Congress and the Executive Branch." 521 U.S. at 826; Opening Br. 32-33. Just as no Member of Congress "challenged the validity of President Coolidge's pocket veto," Congress as a whole also did not (much less a single chamber). 521 U.S. at 828.

The Committee obscures the absence of interbranch litigation by emphasizing (Br. 23-25) that courts have adjudicated the legal obligations of executive officers to respond to subpoenas. All but one of the cases was decided almost two hundred years after the Founding, however, and *none* were interbranch suits that addressed whether the Legislature could sue the Executive.

In *United States v. Nixon*, 418 U.S. 683, 686 (1974), the President sought relief from a *judicial* criminal subpoena imposing a *duty on him* to produce documents held in his custody. Similarly, in *Trump v. Mazars USA, LLP*, 940 F.3d 710, 717-18 (D.C. Cir. 2019), and a parallel case, the President brought *personal-capacity* suits to prevent *third-party custodians* of his records from complying with congressional subpoenas; a House committee intervened in that controversy as a co-defendant and defended the judgment in its favor after the President appealed. Conversely, in *United States v. Burr*, 25 F. Cas. 30, 32 (C.C.D. Va. 1807), a *criminal defendant* filed a motion for a *judicial* subpoena to compel the President to produce a document in his custody. Finally, in *In re Sealed Case*, 121 F.3d 729, 734 (D.C. Cir. 1997), the Office of the Independent Counsel, *representing the United States as sovereign*, sought to enforce a *grand-jury* subpoena for documents from the White House Counsel.

Only one case—*Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974) (en banc)—was an interbranch suit, and it never addressed Article III standing. "When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed." *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1448 (2011). And that lone, unexplained, and comparatively modern appellate decision does not supply the type of historical tradition necessary to satisfy the Supreme Court's later decision in *Raines*.

The Committee's emphasis on whether the *underlying legal question* of the subpoena's validity could be judicially resolved in a different procedural posture is thus a red herring. As we explained but the Committee ignores, Article III standing and *Raines* focus on whether the Committee is a *proper plaintiff* to seek judicial resolution of the legal question. Opening Br. 30-32; *see Raines*, 521 U.S. at 833 (Souter, J., concurring) (an interbranch dispute "lies far from the model of the traditional common-law cause of action at the conceptual core of the case-or-controversy requirement").

The Committee also speculates (Br. 26) that the absence of interbranch litigation might have reflected that the federal-question jurisdiction statute historically had an amount-in-controversy requirement. But that speculation rejects *Raines*'s reasoning, which relied directly on this "historical practice" in

concluding that interbranch litigation "is obviously not the regime that has obtained under our Constitution to date," and that "[o]ur regime contemplates a more restricted role for Article III courts" than conducting an "amorphous general supervision of the operations of government." 521 U.S. at 826, 828-29.

In sum, the Committee's refusal to take seriously the lengthy historical reasoning in *Raines* flouts this Court's admonition that "carefully considered language of the Supreme Court . . . generally must be treated as authoritative." *Overby v. National Ass'n of Letter Carriers*, 595 F.3d 1290, 1295 (D.C. Cir. 2010). That principle applies "even if" the language is "technically dictum," *id.*, though the language here is no "mere *obiter dicta*, but rather . . . the well-established rationale upon which the Court based the result[]," *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66-67 (1996).

2. *United States v. AT&T*, 551 F.2d 384 (D.C. Cir. 1976), does not foreclose this Court from complying with its duty to follow *Raines*. Although the Committee insists that *AT&T* controls (Br. 17, 20), it does not dispute that *AT&T* is factually and procedurally distinct because the case involved a suit brought by the Executive Branch to enjoin a private company from complying with a congressional subpoena, and an appeal by the House only after the district court quashed the subpoena. Opening Br. 33. Whereas it at least could be colorably argued that the House's asserted injury from the subpoena being

quashed was somewhat analogous to the "nullification" standing theory left open by *Raines*, Opening Br. 21-22, the Committee's asserted injury here from mere executive non-compliance with a still-extant subpoena cannot even colorably be defended on that basis. Indeed, that is akin to the type of harm from executive non-compliance with the law that this Court held could not support legislative standing even pre-*Raines*. *See Chenoweth v. Clinton*, 181 F.3d 112, 117-18 (D.C. Cir. 1999) (Tatel, J., concurring in the judgment) (discussing cases). *AT&T* is thus not controlling here, and expanding its cursory holding would be inappropriate given the intervening *Raines* decision.

