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)

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS, OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

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INTRODUCTION

The Committee on Oversight and Reform (the "Committee") asks this Court to enforce subpoenas seeking documents from Executive Branch agencies. The Committee's claimed authority to accomplish through litigation what it is unwilling to accomplish through the political process of negotiation and accommodation contravenes two hundred years of constitutional tradition and would upend the separation of powers by plunging courts into the middle of the day's most heated political battles—undermining all three branches, and particularly the apolitical judiciary. That is "obviously not the regime that has obtained under our Constitution to date." *Raines v. Byrd*, 521 U.S. 811, 828 (1997). The Court should not erect it now.

First, the Constitution does not permit the Committee to sue the Executive Branch in a dispute about its official powers. While federal courts are certainly capable of enforcing subpoenas, the mere issuance of a "subpoena" does not create a justiciable controversy where the plaintiff is not a "proper party" to bring suit. *Raines*, 521 U.S. at 818. "The province of the court is, solely, to decide on the rights of individuals," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803), which is why *Raines* described the "irreplaceable value of the [judicial] power" as protecting "the constitutional rights and liberties of individual citizens," *Raines*, 521 U.S. at 829 (internal quotation marks omitted). The Committee's complaints about non-compliance with its subpoenas concern an asserted "loss of political power," not the "loss of any private right." *Id.* at 821. The Committee must therefore "turn to politics instead of the courts." *Campbell v. Clinton*, 203 F.3d 19, 24 (D.C. Cir. 2000).

Second, the Court lacks statutory jurisdiction. Congressional suits to enforce subpoenas were unheard of throughout most of American history. When Congress first enacted a statute conferring jurisdiction for certain subpoena-enforcement actions brought by the Senate and its committees in 1978, it did not enact a comparable provision for the House. And, at the urging of the Executive Branch, which "argued vigorously that bringing such suits would be unconstitutional," 123 Cong. Rec. 2970 (Feb. 1, 1977) (statement of Sen. Abourezk), it specifically excluded suits against the Executive

Branch. The Committee offers a lengthy explanation of how this careful limitation is consistent with its all-encompassing reading of the neighboring federal question statute, but the Committee offers no legislative history to support its convoluted account—and it offers no explanation for the legislative history showing that Congress repeatedly, intentionally determined that disputes like this should be kept "out of the courtroom." 142 Cong. Rec. 19,412 (July 25, 1996) (statement of Sen. Specter).

Third, the Committee lacks a cause of action. Congress knows how to create a cause of action for informational disputes—the Senate has one—but it has not created one that applies here. The Committee may not circumvent that legislative choice by conjuring an implied judicial remedy directly under Article I, nor can the Committee rely on the "traditional" powers of the courts of equity because there is no tradition whatsoever of federal courts enforcing congressional subpoenas against the Executive. Nor can the Committee rely on the Declaratory Judgment Act as a stop-gap cause of action. For that reason too, there is no basis for the Court to entertain the Committee's suit.

Fourth, even if the Court reached the merits, the subpoenas at issue are unconstitutionally overbroad, casting an "indiscriminate dragnet" for confidential Executive Branch documents. While Congress can certainly legislate about the census, the documents it demands either have nothing to do with the census or pertain to an abandoned and enjoined effort to reinstate a citizenship question on the census; they are not reasonably relevant to any legislation that Congress might pass today. No separate "oversight" power allows Congress to subpoena Executive Branch information unrelated to its legislative functions.

Fifth, Congress's entitlement to subpoena information from the Executive Branch is limited by the President's Article II authority to invoke executive privilege in order to protect the confidentiality of internal agency decisionmaking that is essential to the effective functioning of the Executive Branch. The President properly invoked executive privilege—not common-law privileges—over information contained in the priority documents at issue in this case. The Committee cannot abrogate that considered, specific invocation.

Sixth, the Committee has not established a sufficient need for the information over which the President asserted executive privilege to overcome that assertion. Many of the so-called "priority documents" contain no withheld information concerning the citizenship question, and the Committee's labored attempts to explain its need for the remaining documents only confirm that there is none.

Seventh, the parties have not reached an impasse with regard to the tens of thousands of pages of non-priority documents facially responsive to the subpoenas' catch-all requests. Further accommodation is feasible on both sides, and indeed the parties have continued to engage in limited discussions following the filing of this lawsuit. In addition, the Committee may not constitutionally require the Executive to make thousands of individual determinations of executive privilege among these indiscriminately demanded documents without narrowing its requests. Thus, even if the Court does not dismiss the case for lack of jurisdiction, it should decline to rule on the Committee's entitlement to documents in the catch-all categories at this time.

ARGUMENT

I. The Court Lacks Jurisdiction Over This Interbranch Dispute.[1]

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

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

This dispute is not of the kind "traditionally thought to be capable of resolution through the judicial process." *Raines*, 521 U.S. at 818-19 (internal quotation marks omitted); *see* Mem. in Supp. of Defs.' Mot. to Dismiss or for Summ. J. & in Opp. to Pl.'s Mot. for Summ. J., ECF Nos. 18, 19 ("Defs.' Mem.-Opp.") at 14-17. Congress and the Executive have clashed over access to information since

[1] 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.). They are also substantially similar to arguments pressed before Judge McFadden in *Committee on Ways & Means v. U.S. Department of the Treasury*, No. 19-1974 (TNM) (D.D.C.), in which a motion to dismiss is pending. On January 14, 2020, Judge McFadden stayed *Ways & Means* pending the D.C. Circuit's decision in *McGahn*. *See Ways & Means*, Minute Order dated January 14, 2020.

the founding, but for nearly two centuries Congress did not attempt to resolve those impasses through litigation. The Committee's effort to enlist the courts as umpires of these disputes should fail.

First, the Committee argues that *Raines* is irrelevant because the plaintiffs there were individual legislators. *See* Pl.'s Reply in Supp. of Its Mot. for Summ. J. & Opp. to Defs.' Cross-Mot., ECF Nos. 23, 24 ("Pl.'s Opp.-Reply") at 5-6, 10-12. But, while the *facts* of *Raines* involved individual legislators, multiple pages of *reasoning* in the Court's short opinion focused on the historical absence of litigation between "*one or both Houses of Congress* and the Executive Branch." 521 U.S. at 826 (emphasis added), 827-29; *see also* Defs.' Mem.-Opp. at 15. The D.C. Circuit has repeatedly explained that "carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative." *Sierra Club v. EPA*, 322 F.3d 718, 724 (D.C. Cir. 2003). And, although the Supreme Court has in very narrow circumstances allowed sub-components of a *state* government to sue, *see* Pl.'s Opp.-Reply. at 11, it specifically explained in doing so that those holdings do not extend to the federal government given the separation-of-powers concerns presented. *See Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2665 n.12 (2015). This Court is not free to limit *Raines* to its facts in disregard of its broader reasoning.

