IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMITTEE ON OVERSIGHT AND, REFORM, UNITED STATES HOUSE OF RESPRESENTATIVES, *Plaintiff*, v. HON. WILLIAM P. BARR, in his official capacity as Attorney General of the United States, *et al.*, *Defendants.*	)	No. 1:19-cv-3557 (RDM)

DEFENDANTS' MOTION TO DISMISS, OR,
IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Defendants William P. Barr, in his official capacity as Attorney General, and Wilbur Ross, Jr., in his official capacity as Secretary of Commerce, respectfully move to dismiss or, in the alternative, for summary judgment on all claims in this case. The grounds for Defendants' motion are set out in the attached memorandum of law, agency declarations, and statement of material facts. A proposed order also accompanies this motion.

Dated: January 14, 2020

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMITTEE ON OVERSIGHT AND REFORM, UNITED STATES HOUSE OF REPRESENTATIVES

Plaintiff,

v.

WILLIAM P. BARR, in his official capacity as Attorney General of the United States, *et al.*,

Defendants.

No. 19-cv-3557 (RDM)

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS, OR,
IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT AND
IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

STATUTES AND REGULATIONS

RULES

OTHER AUTHORITIES

INTRODUCTION

In the Committee's telling, this is an easy case: the Committee has issued subpoenas to federal agencies; those agencies have failed to turn over unredacted copies of every last document that is theoretically responsive to those subpoenas on a timeframe satisfactory to the Committee; and the Committee is thus entitled to a pro forma order from this Court compelling the Executive Branch to comply with its subpoenas. *See generally* Pl.'s Mem. in Supp. of its Mot. for Expedited Summ. J., ECF No. 17 ("Pl.'s Mem."). But virtually every step of that theory is without precedent in our constitutional history and is fundamentally incorrect.

First, and most basically, the Committee does not have standing to conscript this Court as arbiter of its quarrels with the Executive Branch. The Supreme Court made clear in *Raines v. Byrd* that institutional injuries of the sort the Committee asserts are not the type of harm that can supply Article III injury and that, moreover, the Legislative Branch is not permitted to bring its disputes with the Executive Branch to the Judiciary for resolution because such disputes are not "traditionally thought to be capable of resolution through the judicial process." 521 U.S. 811, 819 (1997). While there "would be nothing irrational" about vesting the Judiciary with general supervisory power of legal disputes between the political branches in the manner of European constitutional courts, "it is obviously not the regime that has obtained under our Constitution to date," which "contemplates a more restricted role." *Id.* at 828. The House has previously argued that *Raines* is irrelevant because its precise holding involved individual legislators rather than (as here) a House committee, but accepting that distinction requires ignoring the Supreme Court's reasoning. The *Raines* Court explained that its decision turned on longstanding constitutional "practice," which "cut against" jurisdiction because "[i]t is evident from several episodes in our history that in analogous confrontations between *one or both Houses of Congress and the Executive Branch*, no suit was brought on the basis of claimed injury to official authority or power." *Id.* at 826 (emphasis added). In that passage—and the multiple pages elaborating upon it—the Court discussed multiple examples of clashes between "one or both Houses

of Congress and the Executive Branch" and derided the notion that the courts could directly resolve those interbranch conflicts. That reasoning had nothing to do with individual legislators, and this Court is required to follow that reasoning. *See, e.g.*, *Sierra Club v. EPA*, 322 F.3d 718, 724 (D.C. Cir. 2003). The main case the Committee relies upon for the contrary position, *United States v. AT&T, Inc.*, 551 F.2d 384 (D.C. Cir. 1976) ("*AT&T I*"), pre-dates *Raines* and arose in entirely distinguishable circumstances, contains no reasoning on the jurisdictional issues, and in any event would not survive *Raines* if it were read as the Committee reads it. At bottom, then, the Committee asks this Court to ignore the reasoning in *Raines* and apply it as narrowly as possible, while ignoring the absence of reasoning in *AT&T* and applying it as broadly as possible. The Court should decline.

Second, even if the Constitution did permit this Court to directly adjudicate disputes between a House Committee and the Executive Branch, Congress has not even taken the basic, necessary step of giving it statutory jurisdiction to do so. The House invokes the general grant of federal question jurisdiction in 28 U.S.C. § 1331, but that provision in inapplicable. As the D.C. Circuit has explained, "[p]rior to 1978 Congress had only two means of enforcing compliance with its subpoenas: a statutory criminal contempt mechanism and the inherent congressional contempt power." *In re Application of the U.S. Senate Permanent Subcomm. on Investigations*, 655 F.2d 1232, 1238 (D.C. Cir. 1981). That is when Congress enacted 28 U.S.C. § 1365, which governs jurisdiction over subpoena-enforcement suits brought by Congress. That provision excludes this suit in two dimensions—it both excludes suits against the Executive Branch and declines to confer jurisdiction for suits brought by House committees. And Congress did not include a carve-out for suits against the Executive Branch by mistake; it added that carve-out because the Justice Department "argued vigorously that bringing such suits would be unconstitutional." 123 Cong. Rec. 2970 (Feb. 1, 1977) (statement of Sen. Abourezk). Or, as the sponsor of a 1996 amendment to Section 1365 put it: "The purpose is to keep disputes between the executive and legislative branches out of the courtroom." 142 Cong. Rec. 19,412 (July 25, 1996) (statement of Sen. Specter).

Third, even if this dispute were justiciable, the Committee fails to state a claim because Congress has never created a cause of action allowing House committees to enforce their subpoenas in court. Both claims asserted in the Complaint are for enforcement of a congressional subpoena and neither invokes any congressionally conferred cause of action. Just as with jurisdiction, Congress *has* enacted an express cause of action with carefully delineated limitations for civil enforcement of subpoenas issued by committees of *the Senate*. But for the House, there is nothing. This Court should not step into that void by inventing a new cause of action itself.

Fourth, even if this Court could reach the merits of this case—and it cannot—the Committee's subpoenas are unconstitutionally overbroad and lack any substantial connection to a legitimate legislative purpose. While the Committee might be interested in the census generally, the documents it seeks relate to the abandoned and enjoined effort to reinstate a citizenship question on the 2020 census. The Committee's unjustifiable desire to relitigate that closed case is *judicial*—not *legislative*. The subpoenas are also unconstitutionally burdensome: if their catchall demands for all agency communications having anything to do with restoration of a citizenship question are not drastically narrowed—whether through the accommodation process or otherwise—then the President would be required to make thousands of individualized decisions about Executive Privilege, in violation of the Supreme Court's admonition that the President should not be put to the burden of specifically asserting executive privilege in response to overbroad document requests. *See Cheney v. U.S. Dist. Ct. for the Dist. of Columbia*, 542 U.S. 367 (2004).

Fifth, the Committee is wrong about the scope of executive privilege as it applies to Congress. While the Committee advances a cramped view of the privilege as applying only to presidential communications, the D.C. Circuit has held that a "form of executive privilege" that "originated as a common law privilege" may nonetheless have "roots in the constitutional separation of powers." *In re Sealed Case ("Espy")*, 121 F.3d 729, 737 & n.4 (D.C. Cir. 1997). Thus, as Judge Berman Jackson has observed, "*Espy* does not hold—and no case cited by the Committee holds—that the *only* privilege

the executive can invoke is the privilege that shields Presidential communications." *Comm. on Oversight & Gov't Reform v. Holder ("Holder")*, 2014 WL 12662665, at *1 (D.D.C. Aug. 20, 2014). Were the law otherwise, the Committee would be entitled to every document inside every federal agency, even documents revealing the deliberative process of Executive Branch officials, the Executive's work product in responding to Congress, open law enforcement investigations, matters concerning national security and foreign relations, or even attorney work product generated in litigating this case. That would be absolutely extraordinary, which is doubtless why no court has ever held executive privilege to be so limited, or the power of Congress to extend so far. And to do so would plainly interfere with the President's ability to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3.

Sixth and finally, the eleven so-called "priority" documents that the Committee seeks fall within the deliberative process, attorney-client, and attorney-work-product components of executive privilege. The Departments of Commerce and Justice have supplied detailed declarations attesting to the nature of the information withheld from the Committee, and those declarations clearly demonstrate that the information falls within those aspects of executive privilege. The Committee's novel arguments that the information is nonetheless not subject to the privilege are both unsupported by relevant legal authority and highly unpersuasive. Likewise, the Committee has not demonstrated a legislative need for these documents sufficient to overcome the President's assertion of privilege. These two- to three-year old communications about a (now-enjoined) citizenship question have no appreciable bearing on legislation concerning the administration of the census today.

At bottom, then, this is no ordinary case: it is as much of a wolf as this Court will ever see. If courts were to seize jurisdiction over these sorts of suits and issue the type of relief the Committee seeks, the political give-and-take between the branches concerning congressional requests for information would vanish and the balance of powers would be upended. Congress could subpoena whatever it wants, the Executive Branch would be powerless to assert privilege or object to burden,

and courts would be reduced to the role of congressional enforcer. That is "obviously not the regime that has obtained under our Constitution to date," *Raines*, 521 U.S. at 828.

BACKGROUND

I. The Census Litigation

Exercising authority delegated to him by Congress, Secretary of Commerce Wilbur Ross "decided to reinstate a question about citizenship on the 2020 decennial census questionnaire." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2562 (2019). In a March 26, 2018 memorandum, the Secretary explained that the decision was responsive to a December 12, 2017 letter from the Department of Justice (the "Gary Letter") requesting improved data about citizen voting-age population for purposes of enforcing the Voting Rights Act. *See id.*

A collection of State and local governmental entities and non-profit organizations filed suit in federal district court in New York, asserting that the Secretary's decision violated the Enumeration Clause, the Administrative Procedure Act ("APA"), 5 U.S.C. 701 *et seq.*, and the Equal Protection Clause. *See Dep't of Commerce*, 139 S. Ct. at 2563 (together, with the cases in footnote 1, the "Census litigation").[1] The district court dismissed the Enumeration Clause claim but otherwise allowed the claims to proceed. *Id.* at 2564. The government then assembled (in initial and supplemental productions) a 13,000-page administrative record and subsequently produced more than 150,000 pages of documents in discovery. *See* Response, *New York v. Dep't of Commerce*, No. 18-cv-2921, ECF No. 667 (S.D.N.Y. Nov. 22, 2019). These materials included a supplemental memorandum and correspondence indicating the Secretary had begun considering the citizenship question shortly after he took office in early 2017, before receiving the Gary Letter. *See Dep't of Commerce*, 139 S. Ct. at 2564; *New York v. Dep't of Commerce*, 315 F. Supp. 3d 766, 808-09 (S.D.N.Y. 2018). The government did not,

[1] Similar lawsuits were filed in other districts. *See California v. Ross*, No. 18-cv-1865 (N.D. Cal. filed Mar. 26, 2018); *City of San Jose v. Ross*, No. 3:18-cv-02279-RS (N.D. Cal. filed April 27, 2018); *Kravitz v. Dep't of Commerce*, No. 18-cv-1041 (D. Md. filed Apr. 11, 2018); *La Union Del Pueblo Entero v. Ross*, No. 18-cv-1570 (D. Md. filed May 31, 2018).

however, produce a memorandum by James Uthmeier, then a Senior Counsel in the General Counsel's Office of the Department of Commerce, concerning potential legal bases for the reinstatement of a citizenship question to the 2020 Census ("Uthmeier Memo"), or Mr. Uthmeier's handwritten note transmitting a draft of the Memo to Acting Assistant Attorney General John Gore. Those materials were withheld on the basis of the attorney-client privilege, with the blessing of the district court. *See New York v. Dep't of Commerce*, 351 F. Supp. 3d 502, 553 (S.D.N.Y. 2019). After a bench trial, the district court entered judgment for plaintiffs on the APA claims and vacated the Secretary's decision. *Dep't of Commerce*, 139 S. Ct. at 2564-65.

In a June 27, 2019 decision, the Supreme Court held that the Secretary's decision to reinstate the citizenship question was consistent with the Enumeration Clause and the Census Act, as well as longstanding historical practice, and was substantively reasonable and supported by the evidence. *Dep't of Commerce*, 139 S. Ct. at 2566-67, 2569-73. But the Court further concluded that there was a "significant mismatch between the decision the Secretary made and the rationale he provided" and thus that the Secretary had not complied with the requirement that "agencies offer genuine justifications for important decisions." *Id.* at 2573-76.

On remand from the Supreme Court, the district court permanently enjoined the Secretary and his agents from "including a citizenship question on the 2020 decennial census questionnaire . . . and from asking persons about citizenship status on the 2020 Census questionnaire or otherwise asking a citizenship question as part of the 2020 decennial census." *New York v. Dep't of Commerce*, No. 18-CV-2921 (JMF), 2019 WL 3213840, at *1 (S.D.N.Y. July 16, 2019). The district court also "retain[ed] jurisdiction . . . to enforce the terms of this Order until the 2020 Census results are processed and sent to the President[.]" *Id.*[2]

[2] The district courts presiding over related cases in Maryland and California entered similar orders. *See Kravitz v. Dep't of Commerce*, No. 18-cv-1041 (GJH), ECF No. 203 (D. Md. July 16, 2019); *California v. Ross*, No. 18-cv-1865 (RS), ECF No. 240 (N.D. Cal. Aug. 1, 2019); *City of San Jose v. Ross*, No. 3:18-cv-02279-RS, ECF No. 228 (N.D. Cal. Aug. 1, 2019).

II. The Oversight Requests and Subpoenas

The House of Representatives Committee on Oversight and Reform ("Committee") accuses Defendants of "obstructing" its investigation concerning the census, and "defying" its subpoenas. Yet the record shows that Defendants have gone to great lengths to accommodate the Committee's requests for documents and information concerning the Secretary's decision to reinstate a citizenship question. By the time the Committee brought the accommodation process to a halt by holding Defendants in contempt, they had provided more than 30,000 pages of responsive documents to the Committee, were prepared to deliver more, and had made senior officials requested by the Committee—including Secretary Ross—available for testimony.

A. Requests to the Department of Commerce

The 116th Congress convened on January 3, 2019. The Committee commenced issuing oversight requests concerning the 2020 Census almost immediately thereafter. On January 8, 2019, the Committee Chairman, Representative Elijah E. Cummings, wrote to Secretary Ross requesting that he testify before the Committee regarding his decision to reinstate a citizenship question and also requested that Commerce provide, within two weeks' time, four categories of documents and communications to the Committee pertaining to that issue. The third of these categories (Request 3) broadly sought "[a]ll communications between or among officials from the Department of Commerce, the Census Bureau, and any other office or entity inside or outside of the government regarding the addition of a citizenship question." Decl. of Anthony Foti (filed herewith) ("Foti Decl.") ¶¶ 5-6. Chairman Cummings' letter did not explain how the requested documents and information would aid the Committee's consideration of any pending legislative proposals within the Committee's jurisdiction. *Id.* ¶ 9.

Between January 29 and March 26, 2019, Commerce prepared and delivered five installments of responsive documents to the Committee, totaling almost 12,000 pages, together with privilege logs explaining the bases on which confidential information contained in the documents had been

redacted. Foti Decl. ¶¶ 10-12, 15, 21, 26. Commerce devoted more than 1,000 hours of personnel time to these efforts. *Id.* ¶ 22. To produce as much responsive information to the Committee as expeditiously as possible, Commerce began by delivering documents contained in the administrative record compiled in the Census litigation, using search terms and procedures calculated to identify documents even potentially relating to that issue. *Id.* ¶¶ 48-52. During this period the Secretary also appeared and testified before the Committee, and the parties negotiated arrangements for transcribed interviews of three senior Commerce Department officials requested by the Committee, that ultimately took place in June 2019. *Id.* ¶¶ 19, 24, 29.

Notwithstanding the cooperation shown by Commerce, the Committee wrote on March 6, 15 and 29, 2019, to insist that all documents responsive to its Request 3, by then already nearing 12,000 pages, be turned over in unredacted form. The Committee's March 15, 2019 letter specified for the first time that its request for documents included (but was not limited to) eleven documents and e-mail chains that the Committee now refers to as Commerce "priority" documents. Although Commerce repeatedly asked the Committee to explain its particularized need for privileged information contained in the eleven priority documents in order to perform its legislative function, the Committee responded only in general terms, in its March 29, 2019 letter, stating that the requested documents may have evidence of the Secretary's "real reason" for restoring a citizenship question, and may provide "insight" into several other topics of interest. Foti Decl. ¶¶ 16, 20, 27.