Contrary to the Committee's contention (Br. 21), *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015), does not reject our reading of *Raines*. Although the Court there allowed a *state* legislature to assert an institutional injury, it reaffirmed that "a suit between Congress and the President would raise" distinct "separation-of-powers concerns." *Id.* at 2665 n.12; *accord Raines*, 521 U.S. at 824 n.8. The Committee ignores both that footnote and the underlying principle.

B. The prohibition on interbranch suits asserting institutional injuries preserves the separation of powers among all three branches

1. The Committee has no answer to the Supreme Court's holding that Article II vests in the Executive Branch the "responsibility for conducting

civil litigation in the courts of the United States [to] vindicat[e] public rights." *Buckley v. Valeo*, 424 U.S. 1, 140 (1976) (per curiam). The separation of powers prohibits the Legislative Branch from "encroachment" on that core executive power through "aggrandizement," but also provides "checks and balances" through which Congress has numerous tools to oversee and influence how the President wields the power. *See id.* at 122; Opening Br. 24-26.

The Committee complains (Br. 25-26) that the Legislative Branch's political means for inducing Executive Branch compliance with subpoenas are inadequate because the Committee cannot fully employ them by itself. But *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000), forecloses that argument. There, even though the plaintiffs included only thirty-one Members of Congress, the Court recognized that where the Legislative Branch as a whole can employ "political self-help" as a "legislative remedy" if dissatisfied with the Executive Branch's conduct, neither it nor its Members may "challenge the President's [actions] in federal court." *Id.* at 22-24.

2. Indeed, Article I itself does not permit Congress, much less the Committee, to bring such suits. Congress's "legislative Powers" are limited to those "herein granted," U.S. Const. art. I, § 1, and those that are "an essential and appropriate auxiliary to the legislative function," *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927). None of that authorizes congressional suits to

enforce subpoenas. As the Supreme Court recognized in *Reed v. Commissioners of Delaware County*, 277 U.S. 376 (1928), "[a]uthority to exert the powers of [a chamber of Congress] to compel production of evidence differs widely from authority to invoke judicial power for that purpose." *Id.* at 389. The Committee never explains how it even has Article I authority to sue in light of the Court's reasoning. At a minimum, the Committee fails to explain why its assertion of what is at most an attenuated undermining of its auxiliary power to issue subpoenas is judicially cognizable notwithstanding *Raines*'s holding that even the dilution of the actual legislative power to vote was too abstract to support Article III standing. Opening Br. 20-24.

The Committee emphasizes (Br. 25) Congress's historical exercise of its inherent contempt power, but none of its examples involves legislators *invoking the federal courts* to compel an executive official's compliance with a subpoena. In fact, the Committee cites (Br. 25 n.5) only two examples of non-judicial efforts to regulate executive conduct through congressional arrest, and those examples undermine its position.

The Committee notes that the House once arrested the district attorney for the Southern District of New York, but fails to note that the Supreme Court granted habeas relief because his detention for sending a letter to a subcommittee chair containing allegedly defamatory statements fell outside

"the implied power to deal with contempt." *Marshall v. Gordon*, 243 U.S. 521, 545 (1917). Likewise, the other example involved a former U.S. diplomat referred for contempt for failure to produce public records, but the House Judiciary Committee *rejected contempt* on the ground that the records were, "under our theory of government, . . . under the control of the President," who could determine that "it was not consistent with the public interest to give the House such information." H.R. Rep. No. 45-141, at 3 (1879).