Second, the Committee contends that jurisdiction is proper because "[c]ourts routinely resolve questions involving the separation of powers." Pl.'s Opp.-Reply at 12. It is obviously true that the "the federal courts have adjudicated disputes that impact the divergent interests of the other branches of government for centuries," *id.* (quoting *Comm. on the Judiciary v. McGahn*, No. 19-cv-2379, --- F. Supp. 3d ----, 2019 WL 6312011, at *24 (D.D.C. Nov. 25, 2019), *appeal pending*, No. 19-5331 (D.C. Cir.)), and that "courts have adjudicated the Executive Branch's legal obligations to respond to subpoenas," *id.* Yet the courts resolve such disputes only in the context of cases that *also* involve the "the constitutional rights and liberties of individual citizens," *Raines*, 521 U.S. at 829. To address the Committee's examples, in *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196-97 (2012), jurisdiction existed only because the State Department was "sued by an American who invoked the statute." *Id.* at 191. *United*

States v. Burr involved a subpoena issued in the trial of a "person charged with a crime in the courts of the United States," who "has a right, before as well as after indictment, to the process of the court to compel the attendance of his witnesses," 25 F. Cas. 30, 33 (C.C.D. Va. 1807), as did *United States v. Nixon*, 418 U.S. 683 (1974). And *In re Sealed Case ("Espy")*, 121 F.3d 729 (D.C. Cir. 1997), was a challenge to a grand jury subpoena. There is a reason why the Committee has not cited historical cases enforcing congressional subpoenas against the Executive Branch: they do not exist. "[I]n 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." *Raines*, 521 U.S. at 826.

It is thus beside the point that the substantive "issues presented here are . . . within the competence of an Article III court to decide." Pl.'s Opp.-Reply at 12. For as long as the federal courts have existed, they have refused to decide cases that they are otherwise equipped to decide when the plaintiff is not a "proper party to bring th[e] suit." *Raines*, 521 U.S. at 818. As Defendants have noted, *see* Defs.' Mem.-Opp. at 29 n.11, the Supreme Court was obviously capable in *Raines* of deciding the constitutionality of the Line Item Veto Act—it did so the next term in *Clinton v. City of New York*, 524 U.S. 417 (1998). But it refused to resolve that issue in *Raines* because it is not the judiciary's role to provide an "amorphous general supervision of the operations of government." 521 U.S. at 829.

Third, the Committee asserts that congressional investigations of the Executive Branch have a long historical pedigree. *See, e.g.*, Pl.'s Opp.-Reply at 13, 15. But that long history only undermines the Committee. When the House historically enforced its demands for information, it did so *without enlisting the Judicial Branch.* As the Supreme Court has noted, it has long "been customary for [Congress] to rely on its own power to compel attendance of witnesses and production of evidence in investigations made by it or through its committees," but that "differs widely from authority to invoke judicial power for that purpose." *Reed v. Cty. Comm'rs of Del. Cty., Pa.*, 277 U.S. 376, 388-89 (1928). Thus, for nearly two hundred years after the founding, it appears to have been universally understood that neither Congress nor its components could sue the Executive Branch directly. *See Raines*, 521

U.S. at 826-29. The fact that the House engaged in negotiation with the Executive Branch over its subpoenas until 2008—eschewing the "highly attractive" path of filing a civil suit—strongly suggests that "the power was thought not to exist." *Printz v. United States*, 521 U.S. 898, 905 (1997).

Finally, the Committee offers the policy argument that a civil action is more desirable than the supposed alternative of arresting Executive Branch officials pursuant to the Committee's inherent contempt power. *See* Pl.'s Opp.-Reply at 15. To be sure, it would raise grave constitutional concerns for the House to use inherent contempt against an Executive Branch official, or for the House to try to compel the Executive Branch to criminally prosecute an Executive Branch officer. But Congress has plenty of potent tools, including the constitutionally mandated accommodation process, and the threat of legislative reprisals backing that process. And its ability to use those political tools against the Executive Branch makes clear why the extreme measure of inherent contempt would not be available here—that tool is available only against private parties against whom Congress lacks other means of imposing its will. *See also* Reply Brief for Defendant-Appellant, *Comm. on the Judiciary v. McGahn*, No. 19-5331, at 9-10 (D.C. Cir. Dec. 19, 2019) (discussing the only two attempts by Congress to use inherent contempt against Executive officials, both of which failed).[2] That is precisely why the Court should not wade into this inherently political struggle: doing so would cut short these constitutionally-mandated processes to deal with conflicts between the branches and largely disincentivize future accommodations between these branches. The fact that the Committee finds its political tools impracticable, or lacks the political will to fully deploy them, cannot justify creating a

[2] Indeed, the only time the House has considered whether it could use inherent contempt to compel an Executive Branch official to produce documents over the President's objection, it concluded it could *not*. As the House Committee assigned to review the matter explained, "[t]he Executive is as independent of either House of Congress as either House of Congress is independent of him, and they can not call for the records of his action or the action of his officers against his consent, any more than he can call for any of the journals or records of the House or Senate." 3 Hinds, *Precedents of the House of Representatives* § 1700.

new civil-enforcement-through-litigation power with no constitutional basis. After all, "the Framers ranked other values higher than efficiency." *INS v. Chadha*, 462 U.S. 919, 959 (1983)."[3]

2. The Committee Fails to State a Cognizable Injury.

The Committee also fails to identify an injury that is sufficiently "concrete and particularized" to satisfy Article III. *Raines*, 521 U.S. at 819. According to the Committee, "Defendants are withholding information that is vital to the Committee's exercise of its Article I" functions, and "[t]hat is an Article III injury that this Court can redress." Pl.'s Opp.-Reply at 6; *see also id.* at 7 (failure to receive documents "impedes the Committee's investigation and obstructs its exercise of its constitutional powers" and suit "seeks to preserve Congress's power of inquiry"). In other words, the Committee is asserting an abstract injury to its institutional interest in legislating wisely. But *Raines* established that "abstract dilution of institutional legislative power" at the hands of the Executive Branch is insufficiently "concrete and particularized" to sustain standing. 521 U.S. at 819, 821, 825-26. It follows *a fortiori* that lack of access to information that might inform a particular vote is also not a sufficiently concrete and particularized injury. *See Waxman v. Thompson*, No. 04-3467, 2006 WL 8432224, at *7 (C.D. Cal. July 24, 2006) (no standing where "plaintiffs do not claim that defendant's