When by April 2, 2019, Commerce had not committed to producing the privileged "priority" documents in unredacted form, the Committee served on the Secretary a subpoena demanding that Commerce produce by April 16, 2019, (i) unredacted copies of all eleven documents first identified as "priority" documents by the Committee on March 15, 2019, as well as (ii) "[a]ll communications from January 20, 2017 through December 12, 2017 between or among officials from the Department of Commerce, the Census Bureau, and any other office or entity inside or outside of the government regarding the addition of a citizenship question." Foti Decl. ¶ 31.

Following service of the Committee's subpoena, Commerce continued to produce responsive documents. On April 25 and June 3, 2019, Commerce delivered two more installments of documents to the Committee, bringing the total volume to more than 13,000 pages. Foti Decl. ¶ 33.

B. Requests to the Department of Justice

On February 12, 2019, Chairman Cummings requested that the Department of Justice produce, in a mere two weeks, six categories of documents concerning the census, including "[a]ll documents and communications relating or referring to the addition of a citizenship question to the census." Declaration of Megan Greer (filed herewith) ("Greer Decl."), Ex. A. The Department concluded that the documents sought by the Committee were of the same kind as those produced by the Department in response to a third-party subpoena served in the Census litigation, which was then ongoing. *See* Greer Decl. ¶ 8. Between the date of the request and the end of March 2019, the Department produced more than two thousand pages. *See* Greer Decl. Exs. D, F, G. These productions did not include certain materials that the Committee was seeking, however, including the Uthmeier Memo and drafts of the Gary Letter.[3]

On April 2, 2019, the Committee served a subpoena on the Attorney General, demanding that the Department of Justice produce, by April 16, 2019:

1. Memorandum and note from James Uthmeier to John Gore in Fall 2017.

2. All documents and communications from January 20, 2017, through December 12, 2017, within the Department of Justice and with outside entities regarding the request to add a citizenship question to the census, including, but not limited to, the White House, the Commerce Department, the Republican National Committee, the Trump Campaign, or Members of Congress.

Greer Decl. Ex. H.

[3] In a March 1, 2019, e-mail, Committee staff identified the Uthmeier memo as falling among the "high-priority" documents that the Committee wished to obtain. *See* Pl's Mem. Ex. TTT. Committee staff followed upon this request by e-mail dated March 20, 2019. *See* Greer Decl. Ex. E. On March 22, 2019, the Department indicated that it would "continue to reevaluate your document production . . . requests." *Id.*

On April 11, 2019, the Department explained that it would "continue to make productions to the Committee on a rolling basis responsive to both the April 2 subpoena and the February 12 letter." Greer Decl. Ex. I. Each subsequent production letter contained a disclaimer that the productions "contain[] limited redactions," including "limited redactions to preserve the deliberative, attorney-client, and/or attorney-work product protections." Greer Decl. ¶ 20. By the end of May 2019, the Department had produced some 17,500 pages of material responding to the February request and the April 2019 subpoena, but it had not provided the Uthmeier Memo, drafts of the Gary Letter, or other privileged materials.

C. The Committee Begins Contempt Proceedings.

On June 3, 2019, Chairman Cummings wrote separately to the Secretary and the Attorney General to inform them that the Committee had scheduled a vote to hold them in contempt of Congress. The Committee further advised the Secretary that it would "consider postponing" the contempt vote against him if Commerce produced by June 6, 2019, "unredacted copies of the 11 documents identified in item 1 of the subpoena" to the Secretary. The Committee similarly suggested that it might "postpone" a Committee contempt vote against the Attorney General if the Department of Justice produced two specific categories of documents by June 6, 2019: (1) a "memorandum and note from James Uthmeier to John Gore in Fall 2017"; and (2) "all drafts of the Department of Justice's December 12, 2017 letter."[4] *See* Foti Decl. ¶ 35; Greer Decl. Ex. Q

On June 6, 2019, Commerce wrote to Chairman Cummings to express the Secretary's disappointment that the Committee had embarked on this path, given the extensive efforts Commerce had made to accommodate the Committee's requests for documents and testimony. Commerce reiterated its readiness to "continue to address redacted material that is protected by privilege[,]" and its "eager[ness] to continue its cooperation with the Committee by producing additional, non-

[4] The Commerce "priority" documents and the Department of Justice documents demanded by the Committee in exchange for postponement of contempt proceedings are referred to collectively herein as the "priority documents."

privileged documents and information." Foti Decl. ¶ 36. Also on June 6, 2019, the Department of Justice responded to Chairman Cummings, explaining that the "Committee's insistence that the Department immediately turn over" documents that are "protected from disclosure by the attorney-client privilege, deliberative process privilege, and/or the attorney work product doctrine" was improper. Greer Decl. Ex. R. The Department made clear that it was willing to "continue working with the Committee to find a resolution that would balance Congress's legitimate need for information that will help it legislate and the Department's legitimate, constitutionally recognized need to keep certain information confidential." *Id.* (internal quotation marks and footnotes omitted).

On June 11, 2019, the Department of Justice wrote to the Committee, again highlighting that "a limited subset of the documents is protected from disclosure by the deliberative process, attorney-client communications, or attorney work product components of executive privilege." Greer Decl. Ex. S. The Department explained that in light of the Committee's refusal to negotiate in good faith and work to accommodate the Executive Branch's confidentiality interests, the "Attorney General [was] compelled to request that the President invoke executive privilege with respect to the materials subject to the subpoena[s]" to the Attorney General and the Secretary, and to request "that the Committee hold the subpoenas in abeyance and delay any vote on whether to recommend a citation of contempt for noncompliance with the subpoenas, pending the President's determination of this question." Greer Decl. Ex. S at 1. The Department explained that this request was "consistent with long-standing policy of the Executive Branch about congressional requests for information implicating executive privilege," as stated in President Reagan's 1982 Memorandum for the Heads of Executive Departments and Agencies Re: *Procedures Governing Responses to Congressional Requests for Information.* The same day, Chairman Cummings responded that the Committee would only postpone the contempt vote against the Attorney General if the Department agreed to produce—by the very next day—unredacted copies of the Uthmeier memo and all drafts of the Gary letter. Greer Decl. Ex. U. Chairman Cummings similarly offered to postpone the contempt vote against the Secretary if

Commerce agreed to product—again by the very next day—unredacted copies of the eleven documents identified in Item 1 of the subpoena to him. Foti Decl. ¶ 38.

In light of the Committee's intended actions, the Secretary and the Attorney General sent letters to the President on June 11, 2019, formally requesting that the President "assert executive privilege with respect to [the] documents" at issue. Foti Decl. ¶ 39; Greer Decl. Ex. V at 1. In support of this request, the Secretary and the Attorney General described their extensive cooperation with the Committee's investigation, the privileged nature of much of the additional information demanded by the Committee, and the Committee's failure to provide any particularized explanations of its legislative need for such information. The Secretary and the Attorney General therefore requested two separate assertions of executive privilege: a conclusive assertion of privilege over the materials identified as priority documents by the Committee, and a protective assertion over the remaining materials sought by the April 2, 2019 subpoenas. Greer Decl. Ex. V at 1. On June 12, 2019, the President issued a memorandum to the Attorney General and the Secretary asserting executive privilege in accordance with the Attorney General's recommendation. Greer Decl. ¶ 34; Foti Decl. ¶ 40.

On June 12, 2019, both Commerce and the Department informed the Committee by letter that in light of the Committee's "abandon[ment] [of] the accommodation process," the President had asserted executive privilege over the specific documents requested by the Committee. Foti Decl. ¶ 42; Greer Decl. Ex. W. The Department enclosed the June 11, 2019, letter from the Attorney General to the President formally requesting that the President assert executive privilege and providing the legal basis for such an assertion. Greer Decl. Ex. W.

Nevertheless, on June 12, 2019, the Committee voted to hold the Secretary and the Attorney General in contempt of Congress. *See* 165 Cong. Rec. D663 (June 12, 2019). Notwithstanding the Committee's vote, Defendants consistently indicated willingness to pursue the negotiation and accommodation process. *See* Foti Decl. ¶ 46; Greer Decl. ¶ 38. The House voted to hold both the Secretary and the Attorney General in contempt on July 17, 2019. *See* H. Res. 497, 116th Cong. (2019).

Following the filing of this lawsuit, counsel for the Committee and counsel for the Executive Branch continued discussing the possibility of an accommodation. Specifically, on December 19, 2019, Committee counsel indicated that "the Committee remains intent on receiving, in full, unredacted form, all materials responsive to the Barr and Ross Subpoenas," but that it would consider starting with prompt receipt of the unredacted priority documents. Greer Decl. Ex. AA. On January 6, 2020, counsel for the Executive Branch responded that while it was unable to produce privileged documents over which the President had specifically asserted executive privilege, "Defendants would be prepared to continue and resume their production of responsive, non-privileged documents so long as the Committee in good faith is prepared to narrow its requests to focus on documents and information that are relevant to a legitimate legislative agenda." *Id.*

LEGAL STANDARDS

Under Rule 12(b)(1), a plaintiff invoking the jurisdiction of a federal court bears the burden of establishing the court's jurisdiction to hear its claims. *U.S. Ecology, Inc. v. U.S. Dep't of Interior*, 231 F.3d 20, 24 (D.C. Cir. 2000). Rule 56 requires entry of summary judgment if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

ARGUMENT

I. The Court Lacks Jurisdiction Over this Interbranch Dispute.[5]

The exertion of Federal judicial power to declare victors in interbranch disputes of this nature is inconsistent with the limits of Article III and basic separation-of-powers principles. And, even if Article III permitted judicial resolution of this action, Congress has not conferred statutory jurisdiction over such suits on the federal courts. The Court should therefore dismiss this case.

[5] The arguments presented in Sections I and II are functionally identical to arguments pressed before the D.C. Circuit in *Committee on the Judiciary v. McGahn II*, No. 19-5331 (D.C. Cir.), which was argued on January 3, 2020, following expedited briefing, and which could be decided any day.

A. The Court Lacks Jurisdiction Under Article III of the Constitution.

"No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). That limitation is designed "to prevent the judicial process from being used to usurp the powers of the political branches." *Id.* Article III standing "requires, among other things, that the plaintiff have suffered 'an invasion of a legally protected interest which is . . . concrete and particularized' *and* that the dispute is 'traditionally thought to be capable of resolution through the judicial process.'" *Raines*, 521 U.S. at 819 (emphasis added; citations omitted). Because "the law of Art. III standing is built on a single basic idea—the idea of separation of powers"—the inquiry is "especially rigorous" in suits involving the rights and duties of the political branches of the federal government. *Id.* at 819-20.

The Committee fails to satisfy bedrock standing requirements. Like the plaintiffs in *Raines*, the Committee has not brought this suit to vindicate some "private right" (like lost wages) "to which [it] *personally* [is] entitled." *Id.* at 812, 821. Instead, it has come to court solely to vindicate an asserted "institutional injury" to the House as a whole at the hands of the Executive Branch, *id.*; *accord id.* at 829. In assessing whether that sort of "institutional injury" suffices to supply standing, the Court must consider historical practice as well as the separation-of-powers implications of adjudicating the suit. *See id.* at 819-20, 826-29. *See also Chenoweth v. Clinton*, 181 F.3d 112, 116 (D.C. Cir. 1999) (*Raines* "require[s] us to merge our separation of powers and standing analyses").

1. This Dispute Is Not Traditionally Amenable to Judicial Resolution.

In *Raines*, the Supreme Court held that Members of Congress lacked Article III standing to contend that the Line Item Veto Act unconstitutionally divested them of their role in repealing legislation. 521 U.S. at 816, 829-30. The Court emphasized that "historical practice . . . cut against" the Members' standing because "[i]t is evident from several episodes in our history that in analogous

confrontations between one or both Houses of Congress and the Executive Branch, no suit was brought on the basis of claimed injury to official authority or power." *Id.* at 526.

Raines's analysis makes clear that the House or a House Committee may not go to court to vindicate institutional injuries any more than an individual member of Congress could. As the Court explained, neither Congress nor any member thereof "challenged the validity of President Coolidge's pocket veto" of an enacted bill, even though his action prevented them from trying to override his veto. *Id.* at 828. Similarly, multiple Presidents objected to the constitutionality of the Tenure of Office Act of 1867, but "it occurred to [none of them] that they might challenge the Act" even though it caused a "diminution of [their] official power." *Id.* at 826-27. In both situations, the legal questions were not addressed by the Judiciary until individuals with private interests at stake brought suits that required courts to decide the questions in the course of resolving that personal dispute, thus avoiding being "improperly and unnecessarily plunged into the bitter political battle being waged between the President and Congress." *Id.* at 827. Although "[t]here would be nothing irrational about a system that granted standing" to resolve direct interbranch disputes over institutional powers, "it is obviously not the regime that has obtained under our Constitution to date," which "contemplates a more restricted role for Article III courts." *Id.* at 828.

To be sure, *Raines* involved a suit brought by individual members, not a committee purportedly authorized by the House as a whole. 521 U.S. at 814. But the Court's reasoning did not turn on that factual distinction; rather the Court relied broadly on the historical absence of litigation "between *one or both Houses of Congress* and the Executive Branch." *Id.* at 526 (emphasis added). And the D.C. Circuit has repeatedly held that "carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative." *Sierra Club*, 322 F.3d at 724. *Raines*'s reasoning was not dicta, but, even if it were, this Court cannot ignore it.[6]

[6] The full House has not voted to authorize this lawsuit: it has directed the Oversight Committee to "take all necessary steps to enforce the above-referenced subpoenas, including, but not limited to, *seeking authorization* from the House of Representatives through a vote of the Bipartisan Legal Advisory

Nor is the history any more supportive of litigation in the context of congressional subpoenas. Disputes over congressional requests for Executive Branch information have existed since the beginning of the Republic and litigation was not the vehicle for resolving them. For example, in 1792, President Washington clashed with the House of Representatives over records relating to a failed military expedition, and he later refused to provide the House certain documents relating to the negotiation of a treaty. *See Nixon v. Sirica*, 487 F.2d 700, 733-34 (D.C. Cir. 1973) (en banc) (MacKinnon, J., concurring in part and dissenting in part). Numerous other Presidents have likewise withheld information requested by Congress. *Id.* at 733-36 & n.9 (MacKinnon, J., concurring in part and dissenting in part) (providing significant list of examples); Edward S. Corwin, *The President: Office and Powers 1787-1957*, at 110-11 (4th ed. 1957); *History of Refusals by Executive Branch Officials To Provide Information Demanded by Congress*, 6 Op. O.L.C. 751, 752-71 (1982). In a 1954 letter prohibiting the testimony of Executive Branch officials or the production of documents to a Senate subcommittee, President Eisenhower explained the policy behind this position, noting "it is essential to efficient and effective administration that employees of the Executive Branch be in a position to be completely candid with each other on official matters." Tom Wicker, Dwight D. Eisenhower: The American Presidents Series: The 34th President, 1953-1961, at 70 (2014).

For the vast majority of American history, these contests were resolved by "political struggle and compromise." *See Barnes v. Kline*, 759 F.2d 21, 55 (D.C. Cir. 1984) (Bork, J., dissenting), *vacated sub nom. Burke v. Barnes*, 479 U.S. 361 (1987). As *Raines* explained, "the irreplaceable value" of the judiciary

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Group" ("BLAG") to authorize litigation. H. Res. 497, 116th Cong. (July 17, 2019) (emphasis added). House Resolution 430, in turn, provides that "a vote of the [BLAG] to authorize litigation and to articulate the institutional position of the House in that litigation is the equivalent of a vote of the full House of Representatives" authorizing the suit. H. Res. 430, 116th Cong. (June 11, 2019). Both resolutions presuppose that it is permissible for the full House to delegate to the BLAG responsibility for authorizing litigation on behalf of the House. Yet that position, which would allow the House to delegate all its institutional authority to its leadership and thereby shield its members from the political consequences of the House's actions, has no apparent limiting principle: if Congress may delegate to a subset of its members the responsibility for approving litigation, there would appear to be no bar to the House delegating to a subset of its members responsibility for approving legislation either.