Indeed, even though the dispute arose *in the context of an impeachment investigation*, the Committee explained that "[t]he Executive is as independent of either house of Congress as either house of Congress is independent of him, and they cannot call for the records of his action or the action of his officers against his consent, any more than he can call for any of the journals or records of the House or Senate." *Id.*; *see also* Eberling, *Congressional Investigations: A Study of the Origin and Development of the Power of Congress to Investigate and Punish for Contempt* 282 (1928) (where compliance with Congress's investigative demands would interfere "with the Executive in the discharge of his constitutional duties," the "decision of the Executive in the case of a dispute must necessarily be final," as "[t]he question would not be justiciable and the infliction of punishment by one coordinate branch upon the other would be wholly repugnant to the constitutional scheme").

In sum, the weakness of the Committee's position is underscored by its reliance on these two failed attempts to exercise congressional arrest authority over subordinate executive officials. They hardly demonstrate that any implied power "incidental to the legislative function," *McGrain*, 273 U.S. at 161, may be extended so far as to authorize seeking judicial enforcement of a congressional subpoena demanding testimony from executive officers, let alone close presidential advisors.

3. Finally, the Committee retreats (Br. 25) to the notion that a suit "is more practical and desirable than the alternatives." That too fails.

The "fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution," because "[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government." *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010). Regardless, it is more practical and desirable under our constitutional framework that interbranch disputes over institutional prerogatives continue to be resolved through the political process. The Judiciary's intervention "risk[s] damaging the public confidence that is vital to the functioning of the Judicial Branch[,] . . . by embroiling the federal courts in a power contest nearly at the height of its political tension." *Raines*, 521 U.S. at 833 (Souter, J., concurring).

Nor is it practical or desirable for the Judiciary to be flooded with congressional suits raising sensitive executive-privilege arguments, as has already begun. Opening Br. 28. Placing that "entirely anticipated political arm wrestling into permanent judicial receivership does not do the system a favor." *United States v. Windsor*, 570 U.S. 744, 791 (2013) (Scalia, J. dissenting).

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

Although the Committee lacks Article III standing to bring this suit, this Court need not resolve that constitutional question because Congress has foreclosed federal courts from adjudicating the suit.

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

In 28 U.S.C. § 1365(a), Congress created limited subject-matter jurisdiction over legislative suits to enforce congressional subpoenas—only suits by the Senate or its committees, and only to enforce subpoenas against persons as to whom the Executive Branch has not asserted a governmental objection. Moreover, Congress not only carved out all House suits and all suits concerning federal executive objections, but also modified the latter exclusion in 1996—long after the amount-in-controversy requirement had been eliminated for all federal-question cases—to clarify that jurisdiction exists if a

federal executive official's refusal to comply is based only upon a personal privilege. If the general federal-question statute, 28 U.S.C. § 1331, nevertheless conferred jurisdiction over the Committee's suit, Section 1365's specific jurisdictional grant would not only be superfluous, but its detailed limitations would be completely nullified. The Committee fails to overcome this fundamental defect in its suit.

1. The Committee erroneously asserts (Br. 27-28) that *AT&T*, *Mazars*, and other congressional-subpoena cases not involving a legislative plaintiff are "dispositive." Those cases are irrelevant because the identity *of the plaintiff* is critical: Section 1365 displaces Section 1331, and Section 1365 governs subpoena-enforcement suits by congressional plaintiffs, not suits by other parties. The irrelevance of the non-legislative-plaintiff cases would be evident if Section 1365 stated that it was the "only" source of jurisdiction for congressional plaintiffs to sue. Yet the cases do not become relevant merely because Section 1365's exclusivity is clearly implied rather than express.