[3] Plaintiffs observe that, in the Senate impeachment proceeding, the President's counsel have faulted the House for alleging that the President has obstructed Congress without exhausting the possibility of civil litigation to enforce its subpoenas. *See* Pl.'s Opp.-Reply at 6 n.3. Yet the President's argument is not that Congress "should take such disputes to court," *id.*; it is that the House cannot have it both ways. As the President's trial memorandum explained, "[t]he Trump Administration, like the Obama Administration, has taken the position that a suit by a congressional committee attempting to enforce a subpoena against an Executive Branch official is not a justiciable controversy in an Article III court." Trial Mem. of President Donald J. Trump at 49 n.336 (Jan. 20, 2020), https://www.whitehouse.gov/wp-content/uploads/2020/01/Trial-Memorandum-of-President-Donald-J.-Trump.pdf. The President thus reiterated Defendants' position that the political branches must use an "accommodation process in an effort to resolve the disagreement" between themselves. *Id.* at 48. But recognizing that the House "has taken the opposite view," the President responded: "the House cannot simultaneously (i) insist that the courts may decide whether any particular refusal to comply with a congressional committee's demand for information was legally proper and (ii) claim that the House can treat resistance to any demand for information from Congress as a 'high crime and misdemeanor' justifying impeachment without securing any judicial determination that the Executive Branch's action was improper." *Id.* at 49 n.336 (emphasis omitted).

failure to produce the requested documents nullified their votes, and assert only that they have been required to vote and legislate without full access to information").

3. Lawsuits of This Kind Imperil the Separation of Powers.

Lawsuits of this kind threaten the Constitution's allocation of powers in at least three ways:

a. Lawsuits between the branches threaten the independence of the judiciary. *See* Defs.' Mem.-Opp. at 19-21. It is not the role of federal courts to provide "amorphous general supervision of the operations of government." *Raines*, 521 U.S. 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.* Judicial resolution of interbranch disputes would "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." *Id.* at 833 (Souter, J. concurring).

The threat to the judiciary is especially stark in a case like this one, in which a congressional committee seeks to overcome an assertion of executive privilege. If courts assumed jurisdiction over cases like this, over time, courts would develop a body of law specifying the precise bounds of executive privilege. But executive privilege can be overcome by a countervailing showing of need, and it will be exceedingly difficult, if not impossible, for courts to determine in each particular case which political branch has a greater "need" than the other for information, particularly given that these disputes will invariably arise "at the height of [] political tension." *Id.* at 833 (Souter, J. concurring). Thus, in every case like this one—cases that will exponentially proliferate if the Committee prevails on the threshold issues here—courts will need to go line by line and somehow assess which branch's interests are paramount in every case. That assessment of political need is a political function, not a judicial one. It would be exceedingly difficult and perilous for the courts to undertake it.

The Committee responds that its political tools "are neither feasible nor effective at obtaining the information the Committee seeks." Pl.'s Opp.-Reply at 14; *see also id.* at 15. Yet the Committee's dissatisfaction with the tools that the Constitution gives it does not empower this Court to invent new ones—the "fact that a political remedy is hard to achieve does not automatically swing open the doors to the federal courts." *Cummings v. Murphy*, 321 F. Supp. 3d 92, 117 (D.D.C. 2018). Were there sufficient political will in the House—let alone Congress as a whole—the House could exercise its full panoply of political tools. *See Nixon v. Sirica*, 487 F.2d 700, 778 (D.C. Cir. 1973) (per curiam) (Wilkey, J., dissenting). The Committee's real problem is not that the House's Article I tools are ineffective, but that the House does not want these documents enough to use them. From the House's perspective, sending its counsel into court is politically costless and all upside; using legislative tools, by contrast, requires a meaningful (and politically accountable) investment of effort by the Representatives themselves. It hardly threatens the separation of powers to reject an unprecedented litigation shortcut around the careful checks and balances the Constitution provides.

b. It would also 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 v. Valeo*, 424 U.S. 1, 140 (1976); *see* Defs.' Mem.-Opp. at 21. The Committee responds that, under *Buckley*, a commission with members appointed by legislators could exercise power "of an investigative and informative nature." Pl.'s Opp.-Reply at 16 (quoting *Buckley*, 424 U.S. at 137-38). Yet in that passage, the Supreme Court was referring to "powers . . . falling in the same general category as those powers which Congress might delegate to one of its own committees," *id.* at 137, which is why it cited traditional cases about *issuing* subpoenas like *Kilbourn v. Thompson*, 103 U.S. 168 (1881) and *McGrain v. Daugherty*, 273 U.S. 135 (1927). Those traditional powers do not extend to filing suits for *judicial enforcement* of subpoenas, *Reed*, 277 U.S. at 389, and the holding of *Buckley* is that "a different result" was required for "more substantial powers" of that type, 424 U.S. at 138 ("The Commission's

enforcement power, exemplified by its discretionary power to seek judicial relief, is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress.").

The Committee further responds that Defendants' arguments would "tilt the balance in favor of the Executive" by "foreclose[ing] access to the Courts." Pl.'s Opp.-Reply at 13 (quoting *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 95 (D.D.C. 2008)). But as the Committee recognizes one page later, the Constitution "does not guarantee each branch identical tools." *Id.* at 14. Congress may no more exercise the core executive function of filing lawsuits than the Executive Branch may exercise the core legislative function of passing laws. Far from a bug, it is *the* central feature of our constitutional structure that each branch depends on the others to exercise the sovereign's power. *See Loving v. United States*, 517 U.S. 748, 756-58 (1996). And while the Committee complains that denying it access to the courts would "severely undermine Congress's ability to carry out its constitutional functions," Pl.'s Opp.-Reply at 14, the Republic stood for nearly two centuries before it first occurred to a congressional committee that it might sue the Executive Branch to enforce a subpoena.

c. Permitting the House to file lawsuits against the Executive Branch would especially disrupt the balance of powers given the Committee's categorical claim that it is immune from the sort of suit it has brought here. *See* Defs.' Mem.-Opp. at 22. The Committee explicitly embraces that interpretation, citing the Speech and Debate Clause to proclaim that "there is every indication that the Framers intended this result." Pl.'s Opp.-Reply at 14 (internal quotation marks and emphasis omitted). Thus, the Committee demands that this Court simultaneously empower it to bring its political disputes with the Executive Branch into court, but bar the Executive Branch from responding in kind. Such a lopsided interpretation would unquestionably disrupt the separation of powers.[4]

[4] The Committee contends that "the Executive Branch *has* 'invoked the aid of the federal judiciary' to 'challenge[] the validity of a congressional subpoena,' albeit not by suing Congress." Pl.'s Opp.-Reply at 14 (quoting *Miers*, 558 F. Supp. 2d at 96). But that is precisely the point. With the sole exception of *United States v. House of Representatives*, 556 F. Supp. 150 (D.D.C. 1983), in which the House asserted a defense under the Speech and Debate Clause, and which was later dismissed for lack of

4. Defendants' Argument Is Consistent with D.C. Circuit Precedent.

Finally, notwithstanding all the reasons why lawsuits of this kind are not justiciable, the Committee contends that the "D.C. Circuit has recognized that the House of Representatives may sue to enforce a subpoena." Pl.'s Opp.-Reply at 5; *see also id.* at 8-10, 13. The D.C. Circuit has done no such thing. *United States v. AT&T*, 551 F.2d 384 (D.C. Cir. 1976) ("*AT&T I*"), was not—contrary to the Committee's portrayal—a suit by a congressional committee against the Executive Branch. It was a lawsuit that the Justice Department filed on behalf of the United States against a telephone company to enforce a government privilege against that company, while *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974) (en banc), did not address jurisdiction at all. Neither provides support for this sort of extraordinary Committee-on-Executive litigation.