"lies in the protection it has afforded the constitutional rights and liberties of individual citizens," "not some amorphous general supervision of the operations of government." 521 U.S. at 829 (quoting *United States v. Richardson*, 418 U.S. 166 (1974) (Powell, J., concurring)). This "'long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions' regulating the relationship between Congress and the President." *NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014).

2. The Committee Fails To State A Cognizable Injury.

In rejecting standing, *Raines* also explained that the plaintiffs were asserting an abstract institutional injury rather than a concrete personal injury. 521 U.S. at 821, 825-26, 829-30. The legislators could not "claim that they have been deprived of something to which they personally are entitled—such as their seats as Members of Congress" and a "consequent loss of salary." *Id.* at 821. Rather than asserting the "loss of any private right," they were pressing only "a type of institutional injury (the diminution of legislative power)." *Id.*

Raines noted that the Court had only ever "upheld standing for legislators (albeit *state* legislators) claiming an institutional injury" in "one case." 521 U.S. at 821. In *Coleman v. Miller*, 307 U.S. 433 (1939), a bloc of Kansas Senators comprising half the Senate brought suit in state court contending that their votes in the legislature, which were enough to reject a proposed federal constitutional amendment, had been "completely nullified" through an improper voting procedure that ratified the amendment. *See Raines*, 521 U.S. at 821-23. *Raines* explained that *Coleman* stands—"at most"—for "the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified." *Id.* at 823. And the Court held that the "abstract dilution of institutional legislative power" attributable to the Line Item Veto Act fell well short of the "vote nullification" in *Coleman*. *Id.* at 825-26. Accordingly, the

Court had no need to decide whether *Coleman* should extend to a suit "brought by federal legislators" in light of the additional "separation-of-powers concerns" presented. *Id.* at 824 n.8.

Since *Raines*, the Supreme Court has upheld the standing of a state legislature asserting the institutional injury that a voter initiative vesting redistricting power in an independent commission had stripped the legislature of its authority under the U.S. Constitution to draw congressional districts. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2665 (2015). There, too, the Court expressly recognized that "a suit between Congress and the President would raise separation-of-powers concerns absent" in that case. *Id.* at 2665 n.12. Moreover, much like in *Coleman*, the state legislature's institutional injury was that it had been "*permanently* deprived" of a legislative power by a voter initiative. *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1954 (2019). *See also Campbell v. Clinton*, 203 F.3d 19, 22-23 (D.C. Cir. 2000) ("key to understanding the [*Raines*] Court's treatment of *Coleman* and its use of the word nullification" is that the *Coleman* plaintiffs "had no legislative remedy"); *Raines*, 521 U.S. at 829 (plaintiffs there retained "an adequate remedy" through legislative means). Here, as discussed below, the Committee retains a panoply of tools that it can use to work its political will through the negotiation and accommodation process.

It follows that the Committee cannot establish an injury that "is personal, particularized, concrete, and otherwise judicially cognizable." *Raines*, 521 U.S. at 820. The Committee alleges that Defendants' failure to produce privileged documents has "injur[ed] the Committee in carrying out two critical constitutional functions: conducting effective oversight of the Executive Branch and its officials" and "determining whether legislation is necessary . . . to ensure the integrity of the 2020 Census." Compl. ¶ 9. Just as in *Raines*, the Committee is asserting solely "a type of institutional injury (the diminution of legislative power)." *Id.* The Committee's lack of standing thus follows from *Raines*. And besides, this Court should not allow federal legislators to base standing on institutional injuries *at all* given the heightened separation-of-powers concerns presented. *See id.* at 524 n.8; *Ariz. State Legislature*, 135 S. Ct. at 2665 n.12.

3. Lawsuits Of This Kind Imperil The Separation Of Powers.

The historical absence of congressional lawsuits seeking Executive Branch information is no coincidence. "[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers," *Raines*, 521 U.S. at 820 (internal quotation marks omitted), and "[p]lacing the Constitution's 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).

a) Interbranch Lawsuits Threaten the Independence of the Judiciary.

First, interbranch lawsuits threaten the independence of the judiciary and "risk 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). Again, it is not the role of federal courts to provide "amorphous general supervision of the operations of government," *Id.* at 829; rather, the courts' limited role—resolving disputes involving injured *individuals*—has "maintained public esteem for the federal courts and has permitted the peaceful coexistence of the countermajoritarian implications of judicial review and the democratic principles upon which our Federal Government in the final analysis rests." *Id.* The federal courts sometimes have no choice but to resolve difficult separation-of-powers questions, but the courts' need to resolve such questions when faced with a dispute between injured individuals with private rights at stake is well established and "raises no specter of judicial readiness to enlist on one side of a political tug-of-war" between the political branches who are capable of protecting their prerogatives through political tools. *See Raines*, 521 U.S. at 833-34 (Souter, J., concurring).

Rather than enmesh the judiciary in the political process, our constitutional framework contemplates that Congress will obtain the information it needs from the Executive Branch through the negotiation and accommodation process, backed by its powerful Article I tools. *See Campbell*, 203 F.3d at 23; *United States v. Am. Tel. & Telegraph Co. ("AT&T II")*, 567 F.2d 121, 127 (D.C. Cir. 1977).

Among other such tools, Congress can enact ameliorative or restraining legislation, *see McGrain v. Daugherty*, 273 U.S. 135, 173-74 (1927), reduce or eliminate appropriations, *see Barenblatt v. United States*, 360 U.S. 109, 111 (1959), make a case to the public, *see id.* at 132-33, or even consider whether to remove officials, *Campbell*, 203 F.3d at 23. And because the Legislative Branch may employ these means of "political self-help" if it is dissatisfied with the Executive Branch's response to a congressional investigation—as it has done for two hundred years—it "may not challenge the President's [actions] in federal court." *Campbell*, 203 F.3d at 23-24. Were it otherwise, the federal courts would have long ago become "not the last but the first resort," *Barnes*, 759 F.2d at 53 (Bork, J., dissenting), *vacated sub nom. Burke v. Barnes*, 479 U.S. 361 (1987), and "the system of checks and balances" meant to govern the relations between the political Branches would have been "replaced by a system of judicial refereeship," *Moore v. U.S. House of Reps.*, 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia, J., concurring in result), *abrogated on other grounds by Raines*, 521 U.S. 811.[7]

Suits by Congress challenging the Executive Branch's refusal to provide privileged documents are especially ill-suited to judicial resolution. As discussed more fully below, *see infra* Part IV, the Supreme Court has held that executive privilege is a qualified privilege that may yield to a sufficiently strong showing of need. It follows that, if suits like this are justiciable, courts will have to go line-by-line through each withheld document to determine not only if they are in fact privileged, but more troublingly, which political branch has a greater claim of need. Courts will thus be deluged with cases raising "nerve-center constitutional questions" about how to balance an asserted congressional need for information against the President's invocation of privilege. *AT&T I*, 551 F.2d at 394.

[7] The opinions of Judge Bork in *Barnes* and then-Judge Scalia in *Moore* have been cited as early expressions, prior to *Raines*, of the "view[ ] that the role of the judiciary is properly limited to the adjudication of individual rights." *Walker v. Cheney* , 230 F. Supp. 2d 51, 72 n.18 (D.D.C. 2002)). Indeed, one case in this district has explained that, "[f]or all intents and purposes, the strict legislative standing analysis suggested by Justice Scalia in [*Moore*], now more closely reflects the state of the law." *Campbell v. Clinton*, 52 F. Supp. 2d 34, 40 (D.D.C. 1999), *aff'd*, 203 F.3d 19 (D.C. Cir. 2000).

To be sure, judicial resolution of disputes between the political branches might sometimes be more expedient than "political struggle and compromise," *Barnes*, 759 F.2d at 55 (Bork, J., dissenting), but the Framers "ranked other values higher than efficiency," *INS v. Chadha*, 462 U.S. 919, 959 (1983). Political struggle and compromise are features, not defects. The Court should not circumvent them.

b) Congress May Not Assume the Executive Function of Initiating Lawsuits to Vindicate Purported Sovereign Institutional Interests.

Second, it would disturb the separation of powers to allow Congress to initiate judicial proceedings against the Executive Branch to vindicate asserted injuries to its institutional interests as a sub-component of the sovereign. As the Supreme Court has observed, the "power to seek judicial relief . . . cannot possibly be regarded as . . . in aid of the legislative function." *Buckley v. Valeo*, 424 U.S. 1, 138 (1976). *See also Springer v. Gov't of Phil. Islands*, 277 U.S. 189, 202 (1928) ("Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them . . . ." (citing *Myers v. United States*, 272 U.S. 52 (1926))). That is why the House previously has disclaimed any power to bring "suit under the myriad of general laws authorizing aggrieved persons to challenge agency action" and dismissed as "speculative" the possibility that it would attempt "to afford itself broad standing to challenge the lawfulness of Executive conduct." Pls.' Br. for U.S. House of Reps. at 17, 22 & n.25, *U.S. Dep't of Commerce v. U.S. House of Reps.*, 525 U.S. 316 (1999), No. 98-404, 1998 WL 767637 (1998). The traditional means of enforcing congressional subpoenas is contempt prosecutions brought by the Executive, *see McGrain*, 273 U.S. at 167, and it would violate Article II to vest in a legislative body the core executive "responsibility for conducting civil litigation in the courts of the United States [to] vindicat[e] public rights." *Buckley*, 424 U.S. at 140. *See also id.* at 137-38 (invaliding commission that included members appointed by legislators because it had the power not only to demand information in furtherance of legislative functions, but to bring enforcement suits). *Cf. In re Debs*, 158 U.S. 564, 583-84 (1895) (sovereign has standing to file suits, brought by executive officers, to redress harm from violations of federal law by third parties).

c) It Threatens the Separation of Powers to Allow Congress, and Only Congress, to Initiate Interbranch Litigation.

Third, permitting the House to file lawsuits against the Executive Branch would be especially disruptive to the separation of powers given the House's claim that the Executive Branch is powerless to respond in kind. That is, the Committee's view is that it may sue the Executive Branch whenever it pleases, forcing the Judicial Branch into the middle of politically fraught battles over congressional authority and presidential privileges and prerogatives.[8] At the same time, the House asserts that, under the Speech and Debate Clause, no one may sue the House for anything having to do with *its* official activity. *See, e.g.*, *Trump v. Comm. on Ways & Means*, No. 1:19-cv-2173, ECF No. 22, at 3 (D.D.C. July 30, 2019) (contending that suits against House "at the behest of the President" would "rais[e] glaring separation of powers concerns," and are "precisely what the Framers of the Constitution wished to guard against"). There is no indication that the Framers intended this anomalous result.

B. The Court Lacks Statutory Subject Matter Jurisdiction.

Although the Article III defect is clear, this Court need not reach it because Congress has never even tried to grant district courts statutory subject-matter jurisdiction over suits by House committees to enforce subpoenas against the Executive Branch—a necessary prerequisite to this case proceeding. *See Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 366 F. Supp. 51, 55 & n.5 (D.D.C. 1973) ("courts may assume only that portion of the Article III judicial power which Congress, by statute, entrusts to them" (citing cases)).

[8] The House has initiated four such cases in the past nine months. In addition to this suit, see *U.S. House of Reps. v. Mnuchin*, No. 1:19-cv-00969 (TNM) (D.D.C. filed Apr. 5, 2019) (challenging border wall expenditures); *Comm. on Ways & Means v. U.S. Dep't of Treasury*, No. 1:19-cv-01974 (TNM) (D.D.C. filed July 2, 2019) (seeking President's tax returns and related records); *Comm. on the Judiciary v. McGahn*, No. 1:19-cv-02379 (KBJ) (D.D.C. filed Aug. 7, 2019) (seeking to compel testimony from former White House Counsel). In addition, the House has filed a petition seeking grand jury testimony and related records concerning the Mueller report. *See In re: Comm. on the Judiciary*, No. 1:19-gj-00048 (BAH) (D.D.C. filed July 26, 2019).

As the D.C. Circuit has recognized, "[p]rior to 1978 Congress had only two means of enforcing compliance with its subpoenas: a statutory criminal contempt mechanism and the inherent congressional contempt power." *In re Application of the U.S. Senate Permanent Subcomm. on Investigations*, 655 F.2d at 1238. In 1978, Congress enacted a provision purporting to create subject matter jurisdiction over *some* congressional subpoena enforcement actions. *See* Pub. L. 95-521, 92 Stat. 1824 (1978). That statute, now codified (as amended) as 28 U.S.C. § 1365, authorizes jurisdiction over *Senate* subpoena enforcement actions only, and it specifically excludes cases concerning "any subp[o]ena or order issued to an officer or employee of the executive branch of the Federal Government acting within his or her official capacity, . . . if the refusal to comply is based on . . . a governmental privilege or objection . . . ." 28 U.S.C. § 1365. Moreover, Section 1365 contains specific procedural requirements governing the subpoena enforcement suits it authorizes. *See, e.g.*, *id.* § 1365(a) (suit must be filed in this district); *id.* § 1365(b) (violation of court order to comply enforceable only through civil rather than criminal contempt); *id.* § 1365(e); 2 U.S.C. §§ 288b(b), 288d(c) (steps needed to obtain Senate authorization).

Congress' choice not to create judicial jurisdiction for subpoena-enforcement suits by the House was no oversight—it was considered and deliberate, as documented in the legislative history. Specifically, the Senate had proposed a bill that would have conferred jurisdiction to enforce subpoenas issued by both the Senate and the House, but the House did not support the proposal. *See* H.R. Rep. No. 95-1756, at 80 (1978). As the House Report explained, "[t]he appropriate committees in the House . . . have not considered the Senate's proposal to confer jurisdiction on the courts to enforce subp[o]enas of House and Senate committees." *Id.* Despite the House's reluctance, "[t]he Senate . . . twice voted to confer such jurisdiction on the courts and desire[d] . . . to confer jurisdiction on the courts to enforce Senate subp[o]enas." *Id.* Congress therefore passed, and the President signed, a version of the bill creating jurisdiction over Senate subpoenas, but not House ones.

Nor was it an oversight that the statute excluded suits against the Executive Branch. Prior to enacting 28 U.S.C. § 1365 in 1978, Congress considered legislation that lacked such a carve-out. *See, e.g.*, S. 495, 94th Cong., § 1364(a); S. 2170, 94th Cong., § 343(b)(1); S. 2731, 94th Cong., § 6. In hearings on these bills, the Executive Branch relayed its view that such provisions would raise grave constitutional concerns because "the Supreme Court should not and would not undertake to a[d]judicate the validity of the assertion of Executive privilege against the Congress." *Executive Privilege: Secrecy in Government: Hearings before the Subcomm. on Intergovernmental Relations of the Comm. on Govt. Operations of the U.S. Senate*, 94th Cong., 1st Sess. (1975), at 116 (statement of Assistant Attorney General Scalia).[9] Congress got the message and dropped these provisions. *See, e.g.*, 123 Cong. Rec. 2970 (Feb. 1, 1977) (statement of Sen. Abourezk) ("[T]he Department argued vigorously that bringing such suits would be unconstitutional. . . . . Due to this opposition to that section, it was deleted by the Senate Government Operations Committee when the bill was reported."). The Senate bill that would eventually add Section 1365 thus contained a clear carve-out for suits against the Executive Branch from the moment it was introduced in the Senate that same day. *See* 95 S. 555 § 1364 (as introduced Feb. 1, 1977); *see also* S. Rep. 95-170, at 103 ("Under no circumstances is it intended that this subsection be utilized to authorize the Counsel to bring any action against the executive branch . . . to challenge a claim of executive privilege.").

[9] *See also id.* at 84 ("[T]he courts are precisely not the forum in which this issue should be resolved."); *Watergate Reorganization and Reform Act of 1978: Hearings Before the Comm. on Govt. Operations of the U.S. Senate*, 94th Cong., 1st Sess. (1975-1976), at 15 (statement of Assistant Attorney General Uhlmann) ("To ask the courts to weigh the competing interests of the executive and legislative branches when executive privilege is asserted in response to a congressional subp[o]ena would put the courts in an uncomfortable and perhaps impossible situation. It is significant, we think, that while precedents for the exercise of executive privilege go back to the Presidency of George Washington, no formal institutional mechanism of the sort proposed here has ever been established. Nor does the Department believe it should be now."); *Representation of Congress and Congressional Interests in Court: Hearings Before the Subcomm. on Separation of Powers of the Comm. on the Judiciary* of the U.S. Senate, 94th Cong., 2d Sess., 1975-1976, at 91 (Justice Department Statement) (raising "serious constitutional doubt" as to bill creating Congressional Legal Counsel with responsibility for "prosecution of suits relating to congressional subp[o]enas" because "[l]itigation is basically an executive function").