2. The Committee expands (Br. 29-30) upon the reasoning of the district court, which concluded that Section 1365's detailed provisions and limitations became irrelevant when Congress modified and then eliminated the general amount-in-controversy requirement in federal-question cases. The

Committee's attempts to bolster the court's characterization of Section 1365 as an obsolete historical curiosity lack merit.

As to Congress's 1996 amendment of Section 1365, the Committee asserts (Br. 30) that there is "nothing to indicate that Congress considered Section 1331 in enacting this amendment." But "[i]f the text is clear, it needs no repetition in the legislative history." *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1143 (2018). The enactment of the 1996 amendment necessarily presumes that Section 1331 was not already available, because otherwise the clarifying expansion of the scope of Section 1365's limited authorization to sue was unnecessary. This Court must "presume that Congress has used its scarce legislative time to enact statutes that have some legal consequence." *Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872, 877 (D.C. Cir. 2006).

The Committee also asserts (Br. 31) that Congress expanded Section 1365 because it did not want to "abandon[] the detailed procedural and remedial requirements" for Senate actions in Section 1365(b) and (d). But those limitations apply only to actions under "this Section," (*i.e.*, Section 1365(a), not Section 1331). Thus, the Committee itself effectively acknowledges the interpretive principle that Section 1365(a)'s specific jurisdictional limitations foreclose at least the Senate from invoking Section 1331's broader jurisdictional grant. Any procedural and remedial

requirements in Section 1365 would be irrelevant if the Senate could just invoke Section 1331 instead.

The Committee also claims (Br. 34) that our "specific-controls-the-general argument does not bear weight" because the 1996 amendment could not reveal Congress's intentions when it enacted Section 1365 in 1978. But the "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute," and "[t]his is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000).

Moreover, the Committee fails to explain even Section 1365's original exclusion of suits against federal officers. The Committee cites (Br. 33) a snippet of ambiguous legislative history calling into question whether Section 1365's carve-out affected any preexisting "authority to hear a civil action to enforce a subpoena against an officer or employee of the Federal Government." But the very next sentence states that, "if the Federal courts do not now have this authority, this statute does not confer it." S. Rep. No. 95-170, at 91-92 (1977). Regardless of which direction legislative history points, the Committee again ignores the clear import of the statutory text: If district

courts *had* jurisdiction over a Senate suit against federal officers under Section 1331 notwithstanding Section 1365's enactment, there would be no reason *to expressly carve out* such jurisdiction from Section 1365, because the existence or absence of a duplicative jurisdiction grant would be immaterial. But if district courts *lacked* jurisdiction over such suits under Section 1331 given Section 1365's enactment, then it was both rational and essential to carve out such jurisdiction from Section 1365 to preclude those suits entirely. Indeed, the Committee's own explanation of the 1996 amendment appears to concede that the Senate cannot invoke Section 1331 to circumvent the limits in Section 1365.

Accordingly, the Committee must argue (Br. 30-31) that the House can engage in such circumvention even though the Senate cannot. But Congress did not authorize the House to sue *at all*, even against private individuals. The Committee thus is arguing that, by depriving the House of the limited power the Senate has, Congress actually granted the House broader power to sue even federal officers. Stating that argument refutes it. Nor does the legislative history remotely support that upside-down position. The Senate had proposed a bill that would have provided the House with its own authority to enforce subpoenas in court, but the House chose not to support the proposal. Opening Br. 35-36. The House's decision to remain on the sidelines cannot be

transformed into a conscious choice to preserve for itself and its committees the unique ability to seek judicial enforcement of all subpoenas issued against federal officers.

The Committee is also incorrect (Br. 30) that Congress enacted Section 1365 against the backdrop of a holding by *AT&T* that House committees could sue under Section 1331. Again, that case upheld jurisdiction over a suit by the United States (not a House committee) against a private party (not a Branch of government). And precisely because the Section 1331 holding in *AT&T* preceded Section 1365's enactment, it could not have informed Congress's judgment about the relationship between the statutes, much less control this Court's resolution of that question now.