AT&T I is also distinguishable because the D.C. Circuit permitted the House to appeal after the district court had issued an order quashing the subpoena, *contra* Pl.'s Opp.-Reply at 9-10, which is a material factual difference since the order quashing the subpoena could give rise to a plausible argument at that time that the subpoena had been nullified within the meaning of *Coleman v. Miller*, 307 U.S. 433 (1939). Putting aside the fact that *Coleman* cannot be extended to federal legislators following *Raines*, the Committee cannot now invoke *Coleman* merely by alleging that the Executive Branch has failed to comply with its subpoenas, for the Supreme Court "did not suggest in *Raines* that the President 'nullifies' a congressional vote and thus legislators have standing whenever the

jurisdiction, the cases cited by the *Miers* court did not involve suits against Congress. *See Miers*, 558 F. Supp. 2d at 96. The Committee also points to *Trump v. Mazars USA, LLP*, 940 F.3d 710 (D.C. Cir. 2019), cert. granted, 2019 WL 6797734 (U.S. Dec. 13, 2019) (No. 19-715), to contend that the "President himself has initiated suits in his personal capacity to enjoin compliance with Congressional subpoenas," Pl.'s Opp.-Reply at 14, but that case involves the legal obligations of a *private* company to disclose the President's *private* information pursuant to a congressional subpoena, which is why the President's *private* counsel represent him there. That case is thus the sort of adjudication of individual rights that is essential to Article III and absent here.

government does something Congress voted against, still less that congressmen would have standing anytime a President allegedly acts in excess of statutory authority." *Campbell*, 203 F.3d at 22.[5]

Finally, it bears emphasis that after the district court in *Miers* assumed jurisdiction over a dispute like this one, the D.C. Circuit stayed the order in a published opinion highlighting the dispute's "great significance for the balance of power between the Legislative and Executive Branches." *Comm. on the Judiciary v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008). While the D.C. Circuit cited *AT&T I* for propositions other than the district court's jurisdiction, *see* Pl.'s Opp.-Reply at 9, it did *not* cite *AT&T I* for the proposition that the district court had jurisdiction over the dispute. That published opinion staying *Miers* pending appeal is a clear recognition by the D.C. Circuit that *AT&T* does not control on the constitutional question here.

B. The Court Lacks Statutory Subject Matter Jurisdiction.

Regardless, this Court need not decide whether it has Article III jurisdiction, because Congress itself has deprived this Court of statutory subject matter jurisdiction.

The D.C. Circuit has been clear: "[p]rior to 1978 Congress had only two means of enforcing . . . 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). In 1978, Congress enacted 28 U.S.C. § 1365, which purports to "confer[] jurisdiction on the courts to enforce Congressional subpoenas," H.R. Rep. No. 95-1756, at 80 (1978), but *only* for actions brought by the Senate and its committees, and *never* when the suit is brought against an Executive Branch employee asserting an Executive Branch privilege. *See* Defs.' Mem.-Opp. at 22-26.

[5] The D.C. Circuit further observed in *AT&T I* that "the mere fact that there is a conflict between the legislative and executive branches over a congressional subpoena does not preclude judicial resolution of the conflict." *AT&T I*, 551 F.2d at 390; *see* Pl.'s Opp.-Reply at 9. The D.C. Circuit made that observation in discussing the Executive Branch's arguments under the political question doctrine, which Defendants have not invoked here.

The legislative history is crystal clear about why the statute contains these limitations. As to the carve-out for suits against the Executive Branch, the Executive Branch had "argued vigorously that bringing such suits would be unconstitutional," 123 Cong. Rec. 2970 (Feb. 1, 1977) (statement of Sen. Abourezk); *see also, e.g.*, *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). As to the carve-out for the House, "[t]he appropriate committees in the House . . . ha[d] not considered the Senate's proposal to confer jurisdiction on the courts to enforce subp[o]enas of House and Senate committees." H.R. Rep. No. 95-1756, at 80 (1978), and so the bill was amended in conference to exclude the House. And when Section 1365 was amended in 1996, the amendment's sponsors both explained that "[t]he 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) (similar). The Committee says not a word about this legislative history. That silence speaks volumes.

The Committee's principal argument is instead that *AT&T I* establishes statutory jurisdiction as a matter of circuit law. Pl.'s Opp.-Reply at 16-17. It again does no such thing. Although *AT&T I* concerned the legal duty of a House subpoena recipient, the case was brought by the United States against a telephone company, *see* 551 F.2d at 385, not by Congress against the Executive Branch. No specific jurisdictional statute limited the particular circumstances in which the United States could bring such a suit. But the congressional subpoena-enforcement suit at issue here is governed by the specific jurisdictional limitations that Congress itself enacted in Section 1365.

In any case, even if *AT&T I* did contain a relevant holding on Section 1331, *AT&T I* construed a statutory scheme that no longer exists. Congress enacted Section 1365 two years after the *AT&T I* decision and then amended it in 1996 to clarify the carve-out and ensure disputes like this one remained "out of the courtroom." 142 Cong. Rec. 19,412 (1996). Thus, even if the D.C. Circuit's holding about the ability of the United States to invoke Section 1331 to sue a private party had any

relevance here, 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) (internal quotations marks omitted).[6]

The Committee further errs in contending that it is entitled to invoke a general statute like Section 1331, rather than a more specific and detailed one like Section 1365, so long as there is no "irreconcilable conflict[]" between the two. *See* Pl.'s Opp.-Reply at 21. In actuality, while "[t]he general/specific canon is perhaps most frequently applied to statutes in which a general permission or prohibition is contradicted by a specific prohibition or permission," "the canon has full application as well to statutes . . . in which a general authorization and a more limited, specific authorization exist side-by-side." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). "There the canon avoids not contradiction but the superfluity of a specific provision that is swallowed by the general one, 'violat[ing] the cardinal rule that, if possible, effect shall be given to every clause and part of a statute.'" *Id.* (alteration in original and citation omitted). The Committee ignores *RadLAX* in its brief, but that case makes clear that Section 1331 is not available here.[7]

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[6] Plaintiffs observe that "[j]udges of this Court have uniformly relied on *AT&T I* to find subject-matter jurisdiction under Section 1331." Pl.'s Opp.-Reply at 17. Yet the issue was not briefed in *Miers*, where the Executive Branch did not dispute jurisdiction under Section 1331. As for *Committee on Oversight & Government Reform v. Holder*, 979 F. Supp. 2d 1 (D.D.C. 2013) and *McGahn*, 2019 WL 6312011, those courts erred for the reasons stated in Defendants' opening brief, *see* Defs.' Mem.-Opp. at 29-31, and it further bears emphasis that those courts did not address the 1996 amendments to Section 1365 and were not presented with significant portions of the legislative history concerning the enactment of Section 1365 that Defendants have cited here.