Because 28 U.S.C. § 1365 obviously withholds jurisdiction over this type of suit, the Committee instead rests its claim to jurisdiction on 28 U.S.C. § 1331, the general federal question statute. In the Committee's view, the careful compromise reflected in 28 U.S.C. § 1365 — jurisdiction only for the Senate, not for suits against the Executive Branch, and subject to various procedural requirements—is irrelevant because the general language of 28 U.S.C. § 1331 overrides it. That argument flies in the face of the Supreme Court's admonition that where "a general authorization and a more limited, specific authorization exist side-by-side," "[t]he terms of the specific authorization must be complied with." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). And that is particularly true here, because at the time Section 1365 was enacted, it was well understood that Congress otherwise lacked the authority to sue to enforce its subpoenas. Indeed, the 1977 Senate Report for the bill that enacted Section 1365—issued the year after Congress removed the amount-in-controversy requirement from Section 1331 for actions brought against the United States and its officials, *see* Pub. L. No. 94-574, 90 Stat. 2721 (1976)—explained there was a "need for civil enforcement of subp[o]enas" because "[p]resently, Congress can seek to enforce a subp[o]ena only by use of criminal [contempt] proceedings [under 2 U.S.C. § 192] or by the impractical procedure of conducting its own trial before the bar of the House of Representatives or the Senate." S. Rep. No. 95-170, at 16 (1977) (capitalization modified).

The Committee's position that 28 U.S.C. § 1365 is an irrelevant historical artifact is particularly flawed given that Congress amended § 1365 in 1996—well after its 1980 elimination of Section 1331's amount-in-controversy requirement. *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506 (2006). In 1996, Congress amended Section 1365 to make clear that a federal official's refusal to comply with a subpoena based upon a *personal privilege* (rather than a governmental one) does not defeat jurisdiction. *See* Pub. L. No. 104-292, § 4, 110 Stat. 3459, 3460 (1996). And that amendment's sponsor could not have been clearer about its purpose: "The purpose is to keep disputes between the executive and legislative branches out of the courtroom." 142 Cong. Rec. 19,412 (1996) (statement of Sen. Specter).

See also id. at 19,413 (statement of Sen. Levin) (purpose is "to keep interbranch disputes out of the courtroom"). As one Senator explained, when Section 1365 was enacted in 1978, "an exception was carved out for privilege assertions by the executive branch, so that the courts would not be called on to resolve disputes between the two political branches of Government." *Id.* at 25,468 (Statement of Sen. Bryan). Yet the Committee contends that this carve-out is meaningless and the 1996 amendment was pointless because all along congressional committees could simply invoke Section 1331 to initiate the precise sort of litigation that Congress has repeatedly sought to keep "out of the courtroom."

That is not a plausible interpretation, particularly given this Court's obligation to "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 "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). And regardless, the Committee's view is contrary to the D.C. Circuit's statement that Congress lacked the authority to sue to enforce its subpoenas "[p]rior to 1978" and the enactment of Section 1365. *In re Application of the U.S. Senate Permanent Subcomm. on Investigations*, 655 F.2d at 1238.

Finally, at a minimum, Section 1331 does not *unambiguously* confer jurisdiction over the Committee's suit for reasons described above. Because interpreting Section 1331 to authorize this suit 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).

C. Decisions Suggesting that Interbranch Subpoena Enforcement Suits are Justiciable have been Abrogated by *Raines*, or were Wrongly Decided.

Notwithstanding the above, certain decisions have suggested that suits like this one are justiciable. To the extent that decisions predating *Raines* could be read to permit this suit, they are no longer good law. The district court decisions post-dating *Raines* were, with respect, wrongly decided.

1. Cases Pre-Dating *Raines* are No Longer Good Law to the Extent They Would Authorize this Suit.

Prior to the Supreme Court's decision in *Raines*, the D.C. Circuit occasionally contemplated that Congress might have standing to seek judicial enforcement of subpoenas. These cases do not hold that the Committee has standing to bring this suit against the Executive Branch, nor would such a holding survive *Raines*.

In *AT&T I*, 551 F.2d 384, the Executive Branch brought suit against a private telephone company to prevent the release of national-security information subpoenaed by a House subcommittee, and the House, by resolution, designated the subcommittee chairman to intervene on behalf of the House and appeal the judgment. *Id.* at 391. The Court of Appeals stated in a single sentence that "the House as a whole has standing to assert its investigatory power, and can designate a member to act on its behalf." *Id.* That decision is not controlling, as the D.C. Circuit has already suggested by issuing a published order staying the district court's ruling in *Committee on the Judiciary v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008)—a case that presented the same threshold issues as this case. *Comm. on Judiciary v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008) ("The present dispute is of potentially great significance for the balance of power between the Legislative and Executive Branches.").

At the outset, *AT&T I* is entirely distinguishable. Although the D.C. Circuit characterized the case as a "clash of the powers of the legislative and executive branches," the suit was brought by *the United States* (acting through the Executive Branch) against *a private entity* concerning the latter's "legal duty" vis-à-vis a congressional subpoena. 551 F.2d at 389. That decision thus did not present the sort of direct branch-versus-branch suit the Committee advances here. Moreover, by the time the

D.C. Circuit commented on the House's standing, the district court had quashed the subpoena. *See id.* at 385. Thus, *AT&T I* involved "at most," *Raines*, 521 U.S. at 823, whether the House could appeal from a district court order invalidating its request for information in a case that was otherwise properly in court as a suit by the United States against a private party. That decision should not be extended to this much different factual context given *Raines*.

But even if *AT&T I* did suggest that Congress has standing to sue the Executive Branch, such a suggestion would not survive *Raines*. *Raines* and its progeny jettisoned the permissive doctrine of legislative standing that prevailed at the time of *AT&T I*, placing "greater emphasis upon the separation of powers concerns underlying the Article III standing requirement." *Chenoweth*, 181 F.3d at 114. Like the broader doctrine of legislative standing that *Raines* repudiated, cases such as *AT&T I* are now "untenable" as authority for Congress's standing to sue the Executive Branch. *Id.* at 115.

The D.C. Circuit also noted in *AT&T I* that it had jurisdiction under Section 1331. 551 F.2d at 389. But *AT&T I* did not involve a suit brought *by Congress* to enforce a subpoena against the Executive Branch, and so its jurisdictional holding—that *the United States* could invoke Section 1331 against a private company—did not implicate the suit here. And, besides, it was based on a statutory scheme that no longer exists in the wake of Section 1365. Congress enacted Section 1365 two years after the D.C. Circuit's *AT&T I* decision and then amended it in 1996 to clarify and preserve the carve-out to keep these sorts of disputes "out of the courtroom." 142 Cong. Rec. 19,412 (1996). *AT&T I* thus construed a statutory scheme that no longer exists—*i.e.*, the 1976 version of Section 1331 without an adjacent, subpoena-specific provision like Section 1365.[10]

[10] In *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974) (en banc), the Court of Appeals reached the merits of a Senate committee suit against the President to compel the production of tape recordings, without addressing, much less deciding, whether the Senate committee had standing. *Id.* at 729-32. "[D]rive-by jurisdictional rulings of this sort . . . have no precedential effect." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998).

2. The District Court Cases Post-Dating *Raines* Were Wrongly Decided.

Following *Raines*, neither the D.C. Circuit nor the Supreme Court has ever suggested that Congress has standing to sue the Executive Branch to enforce informational demands or that courts have subject-matter jurisdiction to hear such suits. Yet on three instances over the past twelve years, courts in this district have held such disputes justiciable. *See Miers*, 558 F. Supp. 2d at 53; *Comm. on Oversight & Gov't Reform v. Holder*, 979 F. Supp. 2d 1 (D.D.C. 2013); *Comm. on Judiciary v. McGahn*, --- F. Supp. 3d ----, 2019 WL 6312011 (D.D.C. Nov. 25, 2019), *appeal pending*, No. 19-5331 (D.C. Cir.). With respect, those cases were wrongly decided, and this Court should not repeat their errors.

1. In *Miers*, the House Judiciary Committee sought a declaration, *inter alia,* "that [a] former White House Counsel . . . must comply with a subpoena and appear before the Committee to testify regarding an [oversight] investigation." 558 F. Supp. 2d at 55. Denying the Executive Branch's motion to dismiss, the Court held that "this lawsuit involves a basic judicial task—subpoena enforcement—with which federal courts are very familiar." *Id.* at 56. The court read *AT&T I* as establishing the Committee's standing, and interpreted *Raines* as a decision solely about the standing of "individual" Members. *See id.* at 68, 69-70. The court also held that because the dispute concerned enforcement of a subpoena, the "asserted interest[s] [were] more concrete than the situation in *Raines*." *Id.* at 70.

The *Miers* court erred in key respects. First, while the House had formally authorized the lawsuit in *Miers*, as discussed above, that is a distinction without a difference. *See supra* p. 15. Second, the *Miers* court suggested that the issuance of a subpoena made the dispute more concrete, *see* 558 F. Supp. 2d at 70, but formalities of process cannot alter the abstract nature of the Committee's claimed injury. It ignores fundamental separation-of-powers concerns to suggest that because courts are familiar with enforcing "subpoenas," they are thus well-suited to mediate disputes over information between Congress and the Executive Branch.[11] Finally, it bears emphasis that on appeal in *Miers*, the

[11] In any event, judicial familiarity with a general "task" is hardly the touchstone of a justiciable case or controversy. There was no suggestion in *Raines* that the Supreme Court was unfamiliar with

D.C. Circuit stayed the district court's order pending appeal in a published opinion highlighting that the dispute was "of potentially great significance for the balance of power between the Legislative and Executive Branches." *Miers*, 542 F.3d at 911. The case was thereafter settled.

2. In *Holder*, the House sought enforcement of a subpoena calling for the Attorney General to produce certain records relating to the Fast and Furious operation. Denying the Attorney General's motion to dismiss, the Court held that "Article III of the U.S. Constitution does not bar the federal courts from exercising their jurisdiction under the circumstances presented in this case." 979 F. Supp. 2d at 10. The Court further held that statutory subject-matter jurisdiction was available under 28 U.S.C. § 1331. *Id.* at 18.

The *Holder* court largely followed "the reasons set forth in *Miers*," 979 F. Supp. 2d at 4, so that decision can no more be reconciled with *Raines* than can *Miers* itself. In addition, *Holder* relied on *United States v. Nixon*, 418 U.S 683 (1974), but that case involved the enforcement of a *trial* subpoena arising "in the regular course of a federal criminal prosecution." *Id.* at 697. Thus, although *Nixon* implicated separation-of-powers concerns, at bottom the case involved the compulsion of evidence necessary to a criminal prosecution of a citizen—a matter implicating "the constitutional rights and liberties of individual citizens," *Raines*, 521 U.S. at 829, that fell squarely "within the traditional scope of Art. III power," *Nixon*, 418 U.S. at 697. The *Holder* court also erred in finding jurisdiction under Section 1331, in large part because it ignored the 1996 amendment to Section 1365.

3. Finally, in *McGahn*, the Committee on the Judiciary sought an order compelling former White House Counsel Donald F. McGahn to testify. Largely echoing the analysis of *Miers* and *Holder*,

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the "task" of adjudicating the constitutionality of an act of Congress—indeed, the very next term it held the Line Item Veto Act unconstitutional in *Clinton v. City of New York*. 524 U.S. 417, 429-36 (1998). But the Court refused to reach that issue in *Raines*, because that interbranch dispute was not one "traditionally thought to be capable of resolution through the judicial process." 521 U.S. at 819. Likewise, the Tenure of Office Act imposed a "concrete" impairment on the authority of several Presidents to fire subordinate officials—the type of injury that would plainly support standing to sue by a private executive—but the Chief Executive could not sue Congress to resolve that interbranch dispute over institutional prerogatives. *See id.* at 826.

the *McGahn* court principally relied on the general point that "claims regarding the enforceability of a subpoena raise garden-variety legal questions that the federal courts address routinely." 2019 WL 6312011, at *19. The court emphasized its view that "an injury in fact for Article III standing purposes is all but *assumed* in the myriad [private] subpoena-enforcement cases that are filed in federal courts with respect to civil actions every day." *Id.* at *27. And the court asserted that "[t]he Supreme Court has never suggested that the Judiciary has the power to perform its constitutionally assigned function *only* when it speaks to private citizens, or when it is called upon to resolve a legal dispute between a private citizen and one of the branches of government." *Id.* at *24. That analysis is incompatible with *Raines*, where the Supreme Court explained that "[t]he standing inquiry focuses on whether the plaintiff is the proper party to bring this suit" and "often turns on the nature and source of the claim asserted." 521 U.S. at 818 (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)).

II. Plaintiff Lacks a Cause of Action Allowing It to Sue.

In addition to lacking standing and statutory jurisdiction, the Committee has no cause of action. "[R]ights of action to enforce federal law must be created by Congress," *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001), and this case is no exception. The Committee's inability to invoke any extant cause of action represents an alternative threshold basis for dismissing this suit. *See, e.g.*, *Tenet v. Doe*, 544 U.S. 1, 6 n.4 (2005).

Congress knows how to create causes of action for itself and its agents. It has provided a cause of action to the *Senate* to enforce its subpoenas, subject to Section 1365's precise jurisdictional limits. *See* 2 U.S.C. §§ 288b(b), 288d. It has also authorized an agent of Congress, the Comptroller General, to bring suit under certain circumstances. *See* 31 U.S.C. §§ 716(b)(1)-(2) & (2)(A), (d)(1). And it has authorized the Executive Branch to institute contempt proceedings to enforce congressional subpoenas. 2 U.S.C. § 192. Yet Congress has never authorized House committees to enforce their subpoenas in court at all, let alone against the Executive Branch.

Because it cannot point to an available express cause of action, the Committee instead asserts claims directly under Article I of the Constitution. Compl. ¶¶ 199-216. That assertion is contrary to black-letter law. As the Supreme Court explained almost a century ago, the "[a]uthority to exert the powers of [Congress] to compel production of evidence differs widely from authority to invoke judicial power for that purpose." *Reed v. Cty. Comm'rs of Del. Cty.*, 277 U.S. 376, 389 (1928). In *Reed*, the Senate had authorized a special committee to issue a subpoena, and the committee filed suit to enforce the subpoena under a jurisdictional grant covering "any officer [of the United States] authorized by law to sue." *Id.* at 386. Even though the Senate had authorized the committee "to do such other acts as may be necessary," the Court held that this was insufficient to constitute authorization to sue. *Id.* at 388-89. The Court emphasized that the Senate's "established practice" was "to rely on its own powers" to issue subpoenas enforceable through contempt, rather than for it "to invoke the power of the Judicial Department." *Id.* at 389. *Reed*'s holding that the Senate committee was not "authorized by law to sue" necessarily means that the Constitution itself does not authorize a cause of action to enforce any authorized subpoena.

Even putting aside case law like *Reed* that deals with Congress's traditional means of enforcing its subpoenas, the Committee's attempt to find a right to sue directly under Article I is wrong. Implied rights of action are strongly disfavored. *See, e.g.*, *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1402 (2018) ("[T]his Court has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases."). A court's reluctance to imply such a right under the Constitution should be even greater, *see Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015) (Supremacy Clause does not itself create a cause of action), and greater still where the Judiciary is asked to imply a cause of action for the benefit of one political Branch against the other. The Supreme Court recently emphasized that where "litigation implicates serious separation-of-powers . . . concerns," recognizing a right to bring such litigation must be "subject to vigilant doorkeeping." *Jesner*, 138 S. Ct. at 1398. *See also Klay v. Panetta*, 758 F.3d 369, 373, 376 (D.C. Cir. 2014)

(noting the Supreme Court's "shift toward disfavoring judicially implied causes of action" in light of separation-of-powers concerns). As *Ziglar v. Abbasi* put it: "When a party seeks to assert an implied cause of action under the Constitution itself, just as when a party seeks to assert an implied cause of action under a federal statute, separation-of-powers principles are or should be central to the analysis." 137 S. Ct. 1843, 1857 (2017). The key "question concerning the creation of a cause of action is 'who should decide' [and] . . . [t]he answer *most often will be Congress*." *Id.* (emphasis added).