3. The Committee also argues (Br. 31) that other jurisdictional statutes have been rendered redundant by Section 1331's elimination of the amount-in-controversy requirement. But the Committee disregards cases holding to the contrary where those other statutes had specific limitations that would be nullified. Opening Br. 38. That is particularly true in this case, where Congress *expanded* Section 1365 *after* eliminating Section 1331's amount-in-controversy requirement. The Committee cites (Br. 31) as analogous a 2011 amendment to 28 U.S.C. § 1338, but that amendment was not superfluous in

light of Section 1331 because Section 1338 goes further and *preempts state court jurisdiction* over certain intellectual-property cases.

4. The Committee further suggests (Br. 32-33) that *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 535 U.S. 635 (2002), held that a plaintiff may invoke Section 1331 even where the federal claim at issue is expressly excluded from a more specific jurisdictional statute that is applicable. But the more specific provision there did "not even mention subject-matter jurisdiction" and instead "read[] like the conferral of a private right of action." *Id.* at 644. Here, by contrast, the Committee agrees that Section 1365(a) confers jurisdiction only on a limited category of legislative suits to enforce congressional subpoenas, but nevertheless attempts to override those limitations using Section 1331.

The Committee also cites (Br. 28-29) *Mims v. Arrow Financial Services*, LLC, 565 U.S. 368 (2012), where the Supreme Court held that statutory language providing that a plaintiff may bring certain federal statutory claims in state court did not impliedly strip federal courts of jurisdiction under Section 1331. *Id.* at 383. But the Court's holding rested on the longstanding presumption that federal and state courts have concurrent jurisdiction over suits arising under federal law. *Id.* at 378. By contrast, the well-established presumption that applies in this case is that plaintiffs cannot evade the

limitations of a specific jurisdictional grant by invoking a more general one. Opening Br. 38.

5. Finally, and significantly, the Committee offers no meaningful response to our constitutional-avoidance argument. Once its flawed premise (Br. 34) that *AT&T* already resolved the statutory question is set aside, *see* p. 13, *supra*, the Committee cannot dispute that it is, at the very least, ambiguous whether Section 1365 displaces Section 1331 for congressional subpoena enforcement (especially after the 1996 amendment). Accordingly, because interpreting Section 1331 broadly would present substantial "separation-of-powers considerations" concerning legislative standing, controlling precedent "dictate[s] the narrow construction" under "the constitutional avoidance canon," *Judicial Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208, 226-27 (D.C. Cir. 2013), "until such time as Congress clearly manifests its intention of putting such a decisional burden" upon the courts, *Tobin v. United States*, 306 F.2d 270, 276 (D.C. Cir. 1962).

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

Congress has chosen to provide the Senate with a cause of action to enforce certain subpoenas, 28 U.S.C. § 1365(b), and also to grant the Executive Branch authority to institute contempt proceedings to enforce congressional subpoenas, 2 U.S.C. § 192. But Congress has not provided the House or its

components with a cause of action to enforce any subpoena, much less one demanding testimony concerning matters related to McGahn's duties as a close presidential advisor. The Committee's efforts nevertheless to invoke a cause of action are unavailing.

1. The Committee all but abandons the district court's untenable rationale that Article I itself provides a right to sue. Opening Br. 42-44. The Committee instead asserts (Br. 34) that its cause of action is inferred from Congress's grant of equitable jurisdiction to federal courts. But that recharacterization fares no better.

The Supreme Court in *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320 (2015), cautioned that the ability to sue federal officers for unconstitutional conduct is available only in "a proper case" in "some circumstances." *Id.* at 326-27. And under *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), what circumstances are proper must be determined based on "whether the relief [the Committee] requested here was traditionally accorded by courts of equity." *Id.* at 319.