[7] Rather than address *RadLAX*, the Committee cites *Mims v. Arrow Financial Services, LLC*, 565 U.S. 368 (2012), for the proposition that implied repeals are disfavored. *See* Pl.'s Opp.-Reply at 17-18. In *Mims*, the Supreme Court held that language providing that a plaintiff may bring certain federal statutory claims in state court did not impliedly strip federal courts of jurisdiction under Section 1331. That holding is consistent with the longstanding presumption that federal and state courts have concurrent jurisdiction over suits arising under federal law, *see, e.g.*, *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990)—a presumption that is irrelevant here. The Committee's reliance on *Verizon Maryland, Inc. v.*

Against this backdrop, the Committee's theory is that when Congress enacted Section 1365 in 1978, it was only trying to fix the problem of Congress not being able to enforce its subpoenas against private parties, since it could already sue the Executive Branch pursuant to Section 1331. That argument fails at least four times over. *First,* the D.C. Circuit has clearly stated that prior to the enactment of Section 1365 in 1978, Congress could not go to court to enforce its subpoenas—with no caveats. *See In re Application*, 655 F.2d at 1238. *Second*, the Senate agreed with that assessment, recognizing even after the decision in *AT&T I* that 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); *see also id.* at 89 (recognizing that "a future statute" might be needed to "specifically give the courts jurisdiction to hear a civil legal action brought by Congress to enforce a subp[o]ena against an executive branch official").[8] *Third*, the legislative history makes clear that Congress was aware—and accommodating—of the Executive Branch's objections to permitting Congress to sue the Executive Branch, underscoring that neither branch thought Section 1331 already authorized all such suits without limitation. *Fourth*, when Section 1365 was enacted, it included a

Public Service Commission of Maryland, 535 U.S. 635 (2002), Pl.'s Opp.-Reply at 20, is similarly misplaced. Among other differences, in *Verizon* the relevant provision did "not even mention subject-matter jurisdiction, but reads like a conferral of a private right of action." 535 U.S. at 644. Moreover, the narrower provision at issue in *Verizon* did "not distinctively limit the substantive relief available," *id.*, but here the Committee is seeking to overcome the distinct limits reflected in Section 1365.

[8] The Committee points to another passage in this report, which states that the enactment of Section 1365 "'is not intended to be a congressional finding that the federal courts do not now have the authority to hear a civil action to enforce a subp[o]ena against an officer or employee of the Federal government.'" Pl.'s Opp.-Reply at 21 (quoting S. Rep. No. 95-170 at 91-92). The very next sentence, however, states that "if the Federal courts do not now have this authority, this statute does not confer it." S. Rep. No. 95-170, at 91-92 (1977). In any event, if district courts *had* jurisdiction over a Senate suit against federal officers under Section 1331 prior to Section 1365's enactment, there would be no reason *to expressly carve out* such jurisdiction from Section 1365, because the existence or absence of a duplicative jurisdictional grant would be immaterial.

carve-out for suits against the Executive Branch—a carve-out that would be utterly pointless if courts *already* had jurisdiction to resolve all congressional subpoena cases under Section 1331.

Ultimately, the House's interpretation of 1331 would apply equally to Senate and House subpoenas alike, and would thus override the careful limitations in Section 1365. The only way to avoid that direct conflict would be to limit Section 1331 to *House* subpoenas, which would yield the entirely implausible outcome that by giving the Senate *limited* power to enforce subpoenas in court and the House *no* power, Congress actually somehow gave the House *more* power to do so.

If there were any doubt, the 1996 amendments resolve it. In that year, Congress amended Section 1365 to grant district courts jurisdiction over subpoena enforcement suits brought against Executive Branch officials asserting purely personal privileges. *See* Pub. L. No. 104-292, § 4, 110 Stat. 3459, 3460 (1996). That amendment would have been superfluous if Section 1331—which by 1980 had no amount-in-controversy requirement for suits against anyone—provided plenary jurisdiction over such suits. The Committee provides no explanation whatsoever as to why Congress in 1996 would have amended Section 1365 to expand the set of officials that the Senate could sue if the Senate already could have sued those very officials under Section 1331. Nor could it, given the D.C. Circuit's instruction that courts must "presume that Congress has used its scarce legislative time to enact statutes that have some legal consequence." *Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872, 877 (D.C. Cir. 2006).[9] It is true that certain other jurisdictional provisions were rendered superfluous when Congress removed the amount-in-controversy requirement from Section 1331, *see* Pl.'s Opp.-

[9] For similar reasons, the Committee's reliance on an OLC opinion that long predates the 1996 amendments is unpersuasive. *See* Pl's. Opp.-Reply at 17 (citing *Response to Congressional Requests for Information*, 10 Op. O.L.C. 68, 88 (1986)). That OLC opinion was also issued prior to the Supreme Court's decision in *Raines*, at a time when the D.C. Circuit accepted a theory of legislator standing that permitted judicial resolution of interbranch disputes. Judicial resolution of interbranch disputes of this kind is not permissible after *Raines*, as the D.C. Circuit has since recognized, *see Chenoweth v. Clinton*, 181 F.3d 112, 114 (D.C. Cir. 1999), and as the Department of Justice has consistently explained, beginning with its briefs in *Walker v. Cheney*, 230 F. Supp. 2d 51 (D.D.C. 2002).

Reply at 19, but Congress did not merely *fail to repeal* Section 1365—it *substantively amended* it. And Congress did so long after it removed any amount-in-controversy requirement from Section 1331.

Citing 28 U.S.C. § 1366, the Committee also observes that Congress sometimes expressly carves out certain categories of cases from Section 1331. Pl.'s Opp.-Reply at 20. But the single provision cited by the Committee, added as part of a bill reorganizing the District of Columbia's courts and addressing other District-specific matters, has nothing to do with congressional subpoenas and sheds no light on any issue in this lawsuit. *Id.* And more fundamentally, there is nothing unusual about Congress limiting jurisdiction implicitly in some circumstances and explicitly in others. *See, e.g.*, *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994) (implicit limitation on district court jurisdiction); *Elgin v. Dep't of Treasury*, 567 U.S. 1 (2012) (same); *Armstrong v. Bush*, 924 F.2d 282 (D.C. Cir. 1991) (same). The Committee's identification of one instance in which Congress expressly precluded jurisdiction under Section 1331 obviously does not mean that Congress may never implicitly do so.