Nor can the Committee rely on "[t]he power of federal courts of equity to enjoin unlawful executive action." *Armstrong*, 575 U.S. at 327. *Armstrong* 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. Indeed, *Grupo Mexicano* makes clear that the analysis must be conducted at a granular level: there, the Court held that a "creditor's bill" restraining a debtor's assets was traditionally sought only by a "creditor who had already obtained a judgment establishing the debt," and thus could not now be sought by a "general creditor . . . without a judgment," as allowing suits by pre-judgment creditors would represent "a wrenching departure from past practice" that "Congress [was] in a much better position" to address. *Id.* at 319, 322.

Interbranch informational suits such as this have no historical pedigree, much less a strong tradition in equity. *See Reed*, 277 U.S. at 389. Because the Committee's suit is "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.

That is all the more so because "Congress has [had] specific occasion to consider the matter . . . [and] the proper way to remedy" the alleged wrong. *Abbasi*, 137 S. Ct. at 1865. *See also Armstrong*, 575 U.S. at 327-28 ("The power of federal courts of equity to enjoin unlawful executive action is

subject to express and implied statutory limitations," such that a plaintiff cannot "invoke[e] [a court's] equitable powers [to] circumvent Congress's exclusion" of particular remedies). Where there are grounds to conclude that Congress's failure to provide a cause of action is "more than mere oversight," *Abbasi*, 137 S. Ct. at 1862, courts should "refrain from creating [a] remedy in order to respect the role of Congress in determining the nature and extent of federal-court jurisdiction under Article III," *id.* at 1858. That is exactly the case here, where Congress has enacted various provisions permitting certain avenues of judicial enforcement of subpoenas but specifically chose not to authorize lawsuits brought by committees of the House against the Executive Branch.

Nor can the Committee rely on the Declaratory Judgment Act, 28 U.S.C. § 2201, as a cause of action. *See* Compl. ¶ 15 (citing 28 U.S.C. §§ 2201, 2202), Prayer for Relief ¶ A(a-b). The D.C. Circuit has squarely held that the Declaratory Judgment Act does not itself "provide a cause of action." *Ali v. Rumsfeld*, 649 F.3d 762, 778 (D.C. Cir. 2011). Rather, the Declaratory Judgment Act simply "enlarge[s] the range of remedies available in the federal courts" for cases that already can be litigated there. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950). A "cause of action," by contrast, confers the legal authority allowing a plaintiff to "'*enforce in court* the . . . rights and obligations' identified in his complaint" and is "'analytically distinct and prior to the question of what relief, if any, [he] may be entitled to receive." *John Doe v. U.S. Parole Comm'n*, 602 F. App'x 530, 532 (D.C. Cir. 2015) (citations omitted). As this Circuit has long held, "the availability of relief" under the Declaratory Judgment Act "presupposes the existence of a judicially remediable right.'" *C & E Servs., Inc. of Wash. v. D.C. Water & Sewer Auth.*, 310 F.3d 197, 201 (D.C. Cir. 2002). There being none here, the Act, on its own, offers no separate vehicle for bringing this case into court.

In any case, relief under equity jurisdiction or the Declaratory Judgment Act is not appropriate in these circumstances. Such relief is not available as a matter of right, but rests in courts' discretion. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008). And as the D.C. Circuit explained in *Chenoweth*, 181 F.3d 112, even pre-*Raines* decisions finding legislator standing under Article III still

denied relief on "equitable discretion" grounds "because of the separation of powers problems" the suits created. *Id.* at 114-15 (discussing cases). That disposition would be especially warranted here, given Congress's failure to clearly grant the Committee subject-matter jurisdiction and a cause of action.

III. The Subpoenas Exceed the Committee's Investigatory Power Under Article I.

For all the reasons stated above, federal courts cannot enforce the House's subpoenas to the Executive Branch. If courts do have a role to play in enforcing such subpoenas, however, then that role cannot be to simply rubber stamp whatever subpoenas the House might issue, no matter how limited their connection to any legislative purpose and how much burden they impose upon the Executive Branch. Rather, if we are to enter a brave new world in which courts enforce congressional subpoenas just as they enforce judicial subpoenas, congressional subpoenas should be subject to judicial management as are subpoenas in civil discovery. *Cf.* Fed. R. Civ. P. 26(b)(1). Thus, should the Court enforce the Committee's subpoenas in this case, it should dramatically narrow them to the non-privileged documents that Congress actually needs in order to legislate.

As a matter of first principles, Congress has no textually assigned power of inquiry. Instead, the Constitution vests certain *legislative* powers in Congress, *see* U.S. Const. art. I, § 1, and the Supreme Court has held that the "power to secure needed information" is "an attribute of the power to legislate." *McGrain*, 273 U.S. at 161. The "boundaries" of Congress's power to investigate "are defined by its source," *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 n.15 (1975), such that "there is no congressional power to expose for the sake of exposure," *Watkins v. United States*, 354 U.S. 178, 200 (1957), and "[i]nvestigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible," *id.* at 187. As the D.C. Circuit has unambiguously held, Congress may "*subpoena only that information which is 'reasonably relevant' to its legitimate investigation*." *Trump v. Mazars USA LLP*, 940 F.3d 710, 740 (D.C. Cir. 2019), *cert. granted.*

In this case, the Committee identifies two bases for why it is entitled to the extraordinarily broad information it has demanded. Neither suffices to justify the subpoenas.

A. The Committee Cannot Justify Its Broad and Burdensome Subpoenas by a Bare Desire to Expose Asserted Corruption.

The Committee first contends that its subpoenas are justified by its general desire to "probe[] into departments of the Federal Government to expose corruption," Compl. ¶ 146 (quoting *Watkins*, 354 U.S. 178, 187 (1957)). *See also* Pl.'s Mem. at 37-38. Indeed, the Committee suggests that such an interest would justify its subpoenas even if *no* legislation could or would be enacted in response. *See, e.g.*, Dec. 13, 2019, Hr'g Tr. at 5 ("[E]ven without legislation, often congressional committees are able to heavily influence executive branch agencies when various factors are exposed.").

The Committee cannot rest its sweeping subpoenas upon a bare desire to publicize alleged wrongdoing. "No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress." *Id.* at 187. Although Congress is sometimes described as having an "informing function," that function is "the power of the Congress to inform itself" of the facts needed to carry out legislative affairs. *Id.* at 216. *See Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 531 (9th Cir. 1983) ("The 'informing function' of Congress is that of informing itself about subjects susceptible to legislation, not that of informing the public."). "Valuable and desirable as it may be in broad terms, the transmittal of such information . . . in order to inform the public . . . is not a part of the legislative function." *Hutchinson v. Proxmire*, 443 U.S. 111, 133 (1979). *See McSurely v. McClellan*, 553 F.2d 1277, 1285–86 (D.C. Cir. 1976) (en banc) ("disseminat[ing] to the public beyond 'the legitimate legislative needs of Congress'" is not encompassed within Congress's "legislative activity"). It follows that, if the subpoenaed documents are not necessary for Congress to exercise its legislative function, then the subpoenas exceed the House's constitutional authority under Article I.[12]

[12] These principles have long been understood by administrations of both parties. *See, e.g.*, Assertion of Executive Privilege over Documents Generated in Response to Congressional Investigation into Operation Fast and Furious, 36 Op. O.L.C. __, at *7 (June 19, 2012) (opinion of Attorney General Eric H. Holder, Jr). ("Congress's legislative function does not imply a freestanding authority to gather information for the sole purpose of informing 'the American people.'"). Nevertheless, the Committee points to the Department's willingness to provide certain documents to Congress concerning the preparation of an inaccurate letter describing the Fast and Furious operation. *See* Pl.'s Mem. at 38. While the Department was willing to provide "documents concerning the

B. The Documents Sought by the Committee's Exceptionally Broad Subpoenas Are Not Relevant to Any Legitimate Legislative Inquiry.

Because the Committee cannot justify its subpoenas by a bare desire to publicize misconduct, the Committee must show that the documents it seeks are relevant to a legitimate legislative inquiry. They are not.[13] At the outset, the Committee has no legislative interest in documents surrounding the enjoined decision to reinstate a citizenship question on the 2020 Census for the simple reason that a citizenship question will not appear on the 2020 Census irrespective of any further legislative prohibition Congress might enact. *See supra* Background Part I (explaining that four separate injunctions would prohibit it). Even the Committee does not appear to argue that it is considering legislation specifically with respect to the presence of a citizenship question on the 2020 Census.

The Committee instead suggests that it is "consider[ing] whether Title 13 of the U.S. Code, which delineates the scope of the Secretary's authority over the census, may require amendment," and that other measures may be needed to "curb political influence on the census or may require new, judicially enforceable reporting obligations to increase visibility into how the census is being administered." Compl. ¶ 151. And "[f]urther evidence of improper influences, objectives, or considerations in how the Commerce Department is conducting the 2020 Census may prompt consideration of emergency legislation to safeguard the accuracy of the count and the integrity of the process." *Id.* *See also* Pl.'s Mem. at 39-40 (similar). In other words, the Committee's view is that

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drafting" of the letter as part of the negotiation and accommodation process, Assertion of Executive Privilege, *supra*, at *6, the specific accommodation in that case did not establish a requirement that the Executive Branch turn over deliberative and work-product documents in all other cases. In any event, unlike in the Fast and Furious case, Congress is not seeking information specifically about the generation of (purportedly) false testimony; it is asserting the novel proposition that, whenever a congressional committee thinks it has been misled in any respect, it is entitled to conduct a wide-ranging fishing expedition about the underlying facts, disconnected to any legislative purpose.

[13] Courts typically give some deference to Congress's assessment of the information that it needs to legislate. However far that principle goes, it does not apply to this interbranch dispute. As the D.C. Circuit explained in *Mazars*, "this deferential presumption finds its roots in the principle that 'every reasonable indulgence of legality must be accorded to the actions of a coordinate branch of our Government,'" 940 F.3d at 725 (quoting *Watkins*, 354 U.S. at 204), but here the Court arguably faces the competing positions of two coordinate branches of government.

because evidence of alleged past malfeasance might inform legislation prohibiting unrelated, purely hypothetical malfeasance in the future, it is permitted to demand every document in the agencies' files.

That argument is extraordinary. There is no doubt that Congress has an interest in legislating on the topic of the census *generally*, but that general interest cannot justify a demand for documents that is both (1) entirely backwards-looking and (2) exceptionally broad. As the D.C. Circuit recently made clear, "[e]ven a valid legislative purpose cannot justify a subpoena demanding irrelevant material." *Mazars*, 940 F.3d at 723. Rather, the requirement that a subpoena request only those documents that are relevant to a committee's legitimate investigation "is a jurisdictional concept of pertinency drawn from the nature of a congressional committee's source of authority." *Id.* at 739 (quoting *Watkins*, 354 U.S. at 206)). It is therefore not enough for the Committee to declare that it has an interest in the census generally and then issue a blunderbuss demand for documents about the census writ large. The Constitution does not permit such "indiscriminate dragnet" subpoenas. *Id.* at 740 (quoting *Barenblatt*, 360 U.S. at 134). Indeed, "if a committee could subpoena information irrelevant to its legislative purpose, then the Constitution would in practice impose no real limit on congressional investigations." *Id.* at 739-40.

Even if the Committee had a legitimate need for some documents about the citizenship question, it surely lacks an interest sufficient to justify the extraordinarily broad subpoenas it has issued here. *Cf. Cheney*, 542 U.S. at 385 ("A party's need for information is only one facet of the problem. An important factor weighing in the opposite direction is the burden imposed by the discovery orders."). The subpoenas at issue seek essentially every document in either the Department of Commerce or Justice from 2017 having to do with reinstatement of a citizenship question on the census, irrespective of any relevance to the decision-making process. As set out in the Greer and Foti declarations, the Departments of Justice and Commerce both began producing documents from the underlying census litigation, recognizing that there was substantial overlap between the materials sought by the Committee and by the plaintiffs in those cases. Yet if the subpoenas were read as

broadly possible, they could potentially require searches of thousands of additional custodians without reason to believe those individuals possess relevant information. *See* Foti Decl. ¶ 56.

Finally, the consequences of the Committee's sweeping position cannot be overstated. If this Court were to hold it has the power to enforce congressional subpoenas and that it has no power to narrow such subpoenas to the documents Congress actually needs to legislate, Congress—particularly a politically hostile Congress—would have no incentive to reasonably limit the subpoenas that it serves on the Executive Branch, nor to meaningfully engage in the accommodation process. *Cf. Judicial Watch*, 726 F.3d at 230 ("[W]e cannot be blind to the precedent we would set by holding that those records are covered by FOIA: such a holding would in all likelihood be followed by subsequent requests covering the next four years, and then each month thereafter."). The floodgates would be permanently removed from their hinges, with litigation in this Court becoming the new normal for informational disputes between the branches. If the Court is to assume jurisdiction over these disputes—and it should not—it cannot simply enforce the House's subpoenas without review.

IV. Executive Privilege, Accommodation Requirements, and the Separation of Powers Bar Enforcement of the Subpoenas.

Although the Committee's subpoenas are facially invalid, Defendants are also entitled to judgment as a matter of law for three additional reasons. First, the "priority" documents called for by the two subpoenas are protected from disclosure by the President's formal invocation of executive privilege over those specific materials. Second, the Committee cannot bring suit to enforce expansive demands for all agency communications having to do with the citizenship question without first engaging in the constitutionally mandated process of negotiation and accommodation, which it has not yet done as to the "non-priority" documents. Third, separation-of-powers principles that "protect[] the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties," *Cheney*, 542 U.S. at 382, require that the subpoenas' catch-

all demands be drastically narrowed before the President is put to the burden of making individual privilege determinations over so vast an array of documents.

A. The "Priority" Documents Are Protected from Disclosure by Executive Privilege.

1. The President May Assert Executive Privilege Over Internal Agency Deliberations, Attorney-Client Communications, and Work Product.

Executive privilege flows from the authorities vested in the President by Article II of the Constitution, and it has been asserted by numerous Presidents from the earliest days of the Nation, including in many instances where Executive Branch information was sought by Congress. *Espy*, 121 F.3d at 736, 738-39. *See also id.* at 739 n.9 (citing Archibald Cox, *Executive Privilege*, 122 U. Pa. L. Rev. 1383, 1395-1405 (1974)); *Sirica*, 487 F.2d at 733-37 (per curiam) (MacKinnon, J., concurring and dissenting in part). The Executive's duty to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, often requires that certain documents and information in the Executive Branch's control remain confidential, to ensure the effective functioning of the Executive in the performance of its many sensitive and important tasks on the Nation's behalf. Thus, the existence of executive privilege to protect the confidentiality of sensitive Executive Branch documents and communications is a necessary incident of "[t]he executive Power . . . vested in [the] President," *id.* art. II, § 1, cl. 1, and was expressly recognized in *United States v. Nixon* as "fundamental to the operation of Government and inextricably rooted in the separation of powers[.]" 418 U.S. at 708 & n.17. *See also Assoc. of Am. Physicians & Surgeons, Inc. v. Clinton,* 997 F.2d 898, 909 (D.C. Cir. 1993) (discussing the Executive's "Article II right to confidential communications"); *Soucie v. David*, 448 F.2d 1067, 1071 n.9 (D.C. Cir. 1971) ("The doctrine of executive privilege is to some degree inherent in the constitutional requirement of separation of powers.").

Executive privilege is not limited to presidential communications. It protects the confidentiality of a wide variety of sensitive government communications and information, including military and state secrets, the identities of government informants, and law-enforcement investigative

files. *Espy*, 121 F.3d at 735 n.2, 736-37; *Assoc. of Am. Physicians & Surgeons, Inc.*, 997 F.2d at 909 (affirming that the "Article II right to confidential communications" extends beyond the presidential communications privilege); *AT&T I*, 551 F.2d at 392 (referring to the presidential communications privilege as "another executive privilege").