Although the Committee relies (Br. 34-35) on *Armstrong* and *Free Enterprise Fund*, those cases were traditional suits with private parties seeking to protect their personal property or liberty interests from infringement by the government in violation of the Constitution or a statute. There is no tradition,

however, of *interbranch suits* seeking to vindicate *institutional interests* of different federal government components, let alone in cases involving alleged violations, not of the Constitution or any statute, but of a single House's subpoena.

Because the Committee's suit "was unknown to traditional equity practice," allowing it to proceed is "incompatible with [the Supreme Court's] traditionally cautious approach to equitable powers, which leaves any substantial expansion of past practice to Congress." *Grupo Mexicano*, 527 U.S. at 327, 329. Indeed, the Supreme Court's decision in *Reed* emphasized that the power to issue a subpoena "differs widely from authority to invoke judicial power" to enforce it. 277 U.S. at 389. The Committee observes (Br. 36) that *Reed*'s precise holding was that the Senate committee there lacked subject-matter jurisdiction because its equitable action was not "authorized by law." But *Reed*'s rationale for holding that the committee's authorization "to do such other acts as may be necessary" did not include filing a suit was that there is a wide difference between issuing a subpoena and suing to enforce it—as confirmed by the historical practice discussed in *McGrain*, 273 U.S. at 167-74. Here, therefore, the absence of any historical precedent for congressional suits to enforce subpoenas forecloses the conclusion that this is the sort of traditional suit that would be authorized in equity.

The Committee attempts to distinguish *Grupo Mexicano* (Br. 37) by urging that the pre-judgment creditor suit there had been "specifically disclaimed by longstanding judicial precedent." But *Grupo Mexicano* stated that, while it is "especially" improper to award equitable relief in such circumstances, it is sufficient to bar the relief requested that it "has never been available before." 527 U.S. at 322. Indeed, given that the Supreme Court characterized the relatively subtle distinction between suits by post-judgment and pre-judgment creditors as "a wrenching departure from past practice" that "Congress [was] in a much better position" to address, *id.*, it follows *a fortiori* that Congress must decide whether to provide the Committee with an unprecedented cause of action to enforce a legislative subpoena seeking testimony concerning the conduct of a close presidential advisor.

The Committee's observation (Br. 37-38) that *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), involved an implied *damages* action is immaterial. The separation-of-powers concerns articulated there also apply to judicially authorizing suits extending beyond "traditional" equity practice, *Grupo Mexicano*, 527 U.S. at 327, as confirmed by *Abbasi*'s careful inclusion of that qualifier when referring to "traditional equitable powers," 137 S. Ct. at 1856.

In all events, any implied cause of action in equity is also subject to "implied statutory limitations." *Armstrong*, 575 U.S. at 327; *see Seminole Tribe*,

517 U.S. at 76. Here, where Congress specifically chose to authorize only the Senate to sue over only non-federal subpoenas—and otherwise authorized the Executive to bring contempt actions—Congress implicitly denied the House a roving mandate to enforce all subpoenas under an unprecedented implied equitable cause of action.

2. The Committee's alternative reliance on the Declaratory Judgment Act fails. The Committee contends (Br. 39) that the Act's only two requirements are the need for an "independent source of jurisdiction" and an "actual, immediate controversy." But that is irreconcilable with this Court's square holding in *Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011), that the Act does not itself "provide a cause of action" independent of an otherwise "judicially remediable right." *Id.* at 778. The Committee asserts (Br. 40) that *Ali* had earlier rejected plaintiffs' substantive claims, but that mischaracterizes Judge Henderson's opinion for the Court: it rejected plaintiffs' *Bivens* claim without reaching the constitutional merits, 649 F.3d at 769-74, and rejected plaintiffs' Alien Tort Statute claim on administrative exhaustion grounds, *id.* at 774-78, yet nevertheless refused to consider declaratory relief for alleged violations of "the U.S. Constitution, military rules and guidelines and the law of nations," *id.* at 778.