Finally, the Committee gives short shrift to principles of constitutional avoidance, which call for a construction of Section 1331 that would not require the Court to decide a sensitive issue of legislative standing under Article III. While the Committee suggests that the statutory jurisdictional question is obvious, *see* Pl.'s Opp.-Reply at 21-22, that is plainly wrong. And while the Committee cites *Webster v. Doe*, 486 U.S. 592 (1988), for the proposition that a litigant can only be denied a forum for vindication of constitutional rights where Congress speaks clearly, that principle applies to private persons asserting private interests—not to squabbles between the political branches, which have long been resolved through negotiation and accommodation, not litigation. In any case, Congress is in charge of writing Title 28, and it can hardly complain that it denied itself a judicial forum.

II. Plaintiff Lacks a Cause of Action.

The Committee's suit also fails for the threshold reason that the Committee lacks a cause of action. While the Committee contends that its power to issue subpoenas necessarily implies a power to file suits, neither precedent nor general principles supports that claim.

A. The Committee Lacks an Implied Cause of Action Under the Constitution.

At the outset, the Committee lacks an implied cause of action under Article I—the only claim asserted in the complaint. *See* Compl., ECF No. 1, ¶¶ 199-216. In *Reed* the Supreme Court held that Congress's implied Article I power "to compel production of evidence *differs widely* from authority to invoke judicial power for that purpose." 277 U.S. at 389 (emphasis added). And in concluding that the Senate committee in *Reed* could not bring a suit to enforce its subpoenas, the Court emphasized that there was no "*act of Congress* authoriz[ing] the committee or its members, collectively or separately, to sue." *Id.* at 388 (emphasis added).

The Committee attempts to distinguish *Reed* by arguing that it was only about whether the Committee satisfied a prerequisite of the jurisdictional statute invoked in that case. *See* Pl.'s Opp.-Reply at 23-24. That misses the point. Article I was just as available there as it is here, and the Court's enforcement of the statutory requirement—that the plaintiff be "authorized by law" to bring suit—makes clear that the Constitution does itself authorize the Committee to enforce its subpoenas in court. In fact, the *Reed* Court held that the committee could not bring suit even though it was expressly authorized not only to issue subpoenas but also "to do such other acts as may be necessary in the matter of [its] investigation." *Id.* at 386-87. Thus, while the *Reed* Court's scrutiny of the Senate resolutions at issue in that case confirms that authorization of the full House would be *necessary* for the Committee to represent the interests of the full House in litigation, it does not suggest that such authorization is *sufficient*. *See id.* at 388 (finding no express authorization "even if it be assumed that the Senate alone may give that authority").

More broadly, the Supreme Court has rejected the notion that "it [is] a proper judicial function to 'provide such remedies as are necessary to make effective'" a substantive right and instead "adopted a far more cautious course before finding implied causes of action." *Ziglar v. Abbasi*, 137 S. Ct. 1873, 1855 (2017) (citing *Alexander v. Sandoval*, 532 U.S. 275 (2001)); *see also, e.g.*, *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1402 (2018) ("[A] decision to create a private right of action is one better left to

legislative judgment in the great majority of cases."). The Committee attempts to distinguish these cases by contending that they are only about "whether to recognize an implied damages remedy," Pl.'s Opp.-Reply at 24, but that is not a meaningful distinction. The Supreme Court issued these decisions in general terms, holding that *whenever* "'a host of considerations . . . must be weighed and appraised'" before determining whether "the public interest would be served" by a judicial remedy, those considerations "should be committed to 'those who write the laws' rather than 'those who interpret them.'" *Ziglar*, 137 S. Ct. at 1857 (citation omitted). That principle is not limited to damages: whenever "litigation implicates serious separation of-powers . . . concerns," a right to bring such litigation must be "subject to vigilant doorkeeping." *Jesner*, 138 S. Ct. at 1398; *see also, e.g.*, *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015) (Supremacy Clause does not itself create a cause of action). The key "question is 'who should decide' [and] . . . [t]he answer *most often will be Congress*." *Ziglar*, 137 S. Ct. at 1857 (emphasis added).

B. The Committee Cannot Invoke the Federal Courts' Traditional Equity Powers.

Unable to defend the only cause of action alleged in its Complaint, the Committee also contends that it may proceed in equity. *See* Pl.'s Opp.-Reply at 22. Yet equity relief is not available because this is not a context where the "relief . . . requested . . . was traditionally accorded by courts of equity." *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund., Inc.*, 527 U.S. 308, 319 (1999); *accord id.* at 327-29 (equitable powers of the federal courts do "not include the power to create remedies previously unknown to equity jurisprudence" and concluding that no cause of action existed because "the English courts of equity did not actually exercise" the power asserted (emphasis omitted)). There simply is no historical tradition of the courts adjudicating suits by the House to enforce subpoenas.

The Committee contends that *Grupo Mexicano* is distinguishable because it involved a request for relief "specifically disclaimed by longstanding judicial precedent," Pl.'s Opp.-Reply at 24 (quoting *Grupo Mexicano*, 527 U.S. at 322). But that is not what the Court said. While the Court did note that judicial precedent specifically rejecting the claim asserted further weighed against expanding equitable

relief, its opinion makes clear that the historic absence of similar relief was alone sufficient basis to reject it. *See Grupo Mexicano*, 527 U.S. at 322 (refusing "[t]o accord a type of relief that has never been available before — and *especially* (as here) a type of relief that has been specifically disclaimed by longstanding judicial precedent" (emphasis added)). The fundamental question was "whether the relief respondents requested here was traditionally accorded by courts of equity." *Id.* at 319. But even if a "specific[] disclaim[er]" from precedent were required, this Court need look no further than *Reed* to find it. That decision specifically and expressly rejected the Committee's notion that the power to issue a subpoena includes the power to enforce that subpoena in court.

The Committee nevertheless contends that courts "have traditionally accorded declaratory and injunctive relief when Executive officials act contrary to federal law." Pl.'s Opp.-Reply at 24. *Grupo Mexicano* flatly forecloses analysis at such a high level of generality, as the Supreme Court there precisely distinguished between suits by a creditor to retain a debtor's assets *pre*-judgment versus *post*-judgment. 527 U.S. 308, 330-32 (1999). The Committee cannot seriously argue that allowing a component of Congress to enforce alleged informational rights against the Executive Branch is interchangeable with, for example, an action by a private party to "prevent an injurious act by a public officer." *Armstrong*, 575 U.S. at 327 (citing *Carroll v. Safford*, 44 U.S. (3 How.) 441, 463 (1845)). Equating this case with such traditional equitable suits would mean disregarding the separation-of-powers principles underlying the cause-of-action requirement and abdicating the "vigilant doorkeeping" they demand. *Jesner*, 138 S. Ct. at 1398.