Chief among these protected categories are the Executive Branch's deliberative communications. This category includes both "presidential communications"—those exchanged or created in the course of preparing and providing advice to the President, *see Espy*, 121 F.3d at 738-40, 752-53—and, "most frequent[ly]," deliberative communications that do not implicate presidential decisionmaking, but which would "reveal advisory opinions, recommendations and deliberations comprising part of a process by which [agency] decisions and policies are formulated," *id.* at 737 (internal quotation marks and citation omitted). The Supreme Court has recognized "the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties," the importance of which "is too plain to require further discussion." *Nixon*, 418 U.S. at 705. Both the presidential communications privilege and the deliberative process privilege "are executive privileges designed to protect" these interests. *Espy*, 121 F.3d at 745. *See also Landry v. FDIC*, 204 F.3d 1125, 1135–36 (D.C. Cir. 2000) (describing process for asserting "deliberative process" component of executive privilege); *Dow Jones & Co. v. Dep't of Justice*, 917 F.2d 571, 573–74 (D.C. Cir. 1990) (similar); *Black v. Sheraton Corp. of Am.*, 564 F.2d 531, 541 (D.C. Cir. 1977); *Comm. on Oversight & Gov't Reform v. Lynch*, 156 F. Supp. 3d 101, 109 (D.D.C. 2016) (referring to deliberative process privilege as one "prong of the executive privilege").[14]

[14] When necessary, Presidents have often asserted executive privilege to protect Executive Branch confidentiality interests in agency deliberations not involving Presidential communications. *See, e.g., Assertion of Exec. Privilege Over Documents Generated in Response to Cong. Investigation into Operation Fast and Furious*, 36 Op. O.L.C. ___, slip op. 1-2 (June 19, 2012) (internal Department of Justice deliberations); *Assertion of Exec. Privilege Over Commc'ns Re: EPA's Ozone Air Quality Standards [etc.]*, 32 Op. O.L.C. 1, 1-2 (2008) (internal EPA talking points and other deliberative documents); *Assertion of Exec. Privilege in Response to a Cong. Subpoena*, 5 Op. OLC 27, 28-30 (1981) (internal documents reflecting Department of the Interior deliberations). *See also Espy*, 121 F.3d at 739 n.9 (citing Robert Kramer & Herman

Executive privilege also protects attorney-client communications and attorney work product. In the common law, the purpose of the attorney-client privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States,* 449 U.S. 383, 389 (1981). The protection of attorney work product provides an "essential" guarantee that "a lawyer [may] work with a certain degree of privacy, free from unnecessary intrusion by opposing parties[,]" without which "the interests of the clients and the cause of justice would be poorly served." *Hickman v. Taylor,* 329 U.S. 495, 510-11 (1947).

These considerations apply with even greater force where senior executive branch officials are the clients. Matters concerning the scope of high-ranking officials' legal authorities and responsibilities are likely to be among those on which expert advice is most vital. That advice will only be "candid, objective, and even blunt or harsh," *see Nixon*, 418 U.S. at 708—as it must be in order to be effective—if officials know that their discussions, or attorney work product generated in preparation for potential litigation, will not be publicized. Thus, the confidentiality of attorney-client communications and attorney work product, like that of presidential communications and internal agency deliberations, may be asserted under the mantle of executive privilege "to protect executive branch decisionmaking," *Espy*, 121 F.3d at 745. *See also Holder*, 2014 WL 12662665, at *1.

Because the President's authority to assert executive privilege emanates from a constitutional source—the need to ensure the confidentiality that is essential to the effective discharge of the Executive's Article II responsibilities—the President can assert executive privilege in all its manifestations over documents subpoenaed by Congress, even those with counterparts in the common law. In the lone case directly addressing this point, Judge Amy Berman Jackson explicitly "reject[ed] the Committee's suggestion that the only privilege the executive can invoke in response to

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Marcuse, *Exec. Privilege—A Study of the Period 1953-1960, Pt. I*, 29 Geo. Wash L. Rev. 623, 682-87, 692-93 (1961) (describing President Eisenhower's refusal to allow any executive branch officers to reveal internal deliberations on official matters to Congress); *Sirica*, 487 F.2d at 734, 735-36.

a subpoena is the Presidential communications privilege." *Holder*, 2014 WL 12662665, at *1. In so ruling, Judge Berman Jackson explained that "*Espy* does not hold—and no case cited by the Committee holds—that the *only* privilege the executive can invoke is the privilege that shields Presidential communications, or that the only documents that can be withheld are those that implicate foreign policy or national security." *Id.* Rather, the "important constitutional dimension to . . . aspect[s] of the executive privilege" that are also recognized at common law means that these components of executive privilege can "be properly invoked in response to a legislative demand." *Lynch*, 156 F. Supp. 3d at 104.

2. The Committee's Position that the President Cannot Assert "Common Law" Privileges Over Documents Subpoenaed by Congress Misperceives the Nature of Executive Privilege, and Lacks Support.

The Committee argues that because its investigatory powers are constitutionally based, the President cannot resist its subpoenas by invoking any aspect of executive privilege with origins traceable to the common law. Pl.'s Mem. at 46-49. Accepting this argument would result in an unprecedented transfer of power from the Executive to Congress, conferring on every committee with subpoena power the ability to demand virtually any document generated by a federal agency. The Committee's arguments to the contrary have no merit.

First, the Committee cites five cases for the proposition that the attorney-client, attorney work product, and deliberative process privileges are "common law privileges." *See id.* at 47 (citing *Landry*, 204 F.3d 1125; *Jordan v. DOJ*, 591 F.2d 753 (D.C. Cir. 1978); *Espy*, 121 F.3d at 745; *Wolfe v. HHS*, 839 F.2d 768 (D.C. Cir. 1988); *In re Sealed Case*, 676 F.2d 793, 808 (D.C. Cir. 1982)). But that is both undisputed and irrelevant. None of these cases involved demands by Congress for Executive Branch information, and none stands for the proposition that the President cannot assert executive privilege over confidential agency deliberations, attorney-client communications, or attorney work product simply because the government records at issue might also come within the scope of other privileges

recognized at common law. Indeed, contrary to the Committee's own position, one of the cases it cites specifically acknowledges the deliberative process component of executive privilege as being rooted in constitutional doctrines. *See Jordan*, 591 F.2d at 777.

Second, the Committee argues that, *contra Holder*, the deliberative process privilege lacks a constitutional foundation because executive privilege is only "'constitutionally based' '*to the extent* [that the] interest relates to the effective discharge of a President's powers.'" Pl.s' Mem. at 47 n.11 (quoting *Nixon*, 418 U.S. at 711) (alterations in original). But, read in context, the cited language in *Nixon* merely affirms that the interest in preserving the confidentiality required for the effective functioning of the Presidency is constitutionally based, without questioning the "constitutional underpinnings" of the more general need "for protection of communications between high Government officials and those who advise and assist them." 418 U.S. at 705-06.

The Committee also suggests that the deliberative process privilege should not apply here because the Constitution provides that the census shall be conducted "in such Manner as [Congress] shall by Law direct." U.S. Const., art. I, § 2, cl. 3. *See* Pl.'s Mem. at 47 n. 11. But that unsupported assertion proves too much. Innumerable activities for which most Executive Branch agencies are responsible must be conducted in a manner that Congress has prescribed (or may choose to prescribe) via exercise of its enumerated powers. All that means is that Congress may legislate in these fields generally, not that the President is prohibited from asserting executive privilege when Congress seeks information concerning legislation in these areas. Accepting the Committee's argument would mean that legitimate interests in Executive Branch confidentiality could not be protected against encroachment by Congress in any of those areas, radically transforming operations of the Executive Branch and seriously eroding the separation of powers.

Third, the Committee cites statements by past members of Congress, and purported British parliamentary practice, as support for the view that privileges arising under the common law should not limit Congress's access to information. Pl.'s Mem. at 47-49. This, too, is beside the point.

Whatever limits there may be on the ability of non-governmental actors to resist congressional (or parliamentary) subpoenas on the basis of common law privileges, this is a case in which the President has specifically asserted executive privilege—not common law ones—and has done so in exercising his constitutional authority, to which the power of Congress, even when legitimately invoked, must sometimes yield. *See Loving v. United States*, 517 U.S. 748, 757 (1996). Moreover, while Congress's beliefs about its own authority may govern its own enforcement of a subpoena using Article I powers, the Committee can hardly come invoke this Court's jurisdiction and then dictate to the Court which privileges it must recognize or abrogate. If this case is properly in court, then it is "emphatically the province and duty of the judicial department"—not Congress—"to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). *See also Nixon*, 418 U.S. at 697.

Fourth, the Committee relies on *Hannah v. Larche*, 363 U.S. 420 (1960), for the unremarkable proposition that Congress can conduct investigations without using "the full panoply of judicial procedures." Pl.'s Mem. at 49 (quoting *Hannah*, 363 U.S. at 442). In fact, *Hannah* addressed the due-process protections to which private parties under investigation by a statutorily created fact-finding commission are entitled. 363 U.S. at 441-42. *Hannah* could not be further removed from the issues here, which concern the extent of Congress's subpoena power and the constitutional prerogatives of the Executive Branch. Even if Congress generally has great leeway to disregard common-law privileges and abjure norms of judicial procedure when exercising its investigatory powers, when Congress wields those powers against the Executive Branch, and enlists the aid of the Judiciary to do so, the court whose power it invokes must enforce the constitutional limits on Congress's authority.

* * *

In sum, the Committee's arguments do nothing to call into question the established authority of the President to invoke executive privilege to protect Executive Branch interests in the confidentiality of internal agency deliberations, attorney-client communications, and attorney work product, even in response to a congressional subpoena.

3. The "Priority" Documents are Protected by the Deliberative Process, Attorney-Client, and Attorney Work Product Components of Executive Privilege.

As demonstrated by the Davis and Second Foti Declarations, the President validly invoked executive privilege to protect disclosure of information protected by privilege's deliberative process, attorney-client, and attorney work product components. The Committee's challenges to the application of these components of the privilege are unavailing.

a. Internal Agency Deliberations

The deliberative process privilege is a qualified privilege that "allows the government to withhold documents and other materials that would reveal 'advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *Espy*, 121 F.3d at 737. The intent of the privilege is to improve the quality of government decisionmaking "by allowing government officials to debate alternative approaches in private," *id.*, just as judges need not fear the compelled disclosure of a law clerk's bench memorandum or draft judicial opinions, *see, e.g., San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Comm'n*, 789 F.2d 26, 45 (D.C. Cir. 1986) (en banc) ("[T]he analogy to the deliberative processes of a court is an apt one.").

For the privilege to apply, the information withheld must be both "predecisional and deliberative." *Mapother v. DOJ*, 3 F.3d 1533, 1537 (D.C. Cir. 1993). *See also Espy*, 121 F.3d at 737. "To be pre-decisional, the communication (not surprisingly) must have occurred before any final agency decision on the relevant matter." *Nat'l Sec. Archive v. CIA*, 752 F.3d 460, 463 (D.C. Cir. 2014). "The term 'deliberative' in this context means, in essence, that the communication is intended to facilitate or assist development of the agency's final position on the relevant issue." *Id.*

Here, the three categories of documents withheld in whole or in part under the deliberative process component of executive privilege—the drafts of the Gary Letter, the Uthmeier Memo and accompanying note, and the nine e-mail chains demanded under paragraph one of the Ross Subpoena —are all pre-decisional and deliberative. The Committee's arguments to the contrary are meritless.

i. The Withheld Materials are Pre-Decisional and Deliberative

The Gary Letter drafts meet the requirements for the deliberative process component of executive privilege. Although not privileged per se, draft documents "are, by definition, pre-decisional, and they are typically considered deliberative." *Bloche v. Dep't of Def.*, 370 F. Supp. 3d 40, 51 (D.D.C. 2019). This general rule holds true here. The Gary Letter drafts reflect the process by which Justice Department employees decided upon the final language. Davis Decl. ¶ 7. Moreover, there is no way to segregate any non-deliberative information because any "'factual portions of the drafts, as distinct from their 'deliberative' portions, would run the risk of revealing 'editorial judgments—for example, decisions to insert or delete material or to change a draft's focus or emphasis.' Such differences easily could be discerned by comparing the final letter with an earlier version." *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 161 F. Supp. 3d 120, 132 (D.D.C.), *modified*, 185 F. Supp. 3d 26 (D.D.C. 2016) (quoting *Dudman Commc'ns Corp. v. Dep't of Air Force*, 815 F.2d 1565, 1569 (D.C. Cir. 1987)).

The drafts of the Uthmeier Memo and accompanying note are also pre-decisional and deliberative. The two drafts of the Memo the Committee specifically requested in the Ross Subpoena —documents (a) and (f)—are, respectively: (i) a draft of the Uthmeier Memo shared with then-Acting Assistant Attorney General for Civil Rights John Gore in the fall of 2017, in the course of Commerce's consultation with the Department of Justice about whether reinstating a citizenship could be warranted because the data gathered would be useful for enforcement of the Voting Rights Act;[15] and (ii) a draft of the Memo provided to the Secretary of Commerce on August 11, 2017 (attached to an e-mail that has already been provided to the Committee in full). Second Declaration of Anthony Foti (filed herewith) ("2d Foti Decl.") ¶ 7 & Tab F.

[15] Document (a) also includes an explanatory cover note in which Mr. Uthmeier conveyed the Secretary's tentative views on whether inclusion of a citizenship question might be warranted as useful for purposes of enforcing the Voting Rights Act, and solicits the Department of Justice's views on that issue. It is pre-decisional and deliberative, and therefor properly the subject of a claim of executive privilege, *see Espy*, 121 F.3d at 750, for the reasons stated in the second Foti declaration, ¶ 16.

Both documents include headers, "Draft, Confidential, Pre-decisional, and Attorney-Client Privileged," and Mr. Uthmeier's cover e-mail to the Secretary indicated that he intended to revise the draft memorandum upon receiving further feedback. *See id.* ¶ 12. The draft Memos discuss the statutory authority and pertinent case law bearing on various possible legal grounds for reinstating a citizenship question, evaluates the legal strengths and weaknesses of these alternatives, and makes recommendations from a legal standpoint. *Id.* ¶¶ 9-10. The draft Memos are pre-decisional because they pre-date the final March 2018 decision to reinstate a citizenship question. *See Nat'l Sec. Archive*, 752 F.3d at 463. They are also deliberative because they are from a subordinate, Mr. Uthmeier, to the Secretary of Commerce to assist the Secretary in deciding the legal basis upon which to rely to reinstate the question. *See id.* In addition, these draft Memos doubly qualify for the deliberative process component of executive privilege because, not only is the Memo itself protected deliberative material, the drafts pre-date the final decision about the ultimate content of the Memo and reflect internal decision-making about that content. *See Bloche*, 370 F. Supp. 3d at 51.

Documents (b), (c), (i), (j), and (k) sought by the Ross Subpoena are e-mail chains produced to the Committee from which certain information has been redacted. *See* 2d Foti Decl. ¶ 18 & Tabs B, C, I, J, K. All of the information withheld from these five e-mail chains constitutes confidential internal deliberations among Commerce officials and employees and other Executive Branch personnel regarding undecided questions pertaining to the conduct and administration of the 2020 Census, including but not limited to questions pertaining to the inclusion of a citizenship question. *Id.* ¶ 18. Specifically, the redacted material reflects internal discussions among the Secretary of Commerce and his advisors—and in one case with White House staff—regarding how to address identified management and logistical issues concerning preparations for the 2020 Census; whether and from whom to seek additional input and advice regarding the inclusion of a citizenship question; whether Commerce was legally required to notify Congress of the Justice Department's request to reinstate a citizenship question; and which issues to address, and in what depth, in the Secretary's

March 2018 decision memorandum. *Id.* ¶¶ 19-22. This material is all both pre-decisional and deliberative. *Id.* ¶ 23. *See Nat'l Sec. Archive*, 752 F.3d at 463.

The final group of subpoenaed documents—listed as (d), (e), (g), and (h) in the Ross Subpoena—are four e-mail chains from which the redacted information does not pertain in any way to the 2020 Census. 2d Foti Decl. ¶ 24. The text redacted from documents (d) and (e) concerns an issue that had arisen regarding the process of selecting individuals to author a publication for the National Oceanic and Atmospheric Administration. *Id.* ¶ 25. The text redacted from documents (g) and (h) concerns the Secretary's tentative thoughts and questions as well as responses by the Commerce Deputy Chief of Staff, about (1) a request transmitted by the International Trade Administration for a particular action regarding a domestic U.S. company and a foreign nation and (2) a number of pending or contemplated administrative actions and general managerial issues unrelated to the 2020 Census. These documents are not only irrelevant to the Committee's investigation, but also qualify for the deliberative process component of executive privilege. *See Nat'l Sec. Archive*, 752 F.3d at 463.

ii. The Committee's Counter-Arguments Lack Merit.