3. Finally, the Committee offers no response to our argument that relief is not appropriate here as a matter of equitable discretion. Opening Br. 46-47. A court should refrain from embroiling itself in an interbranch dispute without any imprimatur from Congress as a whole, particularly where the Committee's primary asserted need for subpoenaing McGahn—his potential testimony related to an obstruction-of-justice impeachment charge, *see* JA17—appears to be moot.

Exercising equitable discretion to deny relief at the threshold would not, as the Committee states (Br. 40), harm Congress. It would help Congress by precluding a single House from filing a novel suit to enforce a subpoena against a close presidential advisor before "opportunity for full study and debate in separate settings" by "two distinctive bodies." *INS v. Chadha*, 462 U.S. 919, 951 (1983). The critical check of bicameralism (and presentment) would ensure that the entire Legislative Branch intended to place itself on a collision course with the Executive Branch, to force the Judicial Branch into the middle of that fraught dispute, and to authorize courts to resolve definitively the scope of institutional prerogatives that have long been negotiated through the political process.

III. The Committee Lacks The Constitutional Authority To Subpoena McGahn

The Committee does not dispute that, under the Constitution, the House and its components have no express subpoena power, and any "incidental" exercise of subpoena power must be "an essential and appropriate auxiliary to the legislative function." *McGrain*, 273 U.S. at 160-61, 174. Nor does the Committee dispute that such an exercise of power *both* must be justified through longstanding "history" that forms "a practical construction" of the Constitution, *id.* at 174, *and* cannot "impair another [Branch] in the performance of its constitutional duties," *Cheney v. U.S. Dist. Court for the District of Columbia*, 542 U.S. 367, 382 (2004).

Under that framework, the Committee cannot compel testimony from a former White House Counsel on matters related to his duties as a close presidential advisor. Such a subpoena cannot be characterized as "incidental" or "essential" given the absence of any historical tradition of extending the congressional subpoena power in this extraordinary manner. And such a subpoena cannot be characterized as "appropriate" given the significant "impairment" of the President's interests in autonomy and confidentiality. The Committee's various arguments in support of its subpoena compelling McGahn's testimony do not engage with these basic principles and are unpersuasive even on their own terms.

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

The Committee errs in assuming it has the power to subpoena close presidential advisors and focusing exclusively on whether the President may assert immunity from such subpoenas. It is certainly true (Br. 41) that the Supreme Court has held that the separation of powers does not require "airtight departments of government" and that there is some "degree of overlapping responsibility." Yet it is nevertheless a bedrock principle that the powers of Congress are "are dependent solely on the Constitution," and every action Congress or its components wishes to take must fall within its limited constitutional powers. *Kilbourn v. Thompson*, 103 U.S. 168, 182 (1881).

Here, the Committee cannot show that subpoenaing testimony from the President's close advisors (let alone the President himself) is an "essential" "auxiliary" based on "history" and "practice." *McGrain*, 273 U.S. at 174. Instead, the Committee offers examples (Br. 46-49) of *voluntary* testimony by close advisors and the President on a handful of occasions. But that testimony occurred because the Executive chose to allow it, as a political accommodation, rather than pursuant to a court order.

Likewise, given the multiple autonomy and confidentiality interests implicated in compelling the testimony of the President or his close advisors

Opening Br. 50-56, the Committee cannot explain why the Founders would have left such a significant power to implication even though "our institutions" have long been "hostile to the exercise of implied powers," *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 225 (1821); *see* Opening Br. 48-49. Nor does the Committee address that the Supreme Court would require a clear textual or historical basis "[o]ut of respect for the separation of powers and the unique constitutional position of the President," *Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992); *see* Opening Br. 49-50.