Finally, the Committee has no answer to Defendants' demonstration that "[t]he 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. *Armstrong*, 575 U.S. at 327-28 (2015). As Defendants have shown, Congress has provided a cause of action purporting to permit the Senate to enforce its subpoenas under certain circumstances, *see* 28 U.S.C. § 1365(b); 2 U.S.C. §§ 288b(b), 288d, and it has

enacted certain other provisions permitting congressional requests for information to come before a court. *See* Defs.' Mem.-Opp. at 31, 33-34. It would render this carefully designed scheme superfluous to hold that any congressional committee may simply invoke this Court's traditional equity powers.

C. The Committee Cannot Rely on the Declaratory Judgment Act.

Finally, the Committee is wrong to assert that the Declaratory Judgment Act, 28 U.S.C. § 2201, permits it to proceed without a cause of action. The Committee's argument boils down to the contention that it may invoke the Declaratory Judgment Act because it has "rights guaranteed elsewhere." Pl.'s Opp.-Reply at 25. But the existence of *rights* is not the question; the question is whether the Committee has a *judicial remedy* guaranteed elsewhere, for a party seeking a declaratory judgment must show that the suit could be litigated in federal court even absent the Declaratory Judgment Act. *See Ali v. Rumsfeld*, 649 F.3d 762, 778 (D.C Cir. 2011) (the right must already be "judicially remediable"); *Walpin v. Corp. for Nat'l & Cmty. Serv.*, 718 F. Supp. 2d 18, 24 (D.D.C. 2010). In other words, as *Ali* made clear in refusing to consider a request for a declaratory judgment concerning violations of the Constitution and the Alien Tort Statute, "plaintiffs [who] have not alleged a cognizable cause of action . . . have no basis upon which to seek declaratory relief." 649 F.3d at 778. That precisely describes this case: the Committee is not seeking to use the Declaratory Judgment Act to preempt a potential coercive action from the Executive Branch, or as a lesser form of relief than an injunctive suit it could have brought itself, but instead as a universal cause of action that could be invoked by any party that asserts a substantive right but otherwise lacks a cause of action. In any case, even if the Declaratory Judgment Act were available here, the Court should exercise its discretion to decline to leap into the middle of an interbranch suit without Congress's express imprimatur.

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

For all the reasons stated above, this Court should dismiss this case and allow the political branches to work out their disagreements through the political process, as they have done for centuries. If the Court is to serve as an umpire over this dispute, however, then it must call balls and

strikes—and before the Court considers whether the Executive Branch has complied with the Committee's subpoenas, it must evaluate the legality of those subpoenas in the first place.

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

Initially, the Committee's interest in enacting legislation concerning the census cannot justify the extraordinarily overbroad subpoenas it has served on the Executive Branch. Defendants of course acknowledge that the census is a topic on which legislation "could be had," *Mazars*, 940 F.3d at 724 (quoting *McGrain*, 273 U.S. at 177); *see* Pl.'s Opp.-Reply at 26-28. The key question is instead whether the information the Committee seeks is "reasonably relevant to its legitimate investigation," *Mazars*, 940 F.3d at 740, for "[e]ven a valid legislative purpose cannot justify a subpoena demanding irrelevant material," *id.* at 723. In other words, are years-old documents pertaining to an abandoned and enjoined effort to reinstate a citizenship question reasonably relevant to any legislative inquiry that the Committee is conducting today?

They are not. While the Committee is evidently disturbed by its understanding of the events surrounding the effort to reinstate a citizenship question on the census, *see* Pl.'s Opp.-Reply at 28, its expressions of concern do not come close to showing that the events of 2017 are reasonably relevant to any legislation that the House is considering now. Rather, the Committee's theory remains that it "must understand" the circumstances surrounding the effort to reinstate a citizenship question, *see id.*, so that it can consider whether to enact legislation to prevent entirely unspecified, hypothetical, future misconduct. That is a theory with no limiting principle, and it flies in the face of the D.C. Circuit's recognition that the Constitution does not permit "indiscriminate dragnet" subpoenas. *Mazars*, 940 F.3d at 740 (quoting *Barenblatt v. United States*, 360 U.S. 109, 134 (1959)). The mere fact that *potential* legislation may touch upon a *general* policy issue does not and cannot automatically legitimize every Congressional inquiry tangentially related to that issue—otherwise, the limitations on Congressional inquiries would be meaningless. 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. Congress of course "cannot investigate events that have not yet occurred," Pl.'s Opp.-Reply at 29, but "legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events." *Senate Select Comm.*, 498 F.2d at 732.[10] The Committee does not claim that it is considering legislation relating to the presence of a citizenship question on the 2020 decennial census, and the Committee cannot demand that the Department of Justice and the Department of Commerce turn over tens of thousands of pages merely by alleging that it wants to know more about years-old alleged misconduct.

Moreover, the Committee is wrong to downplay the extraordinary burden that its subpoenas would impose upon the Executive Branch if this Court were to enforce them. *See* Pl.'s Opp-Reply at 38, 55-57. While the Committee may not be seeking literally "every document in the agency's files," *id.* at 31, the subpoenas come close, asking for every document within either the Department of Justice or the Department of Commerce concerning the reinstatement of a citizenship question on the 2020 census from the year 2017. The subpoenas are not limited with respect to particular offices, custodians, or search terms: thus, the Committee cannot credibly say that the subpoenas "focus" on what it refers to as "one specific and exceptionally egregious instance of census maladministration." *Id.* Whatever the Committee might say about its need for the so-called priority documents, the Committee's broad request for every document relating in any way to the citizenship question will *not* "illuminate how the political leadership of the Commerce Department treated expert views; what methods, processes, and channels were used to add the citizenship question; and whether those processes are susceptible to further efforts to abuse the census power as a lever to achieve partisan

[10] It is thus no answer for the Committee to cite *Mazars* and announce that it has made its legislative purpose "clear" and "identified specific legislative measures" that it is considering. *See* Pl.'s Opp.-Reply at 30. Defendants' point is that even if the Committee is considering legislation, the extraordinarily overbroad subpoenas are not reasonably relevant to that legislation.

ends." *Id.* at 31. Instead, the subpoenas call for tens of thousands pages of materials, most of which the Committee appears to have no interest in whatsoever.

B. Congress Has No Freestanding Power of "Oversight" That Independently Empowers the Committee to Subpoena Executive Branch Records.

The Committee also contends that the subpoenaed documents are relevant for purposes of conducting "effective oversight of Executive Branch operations." Pl.'s Opp.-Reply at 32-34. But no freestanding "oversight" power, untethered to Congress's legislative functions, exists under Article I.