The Committee nevertheless argues that these documents should not be considered privileged, for two reasons. Neither is well taken.

First, the Committee argues that none of the information withheld from the Commerce documents can be considered pre-decisional because Secretary Ross allegedly decided to add a citizenship question in early 2017. Pl.'s Mem. at 50. This argument fails for two reasons. Initially, an official's initial policy inclination to pursue a potential course of action does not constitute the kind of formal agency decision that concludes the deliberative process. Rather, "'[u]p to the point of announcement, agency decisions are freely changeable, as are the bases of those decisions,'" meaning that "decisions do not become final until they are released, accompanied by an explanation of the reasons for the result." *Checkosky v. SEC*, 23 F.3d 452, 489 (D.C. Cir. 1994). *See also Marrie v. SEC*, 374 F.3d 1196, 1202 (D.C. Cir. 2004); *Judicial Watch, Inc. v. DOJ*, 20 F. Supp. 3d. 260, 272-74 (D.D.C.

2014) (holding that documents dated the day before a policy's public announcement were pre-decisional). Even if Secretary Ross was interested in early 2017 in the issue of reinstating citizenship question to the 2020 Census, the possibility that he could change his mind about whether, how, or why to do so during the exploration of the issue means that that documents generated before the formal decision was announced are nonetheless pre-decisional.

Further, the Committee's argument relies on the false premise that the ultimate agency action to be taken is the only decision to be made in the course of the deliberative process to which the privilege applies. In fact, the privilege covers deliberations about the many interim decisions that agencies and their employees must make in reaching a final decision about proposed agency actions. For example, an agency deciding on a major regulatory action will almost certainly have internal discussions about how best to present its decision to the media and the public. Such deliberations qualify for the privilege. *See Am. Ctr. for Law & Justice v. DOJ*, 325 F. Supp. 3d 162, 171-72 (D.D.C. 2018) ("[T]he overwhelming consensus among judges in this District is that the [deliberative process] privilege protects agency deliberations about public statements . . . .").

The documents over which the President has asserted the deliberative process component of executive privilege would reveal decision-making processes about issues ancillary to the decision to reinstate a citizenship question, and some wholly unrelated to that decision at all. For instance, the e-mails produced to the Committee concerning the administration and conduct of the Census (*i.e.*, documents (b), (c), (i), (j), and (k) in the Ross Subpoena) disclosed the deliberations about reinstating the citizenship question and withheld only deliberations about other topics. 2d Foti Decl. ¶¶ 19-23. *See also id.* ¶¶ 25-26; Davis Decl. ¶¶ 7, 11. Thus, even if by early 2017 Commerce had reached a final decision about inclusion of a citizenship question, the withheld portions of the documents in question concern collateral, or entirely unrelated, issues about which no decision had been reached when these communications were exchanged.

Second, the Committee argues that the deliberative process privilege does not apply to the withheld information because the Executive Branch purportedly made false statements regarding its reasons for reinstating a citizenship question. Pl.'s Mem. at 50-51. Even assuming for the sake of argument that the Committee has accurately characterized judicial findings regarding the Executive Branch's conduct—characterizations that Defendants strongly contest—the Committee has nonetheless not shown a basis for vitiating the deliberative process aspect of executive privilege. The Committee argues that the deliberative process privilege is unavailable when "the plaintiff's cause of action is directed at the government's intent." Pl.'s Mem. at 51 (quoting *In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998), *aff'd on reh'g* 156 F.3d 1270 (D.C. Cir. 1988)). But *Office of Comptroller of Currency* concerned a routine assertion of deliberative process privilege by a federal agency in civil litigation and did not purport to hold that the President cannot assert executive privilege over deliberative documents simply because Congress seeks information concerning the government's intent. In any event, the Committee's argument is a *non sequitur*. To the extent the Committee has a cause of action to enforce subpoenas against the Executive Branch, the Executive Branch's intent is not an element of that subpoena-enforcement claim. Rather, the "elements" would be a validly issued subpoena and a showing that the documents are reasonably relevant to the fulfilment of the Committee's legitimate and authorized functions. The Committee need not show bad faith by the Executive Branch to meet these elements, so even if the legal rule the Committee advances were correct as to claims based on "intent," it would be irrelevant here.

b. Attorney-Client Communications

The attorney-client aspect of executive "privilege protects confidential communications made between clients and their attorneys when the communications are for the purpose of securing legal advice or services." *In re Lindsey (Grand Jury Testimony)*, 158 F.3d 1263, 1267 (D.C. Cir. 1998). Here, that aspect of the privilege applies to the Uthmeier Memo drafts and certain redactions in the e-mail correspondence concerning the matters related to the Census, but not the reinstatement of the

citizenship question. 2d Foti Decl. ¶¶ 10-14, 20, 22. The drafts of the Uthmeier Memo qualify as confidential attorney-client communications, as held by the court in *Dep't of Commerce*, 351 F. Supp. 3d at 553, and as such are protected by the attorney-client component of executive privilege. They were prepared by an attorney (Mr. Uthmeier) for his client (the Secretary of Commerce) to provide legal advice concerning possible legal justifications for the reinstatement of the citizenship question to the 2020 Census. *Id.* ¶¶ 10-14. So too, the text withheld from Ross Subpoena documents (i) and (k) under the attorney-client aspect of executive privilege constitutes impressions and advice about what issues to address and in what depth in the Uthmeier Memo and the Secretary's formal decision memorandum. *Id.* ¶¶ 20, 22. There can be no doubt that the information withheld is therefore privileged.

Nonetheless the Committee argues that attorney-client communications withheld by Defendants do not qualify for protection because (1) Defendants asserted the attorney-client aspect of executive privilege too broadly, (2) the information withheld is merely strategic, not legal, (3) the crime-fraud exception to the privilege applies, and (4) aspects of executive privilege arising under the common law are all qualified. Pl.'s Mem. at 51-52. These claims are unsupported and lack merit.

With regard to the Committee's claim that the Executive Branch has withheld more information than necessary to preserve the confidentiality of attorney-client communications, the Committee does not identify any information that the Executive Branch purportedly improperly withheld. *See generally id.* Instead, the Committee makes the bare assertion that the Executive Branch applied the attorney-client component of executive privilege too broadly because some documents were withheld in full. *Id.* at 51-52. To the contrary, the Second Foti Declaration explains the precise justifications for withholding information under this facet of executive privilege. *See* 2d Foti Decl. ¶¶ 10-14, 20, 22. Thus, the Committee's "vague claims do not rebut the presumption of good faith afforded the Government's affidavits, particularly when an affidavit . . . provides the reasonable level of detail seen here." *See Cornucopia Inst. v. Argric. Mktg. Serv.*, 312 F. Supp. 3d 85, 95 (D.D.C. 2018)).

The Committee's unsupported contention that the attorney-client communications withheld were merely strategic, and therefore not privileged, is similarly unavailing. The Committee again fails to cite to any particular document purportedly containing only "strategic" advice or to explain why the withheld information is only strategic in nature, not legal. *See* Pl.'s Mem. at 51. These vague and conclusory claims fail in light of the detailed justifications for the assertion of the privilege in the Second Foti declaration. *See Cornucopia Inst*, 312 F. Supp. 3d at 95.

The Committee's reliance on the crime-fraud exception is wholly without merit. *See* Pl.'s Mem. at 52-53. That exception to the confidentiality of attorney-client communications applies only if a client "made or received the otherwise privileged communication with the intent to further an unlawful or fraudulent act" and the client "carried out the crime or fraud."[16] *In re Sealed Case*, 107 F.3d 46, 49 (D.C. Cir. 1997). Although the Supreme Court held that the rationale given by the Secretary for reinstating the citizenship question did not adequately explain his decision as the Administrative Procedure Act required, the Court found that there was "no particular step in the process [that] stands out as inappropriate or defective," much less that a crime or criminal fraud occurred. *Dep't of Commerce*, 139 S. Ct. at 2574-75. Thus, the Committee's reliance on the crime-fraud exception fails.

c. Attorney Work Product

A document or other work product created by an attorney and "prepared or obtained because of the prospect of litigation" is subject to qualified protection under the attorney work product privilege. *United States v. Deloitte LLP*, 610 F.3d 129, 137 (D.C. Cir. 2010) (quoting *In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998)). Here, the drafts of the Uthmeier Memo sought by the Ross Subpoena are covered by the attorney work product aspect of executive privilege, because they were prepared in anticipation of litigation against the Department of Commerce if the Secretary opted to

[16] A related exception applicable only to government attorneys is when a government official engages in a federal crime. *See In re Lindsey*, 158 F.3d at 1266. This exception is inapplicable here because there is not even a suggestion that the information withheld under the attorney-client component of executive privilege relate to a criminal offense.

reinstate the citizenship question on the 2020 Census. 2d Foti Decl. ¶ 4. The Uthmeier Memo and the drafts of it thus fall squarely within the attorney work product component of executive privilege.

4. The Committee as Not Made a Demonstration of Sufficient Need for the Withheld Documents to Overcome the President's Assertion of Executive Pprivilege.

a. The Standard of Need

The protection that executive privilege extends to internal agency deliberations and presidential communications is qualified, *Nixon*, 418 U.S. at 705-07, and "can be overcome by a sufficient showing of need," *Espy*, 121 F.3d at 737. *See id.* at 745.[17] The next question the Court must address in this case, therefore, is "what type of showing of need the [Committee] must make . . . in order to overcome" the President's assertion of executive privilege over these confidential agency materials. *Id.* at 753.

To determine "what counts as a sufficient showing of need in [this] situation," separation-of-powers principles require the Court to "balance[ ] the public interests served by protecting [Executive Branch] confidentiality in [this] context with those furthered by requiring disclosure." *Id. See Nixon*, 418 U.S. at 711-12 ("weigh[ing] the importance of the general privilege of confidentiality of Presidential communications . . . against the inroads of such a privilege on the fair administration of criminal justice"); *Espy*, 121 F.3d at 755-57 (ascertaining the applicable standard of need by balancing the importance of the functions served by the grand jury against the threat of grand jury subpoenas to presidential authority). *See also Nixon v. Fitzgerald*, 457 U.S. 731, 754 (1982) (in a separation-of-

[17] Ordinarily, the protection against intrusion afforded by the attorney-client privilege is absolute, and where, as here, an attorney's work product records his thoughts and impressions about a matter in which litigation is anticipated, it is "virtually undiscoverable." *See Director, Office of Thrift Supervision v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1307 (D.C. Cir. 1997). The D.C. Circuit has indicated that the attorney-client privilege is not in all cases absolute in the governmental context, however, holding that the privilege does not "permit[ ] a government lawyer to withhold from a grand jury information relating to the commission of possible crimes by government officials." *In re Lindsey*, 148 F.3d 1100, 1107-1112 (D.C. Cir. 1998). Of course, the circumstances of this case bear no resemblance to *In re Lindsey*, and do not implicate the "unique function" of the grand jury within our system of criminal justice, *see Espy*, 121 F.3d at 755. Even assuming for the sake of argument, however, that a committee of Congress could surmount a presidential claim of executive privilege over confidential attorney-client communications or an attorney's "opinion" work product on the basis of a "sufficient showing of need," *id.* at 738, the Committee has made no such showing here.

powers conflict, a court "must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch").

The D.C. Circuit's decision in *Senate Select Committee* is the most relevant authority here. *See Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974) (en banc). That case addressed the showing of need required to enforce a congressional committee subpoena for tape recordings of presidential conversations over which the President had claimed executive privilege. *Id.* at 727. The Court concluded that "the presumption that the public interest favors [Executive] confidentiality [could] be defeated only by a strong showing of need by another institution of government—a showing that the responsibilities of that institution cannot responsibly be fulfilled without access" to the information demanded. *Id.* at 730. On this basis the D.C. Circuit refused to enforce the Committee's subpoena, because it had not shown that "the subpoenaed evidence [was] *demonstrably critical to the responsible fulfillment of the Committee's functions.*" *Id.* at 731 (emphasis added).

As "the case most directly on point in this respect," *Espy*, 121 F.3d at 755, *Senate Select Committee* informs the standard of need that a committee of Congress must meet in order to supersede a presidential assertion of executive privilege. It is true that in *Senate Select Committee*, the claim of executive privilege was made to protect confidentiality interests in presidential communications, whereas in this case the President's claim of privilege concerns the deliberations of other Executive Branch officials. That is a distinction, however, that makes little difference, if any, in this context. That is so for at least two reasons.

First, "the presidential communications privilege and the deliberative process privilege are closely affiliated," both being "executive privileges designed to protect executive branch decisionmaking." *Espy*, 121 F.3d at 745. While "congressional or judicial negation of the presidential communications privilege is subject to greater scrutiny than denial of the deliberative [process] privilege," *id.*; *see also id.* at 746, in the final analysis courts use the same factors—the importance of

the subpoenaed information, and its availability elsewhere—"in determining whether a sufficient showing of need has been demonstrated to overcome" both privileges, *id.* at 754-55.[18]

Second, this is not a run-of-the-mill situation in which the common-law deliberative process privilege has been asserted in civil litigation by a sub-Cabinet-level official such as an FDIC regional director, *see Landry*, 204 F.3d at 1135, or an "Acting Deputy Assistant Secretary of the Office of Health Policy," *see United States v. Aetna, Inc.*, 2016 WL 8738423, at *3 (D.D.C. Oct. 19, 2016). In this case, it is the President himself who decided that executive privilege must be asserted to protect what he determined to be overriding interests of Executive Branch confidentiality. "The President occupies a unique position in the constitutional scheme." *Fitzgerald*, 457 U.S. at 749. Unlike other executive officials, who are dependent on Congress for the very existence of their positions and powers, the Constitution itself "entrust[s] the President with supervisory and policy responsibilities of utmost discretion and sensitivity," *id.* at 750, placing him at "the ultimate level of decisionmaking in the executive branch," *Espy*, 121 F.3d at 751.

"[S]pecial considerations control" when the Executive Branch "at its highest level" asserts its interests in confidentiality and the "high respect that is owed to the office of the Chief Executive" calls for "judicial deference and restraint." *Cheney*, 542 U.S. at 385 (internal quotation marks and citations omitted). Just as no court would be required in a "case of this kind . . . to proceed against the president as an ordinary individual," *see Nixon*, 418 U.S. at 715 (quoting *United States v. Burr*, 25 F. Cas. 187, 192 (C.C. Va. 1807) (Marshal, J.)), "[n]either should a court be required to proceed against the President as against any other executive official," *Espy*, 121 F.3d at 751. On this very point, Chief Justice Marshall concluded in the *Burr* case that "on objection being made by the president to the production of a paper, [a] court would not proceed further in the case" without a demonstration of

[18] Courts also recognize that the Executive Branch is "better situated than either [the plaintiff] or th[e] [c]ourt to know what confidentiality is needed to 'prevent injury to the quality of agency decisions' while the decisionmaking process is in progress." *Chem. Mfrs. Ass'n v. Consumer Prod. Safety Comm'n*, 600 F. Supp. 114, 118 (D.D.C. 1984) (quoting *Sears, Roebuck & Co.*, 421 U.S. at 151.).

need by the party seeking disclosure sufficient to "clearly shew the paper to be essential to the justice of the case." 25 F. Cas. at 192 (quoted in *Sirica*, 487 F.2d at 787 n.126). Thus, even if a claim of deliberative process privilege by a subordinate executive official is ordinarily not as "difficult to surmount" as a claim of presidential communications privilege, *Espy*, 121 F.3d at 746, the controlling consideration here is that the claim was made by the President himself. *Cheney*, 542 U.S. at 385. The Committee is thus required to make a clear showing that obtaining the documents covered by the President's claim of privilege is "critical to the responsible fulfillment of the Committee's functions." *Senate Select Committee*, 498 F.2d at 731.

b. The Committee has Not Demonstrated a Particularized Need Under Any Standard for the "Priority" Documents.