The Committee goes far astray in emphasizing (Br. 42-46) cases that addressed the scope of executive privilege with respect to *judicial* subpoenas. They are distinguishable in myriad respects. First, the Constitution grants federal courts all "the judicial power of the United States," *Stern v. Marshall*, 564 U.S. 462, 482 (2011), whereas the limited "powers conferred on Congress were the powers to be most carefully circumscribed," *Chadha*, 462 U.S. at 947. Second, the general entitlement of federal courts to "every man's evidence" has an ancient pedigree, *Nixon*, 418 U.S. at 709-10, whereas there is no such history of compelled congressional testimony of close presidential advisors. Third, the power of courts to issue compulsory process is expressly recognized in the Constitution and necessary in the criminal context to vindicate the constitutional rights of the defendant, *see id.*, whereas congressional subpoena

power is merely an auxiliary to effectuating Congress's own legislative powers. Last, federal judicial subpoenas are issued by neutral judges, not elected legislators who are the Executive's "opposite and rival interests" in our system of "checks and balances." *Buckley*, 424 U.S. at 122-23.

The Committee cites (Br. 41-44) only two cases concerning congressional oversight of the Presidency. In *Nixon v. GSA*, 433 U.S. 425 (1977), the Court held that a statutorily prescribed process for Executive Branch archivists to screen presidential documents for personal and privileged matter was not unduly disruptive of presidential functions, because "[t]he Executive Branch remain[ed] in full control of the Presidential materials." *Id.* at 444. That holding is far afield from an effort by a House committee to compel the testimony of a close presidential advisor. There is, moreover, a critical structural difference between regulation by statute and unilateral action of a single house that never underwent the presentment (and bicameralism) process that serves "to protect the Executive Branch from Congress." *Chadha*, 462 U.S. at 951. As for this Court's decision in *Senate Select Committee*, it involved a subpoena for tape recordings, 498 F.2d at 726, so the Court was not asked to confront demands that close presidential advisors appear before congressional committees and subject themselves to questioning on terms of the Legislative Branch's choosing.

B. The Committee's extension of its implied powers improperly minimizes presidential interests

Remarkably, the Committee argues (Br. 45-47) that it has the power to compel even the President himself to testify. That untenable position ignores the President's "unique" position as the single person in whom all Executive Power is vested. *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982). The Committee disregards the radical alteration of the relationship between the Branches that would occur if Congress could compel the President's live testimony as if he were the Prime Minister summoned to Parliament. The Committee's suggestion (Br. 49) that this practice would not undermine autonomy or create subservience to the Legislative Branch cannot be taken seriously. And the notion that courts could determine on an ad hoc basis when demands for the President's own non-privileged testimony have gone too far does not supply the kind of "high walls and clear distinctions" that are the only rules that will be "judicially defensible in the heat of interbranch conflict." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995).

The Committee fails to dispute that the same interests in presidential autonomy and confidentiality are likewise implicated by compelling testimony of a former close presidential advisor on matters related to his duties. For example, the Committee primarily distinguishes (Br. 53) the Supreme Court's extension of Speech and Debate immunity to congressional aides in *Gravel v.*

United States, 408 U.S. 606 (1972), by doubling down on its extraordinary position that the President generally "is not absolutely immune" in the first place. Similarly, the Committee acknowledges that *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), was a damages suit, but it mistakenly treats (Br. 52) that distinction as "cut[ting] against McGahn." Damages supply a private remedy for conduct that the law already proscribes, whereas compelled testimony of close presidential advisors would be a direct regulation of conduct for which the Committee must possess affirmative constitutional authority. None exists, and thus the subpoena of McGahn is invalid.

CONCLUSION

This Court should order that the case be dismissed.[1]

Respectfully submitted,

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[1] The Committee has requested (Br. 53) that this Court should "vacate its administrative stay and affirm the district court's order without delay." Although the judgment instead should be reversed and the case dismissed, if the Court were to disagree, it should at least leave the stay in place for a reasonable period to allow the Solicitor General to seek appropriate relief from the Supreme Court, especially given the serious question whether McGahn's testimony is even relevant to the now-passed articles of impeachment.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,491 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Calisto MT 14-point font, a proportionally spaced typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2019, I electronically filed the foregoing reply brief with the Clerk of the Court by using the appellate CM/ECF system. I further certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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