The Committee's negligible interests in reviewing confidential Executive Branch communications and deliberations about ancillary matters related (and unrelated) to the 2020 Census do not satisfy even minimal requirements of need, much less the demanding showing that *Senate Select Committee* requires. Throughout the course of this interbranch dispute, the Committee has described its interest in the subpoenaed materials in two inconsistent ways, neither of which suffices to demonstrate a genuine, much less critical, need for privileged information to fulfill its legislative duties. At the outset the Committee indicated that its investigation was focused on the Secretary's "decision to add a citizenship question," and the reasons therefore, without reference to any contemplated or pending legislation. *See* Foti Decl. ¶¶ 5, 9, 17, 35 & Exhs. A, G, W. When Defendants repeatedly asked the Committee to identify a particularized need for the "priority" documents that it had singled out, it explained only in general terms that "[t]he requested documents and interviews may provide contemporaneous evidence of the real reason [sic] that [the Secretary] added the citizenship question [to the 2020 Census] and the process [he] followed." *See id.* ¶ 27 & Exh. N at 3.

On its face, the Committee's asserted interest in determining the so-called "real reason" for the Secretary's attempt to reinstate a citizenship question demonstrates little if any legislative need for

the privileged information at issue. *See Senate Select Comm.*, 498 F.2d at 732 ("[L]egislative judgments normally depend more on the predicted consequences of proposed legislative action . . . than on precise reconstruction of past events."). Moreover, following the Supreme Court's ruling in *Department of Commerce*, 139 S. Ct. at 2575-76, three district courts have entered permanent injunctions barring the addition of a citizenship question to the 2020 Census questionnaire. *See supra* at 6. Whatever hypothetical legislative need the Committee might have had in discovering the Secretary's "real reason" for restoring a citizenship question to the 2020 Census *before* these rulings, there can be none now, when the addition of a citizenship question would be legally prohibited by multiple court orders.

Further, the Committee has made no showing of any reason to expect that the information over which the President has invoked privilege would, in fact, reveal the Secretary's "real reason" for restoring a citizenship question. The Uthmeier memorandum concerns the strengths and weaknesses of various potential sources of legal authority for including a citizenship question on the decennial census questionnaire. 2d Foti Decl. ¶¶ 9-10. As set forth in Mr. Foti's declaration, the privileged information redacted from five of the Committee's nine "priority" e-mail chains concern logistical and financial issues, unrelated to the citizenship question; potential sources of information and advice regarding inclusion of a citizenship question; the applicability of congressional notification requirements; and issues to be addressed in the Secretary's March 2018 decision memorandum. *Id.* ¶¶ 19-23. The text redacted from four of the priority e-mail chains does not concern the census, or even the Census Bureau, at all. *See id.* ¶¶ 24-27. The drafts of the Gary Letter all contain (and only contain) the same Voting Rights Act rationale for including a citizenship question that was relied on in the Secretary's March 2018 decision memorandum, and differ only in how that rationale is presented. Davis Decl. ¶¶ 7, 11. Even if ascertaining the "real reason" for the Secretary's decision were critical to the fulfillment of a legitimate legislative objective, the Committee has made no showing that privileged information contained in the disputed priority documents is "directly related to [that] issue[ ]." *Espy*, 121 F.3d at 754.

Tellingly, the Committee makes no effort now to justify its demands for privileged Executive Branch communications on the basis of determining the Secretary's "real" reason for restoring a citizenship question. Instead it repeatedly intones that its investigation has "identified grave" but unspecified "concerns about improper partisan influences that threaten the soundness of the census process," and that it now requires access to privileged Executive Branch information "to conduct . . . oversight and decide on potential remedial legislation." Pl.'s Mem. at 5, 6. It vaguely describes proposals such as "judicially enforceable reporting obligations or emergency legislation and funding measures," *id.* at 39, that the Committee has said it "may consider . . . depending on what the documents reveal[,]" *id.* Exh. G at 14. According to the Committee, access to the privileged materials is "particularly important" for consideration of this "potential" legislation to assess whether "the Commerce Department . . . may be continuing to make inaccurate statements about the census process and using it to advance improper goals." Pl.'s Mem. at 38.

This articulation of the Committee's reasons for seeking access to these materials demonstrates no appreciable need for information over which the President has asserted executive privilege. The draft memoranda and letters at issue were prepared, and the e-mail communications exchanged, between May and December 2017 (and, in one instance, February 2018). The Committee does not even attempt to explain how documents and communications authored nearly two to three years ago can shed light on suspected but unspecified efforts that Defendants "may be continuing to make" today to promote allegedly "improper," unspecified "goals" in the administration of the census. Nor could it offer such an explanation if it tried. Apart from the matter of the citizenship question itself, none of the information withheld from the priority documents concerns the conduct or administration of the 2020 Census, 2d Foti Decl. ¶¶ 8, 16, 20, 22, 24; Davis Decl. ¶ 7, 11, with the exception of two e-mail communications in 2017 that discussed logistical issues and cost overruns, 2d Foti Decl. ¶ 19, and congressional notification requirements, *id.* ¶ 21.

Because the Committee has failed to make a cogent demonstration of a critical or even important need for the documents and information Defendants have withheld, the President's assertion of executive privilege over these materials must be sustained. *Senate Select Comm.,* 498 F.2d at 731.

B. The Committee Must Engage in the Constitutionally Mandated Process of Negotiation and Accommodation Before Seeking to Compel Production of the Non-Priority Documents.

With regard to the non-priority documents that the Committee has subpoenaed—essentially every document or communication within the possession of either the Department of Justice or Commerce that relates in any way to the reinstatement of the citizenship question—it is inappropriate for the Court to address the Committee's claims at this time. The Committee has not discharged its obligation under the Constitution to negotiate and seek accommodation with the Executive Branch over the Committee's demand for production of this vast array of documents.

The Committee seeks disclosure of "all documents responsive to the [Ross and Barr] Subpoenas in unredacted form." Pl.'s Mem. at 61. But the parties' negotiations prior to the Committee's sudden contempt proceeding were focused on witness interviews and the Committee's designated "priority" documents. The parties have reached an impasse only as to these specified documents, over which the President has made a formal invocation of executive privilege. Little if any discussion between the Committee and Defendants focused on the balance of the 30,000 pages of documents Defendants made available to the Committee, or on any additional documents to which the Committee desired access.

Before the Committee terminated negotiations between the parties by prematurely holding two cabinet secretaries in criminal contempt, both the Department of Commerce and the Department of Justice had made—and intended to continue making—substantial productions of responsive documents to the Committee. Greer Decl. ¶ 4; *see* Foti Decl. ¶ 46. But in a letter from Chairman Cummings to the Attorney General dated June 11, 2019, the Committee insisted that it would proceed with its contempt votes against DOJ and Commerce unless both agencies immediately produced,

respectively, unredacted copies of the priority documents. Greer Decl. Ex. U. And indeed, the Committee offered only to *postpone* the contempt vote in exchange for these documents, rather than make an offer that would resolve all disputes between the parties. *Id.* The Executive Branch was unwilling to waive its privileges over those documents in exchange for a mere postponement, and the Committee passed a resolution the next day to hold Secretary Ross and Attorney General Barr in contempt.[19] *Id.* ¶¶ 27, 31. Thus, because of that impasse over the *priority* documents, the Committee prematurely ended negotiations over the *remaining* documents.

In *AT&T I*, the D.C. Circuit initially declined to decide a suit brought by the Executive Branch on behalf of the United States to enjoin a private company from complying with a congressional subcommittee's subpoena for documents containing information the disclosure of which would endanger national security. 551 F.2d at 394-95. Rather, it remanded the case with instructions that the parties should attempt to negotiate a resolution that accommodated both sides' interests. *Id.* at 395. In so ruling, the D.C. Circuit observed that it was constitutionally inappropriate for a court to attempt to resolve such a dispute until the Executive Branch and Congress had reached a true impasse. *Id.* at 390-91, 394. In a later decision in the same case, the D.C. Circuit elaborated that the branches have "an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation." *AT&T II*, 567 F.2d at 127. This duty requires the Executive Branch and Congress to reach a genuine impasse over the disclosure of information before the Judicial Branch will resolve the dispute. *Id.* at 123.

Here, the breakdown in negotiations occurred only with regard to priority documents. The Executive Branch was willing at that time—and remains willing today—to engage in good faith

[19] Although there were further conversations between the parties to avoid a contempt vote by the full House, the Committee refused to consider any resolution short of the Executive Branch releasing all documents responsive to the subpoena, without regard to privilege. *See* Greer Decl. ¶ 38; Foti Decl. ¶ 46. Thus, the conversations were not negotiations constituting part of constitutionally required accommodation process.

negotiations over the withholdings in the remaining documents to try to accommodate the legitimate interests of both branches before seeking judicial intervention. The Committee, however, has never proposed a resolution to the overarching dispute short of complete capitulation by the Executive Branch, nor has it entertained such proposals by the Executive Branch. Instead, the Committee has come to this Court seeking "a permanent injunction ordering Defendants to produce immediately to the Committee copies of all documents responsive to the Subpoenas in unredacted form." Pl.'s Mem. at 61. Under *AT&T I*, until the parties have complied with their constitutional obligation to engage in good faith negotiations and nonetheless reached an impasse, they cannot properly seek intervention by the judiciary. The parties have not even arguably reached such an impasse except with regard to the priority documents. Therefore, judicial review is inappropriate as to the parties' disputes over the Executive Branch's withholdings in the remaining documents.

C. Separation-of-Powers Principles Prevent the Committee from Placing the Onus on the President to Make Thousands of Privilege Determinations as to Information in Which the Committee Has Demonstrated No Interest, Much Less a Critical Need.

In addition to the priority documents, the Committee asserts an unconditional right to complete unredacted production of all other documents demanded in its April 2, 2019, subpoenas, *see* Pl.'s Mem. at 61, including "[a]ll other communications from January 20, 2017, through December 12, 2017," involving "officials from the Commerce Department [or] the Census Bureau," "within DOJ," or with any other entities inside or outside of the Government, regarding the reinstatement of a citizenship question, *see* Compl., Prayer for Relief ¶ A(c)(iv)-(v); Ross Subpoena ¶ 2; Barr Subpoena ¶ 2. The body of documents responsive to these requests that have already been produced to the Committee exceeds 30,000 pages, and depending on how broadly the subpoenas must be read, could include tens of thousands more. *See supra* Background § I. The documents already produced include thousands of individual redactions made to preserve the confidentiality of internal agency deliberations, attorney-client communications, and attorney work product that may be protected by executive privilege. *See* Foti Decl. ¶ 54.

The Committee nevertheless maintains that it is entitled to the production of all of these documents, and more, in unredacted form, because in its view the President has "not actually made a valid assertion of executive privilege" over the information withheld in these documents. Pl.'s Mem. at 43. This argument should be rejected, because the Constitution's separation of powers does not permit the Committee to task the President with determining whether to make individualized assertions of executive privilege over thousands of pieces of information before the Committee has taken the basic, threshold step of showing the information's pertinence—much less its critical importance—to the achievement of legitimate legislative objectives. That is so for at least two reasons.[20]

First, the Committee's undifferentiated claim to unredacted copies of all the documents called for under the catchall paragraphs of its two subpoenas far exceeds the scope of its implied power of investigation under Article I. As discussed § IV.A.4, *supra*, "Congress may subpoena only that information which is 'reasonably relevant'" to its legitimate investigation." *Mazars*, 930 F.3d at 740 (quoting *McPhaul v. United States*, 364 U.S. 372, 381-82 (1960)). This is a "jurisdictional concept," *id.* at 739 (quoting *Watkins*, 354 U.S. at 206), the limits of which the Committee has already transgressed with its wall-to-wall demand for all communications having anything to do with a citizenship question without regard to their relevance to any of the legislative proposals the Committee asserts that it "may consider." Pl.'s Mem., Exh. G at 14.

[20] As a threshold matter, in addition to formally asserting executive privilege over the Committee's identified "priority" documents, the President made a valid "protective" assertion of executive privilege over the balance of the responsive documents pending sufficient "opportunity to consider whether to make a conclusive assertion" of privilege over information withheld from these documents. *See* Foti Decl. ¶¶ 39-41. This protective assertion of privilege was necessitated by the Committee's resort to a contempt vote without allowing sufficient time to make individual privilege determinations, *see id.* ¶ 40, and the corresponding need to protect the Secretary and the Attorney General against the threat of criminal liability under the contempt of Congress statutes, 2 U.S.C. §§ 192 and 194, *see id.* ¶ 45. The President's protective assertion of privilege was also consistent with the 1982 Reagan Memorandum, *see supra* at 11, and past practice, both of which contemplate that, if a committee of Congress will not agree hold demands for potentially privileged Executive Branch information in abeyance pending a Presidential decision on the question, then the President may make a "preliminary, protective assertion of executive privilege designed to ensure [his] ability to make a final assertion, if necessary, over some or all of the remaining materials." *See* Reagan Mem. at 2 (¶ 5); *Protective Assertion of Exec. Privilege re: White House Counsel's Office Documents*, 20 Op. OLC 1 (May 8, 1996) (opinion of Attorney Gen. Reno).

It follows *a fortiori* that if the Committee's demand for documents does not comport with the jurisdictional limits of pertinency that the Constitution places on its implied power of investigation, then it cannot insist on the production of potentially privileged information contained in those documents simply because the President was not afforded a sufficient opportunity to perfect a formal claim of privilege. *See supra* n. 21. Rather, consistent with the limits of Congress's investigatory power, the Committee must first demonstrate that the items of potentially privileged information to which it seeks access are reasonably relevant to a permissible legislative objective. *Mazars*, 940 F.3d at 740.

Second, in addition to the inherent constitutional limits on Congress's investigatory power under Article I, separation-of-powers principles prevent the Committee from burdening the President with the task of making thousands of individual determinations of executive privilege over documents, unlike the "priority" documents, in which the Committee has expressed no particularized interest at all. Even where one branch of the Federal Government acts within its authorized constitutional sphere, "the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties." *Loving*, 517 U.S. at 757. Courts must be "vigilan[t]" that exertions of power by one branch do not "undermine the authority and independence of one or another coordinate [b]ranch." *Mistretta*, 488 U.S. at 383-83. *See also Cheney,* 542 U.S. at 382; *Morrison v. Olson*, 487 U.S. 654, 685 (1988)).

These principles occupy center stage when congressional subpoenas, "by virtue of their overbreadth, . . . might interfere with the [Executive Branch] in the discharge of [its] duties and impinge upon the President's constitutional prerogatives." *See Cheney*, 542 U.S. at 372–73; *see also id.* at 385 ("[s]pecial considerations control" when the burdens imposed by a party's demand for information threaten Executive Branch interests in confidentiality). That is the case here, where a single committee out of dozens, in connection with just one of many investigations, *see, e.g.,* Greer Decl. ¶ 45, insists that the President and other senior Executive Branch officials divert their scarce time and energies from their important and sensitive duties to make literally thousands of

determinations of executive privilege concerning documents in which the Committee has expressed no particularized interest whatsoever. The President does not "bear the burden of invoking executive privilege with sufficient specificity and of making particularized objections" where, as here, "the party requesting the information . . . ha[s] [not] satisfied [its] burden of showing the propriety of the request[ ]." *Cheney*, 542 U.S. at 388, 390. Moreover, assertions of executive privilege force the Judiciary "into the difficult task of balancing the need for information . . . and the Executive's Article II prerogatives[,]" giving rise to "constitutional confrontation[s] between the two branches [that] should be avoided whenever possible." *Id.* at 389-90.

Accordingly, "when [courts] are asked to enforce against the Executive Branch unnecessarily broad subpoenas," the subpoenas must first be "narrow[ed]" in scope before "forcing the Executive to invoke privilege," so the Executive may "consider whether to invoke executive privilege with respect . . . to a possibly smaller number of documents[.]"' *Id.* at 390 (quoting *United States v. Poindexter*, 727 F. Supp. 1501, 1504 (D.D.C. 1989)). Unless and until the Committee drastically narrows its overbroad requests, and makes a clear showing of pertinence, and sufficient need, as to that which remains of them, *see Cheney*, 542 U.S. at 390, the Committee's demands to compel complete production of the unspecified documents swept up in the long reach of its subpoenas, or "to compel the President to make his decision on privilege with respect to [such a] large array[,]" *Poindexter*, 727 F. Supp. at 1503, must be denied.

CONCLUSION

The Court should (1) deny the Committee's motion for summary judgment, and (2) grant Defendants' motion to dismiss, or, in the alternative, enter summary judgment in Defendants' favor.

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