The "legislative Powers" that the Constitution grants to Congress, U.S. Const. art. I, § 1, include "no provision expressly investing [Congress] with power to make investigations." *McGrain*, 273 U.S. at 161. The power of Congress to conduct investigations is an implied authority, "auxiliary to the legislative function," *id.* at 174, that exists only as "necessary and appropriate" to the effective performance of that function, *id.* at 173, 175; *see also Mazars*, 940 F.3d at 719 ("Congress's power of inquiry . . . is an essential and appropriate auxiliary to the legislative function.") (internal quotation marks omitted). This limited power does not give Congress a roving commission to act as overseer of the Executive Branch, or to compel the disclosure of confidential Executive Branch communications "to facilitate an ongoing dialogue between the political branches," Pl.'s Opp.-Reply at 32. Congress may compel the submission of testimony and evidence to obtain information solely in aid of its legislative functions. *McGrain*, 273 U.S. at 176; *see Barenblatt*, 360 U.S. at 111 (power of inquiry exists "to enable [Congress] efficiently to exercise a legislative function." (citation omitted)).

Because Congress's power to investigate is "co-extensive with the power to legislate," *Quinn v. United States*, 349 U.S. 155, 160-61 (1955), it "may investigate only those topics on which it could legislate," *Mazars*, 940 F.3d at 739, and in turn "may subpoena only information calculated to materially aid [those] investigations," *id.* (quoting *McGrain*, 273 U.S. at 177). Unless a subpoena complies with these constraints, it exceeds Congress's implied investigatory authority and is unenforceable, *see id.* at 724, 739, regardless of any desire on Congress's part to conduct "oversight."

The Committee observes that Congress's investigative power "'comprehends probes into [federal agencies] to expose corruption, inefficiency, or waste.'" Pl.'s Opp.-Reply at 33 (quoting *Watkins v. United States*, 354 U.S. 178, 187 (1957)). That statement is true so far as it goes, but it is incomplete, for *Watkins* also admonishes that "[n]o inquiry is an end in itself." 354 U.S. at 187. "[T]here is no congressional power to expose for the sake of exposure." *Id.* at 200. The Supreme Court has left no doubt that even when Congress investigates charges of agency "misfeasance and nonfeasance," as in *McGrain*, 273 U.S. at 151, "[t]he only legitimate object [Congress] could have in ordering [such an] investigation [is] to aid in legislating," *id.* at 178.[11] In the end, even the Committee acknowledges that the process it refers to as oversight must contemplate "legislation mandating Executive Branch action or to change appropriation of funds." Pl.'s Opp.-Reply at 33.

In short, the Committee's subpoenas cannot be independently validated as an exercise of supposed "authority" to "oversee[ ] Executive Branch operations." Pl.'s Opp.-Reply at 34. The subpoenas can be enforced only so far as they "seek[ ] information sufficiently relevant to [a] legislative inquiry" on a topic "on which constitutional legislation 'could be had.'" *Mazars*, 940 F.3d at 724 (quoting *McGrain*, 273 U.S. at 177).

The Committee fails to make the requisite showing. The Committee asserts that it is "seeking to understand the circumstances surrounding the bad faith and outright dishonesty that Executive Branch officials [allegedly] displayed in their interactions with Congress and the public." Pl.'s Opp.-Reply at 34. But it neither explains what legislative "remedies" might ensue from this inquiry, *see id.* at 35, nor, most critically, does it even attempt to explain what relevance the priority documents might have to this topic of inquiry, or attempt to articulate a constitutionally adequate justification for its

[11] The statement in *AT&T I*, that "Congress's power to monitor executive actions is implicit in the appropriations power," 551 F.2d at 394; *see* Pl.'s Opp.-Reply at 33, is not to the contrary. The appropriation of public monies "by Law" is one of the legislative functions invested in Congress by the Constitution, *see* U.S. Const. art. I, § 9, cl. 7, in aid of which Congress may utilize its power of inquiry "in determining what to appropriate from the national purse." *Barenblatt*, 360 U.S. at 111.

"indiscriminate dragnet" demand for all agency communications having anything to do with reintroducing a citizenship question, *Mazars*, 940 F.3d at 740-41 (quoting *Baranblatt*, 360 U.S. at 134). *See* Pl.'s Opp.-Reply at 34-35. The Committee has not carried its burden of showing that its subpoenas comply with the limits of Congress's investigative authority under Article I. *Mazars*, 940 F.3d at 739.

IV. The President May Assert Executive Privilege Over the Priority Documents and Has Properly Done So Here.

Executive privilege presumptively shields from disclosure various types of information that must be kept confidential for the Executive Branch to carry out its Article II functions effectively, even when that information is subpoenaed by Congress. The President's assertion of executive privilege over the priority documents was fully justified, and the Committee has demonstrated no need that could overcome the privilege here. The Committee's arguments to the contrary lack merit.

A. Allegations of Misconduct Do Not Alter the Scope of Executive Privilege.

The Committee first takes the position that executive privilege does not apply to internal agency deliberations and confidential attorney-client communications when Congress investigates alleged misconduct by the Executive Branch, and indeed that executive privilege is never available to protect Executive Branch information, other than presidential communications, in response to a congressional subpoena. Pl.'s Opp.-Reply at 35-42. That position reflects fundamental misunderstandings about the nature of executive privilege.

1. Congressional Allegations of Misconduct Do Not Vitiate Executive Privilege.

The Committee contends that the President wrongly invoked executive privilege over internal agency deliberations, attorney-client communications, and attorney work product on the asserted ground that the common-law deliberative process, attorney-client, and attorney work product privileges do not apply when Congress alleges misconduct by the Executive Branch. Pl.'s Opp.-Reply at 35-38. This contention finds no support in the law.

a. Executive Privilege Over Deliberative Information

With regard to the deliberative process component of executive privilege, the Committee relies exclusively on *Espy* for the broad assertion that the privilege "'disappears altogether when,' as here, 'there is reason to believe government misconduct occurred.'" *Id.* (quoting *Espy*, 121 F.3d at 746). This argument relies on two false premises.

First, the Committee erroneously conflates the common-law deliberative process privilege with the component of the constitutionally rooted executive privilege that protects deliberations within the Executive Branch. The *Espy* court specifically stated that its opinion "should not be read as in any way affecting the scope of the privilege in the congressional-executive context." *Espy*, 121 F.3d at 753. Most critically, *Espy* reaffirmed the holding of *Senate Select Committee* that allegations of wrongdoing do not abrogate a claim of executive privilege. *See id.* at 746. As the D.C. Circuit explained in *Senate Select Committee*, the enforceability of a congressional subpoena that is resisted on grounds of executive privilege "turn[s], not on the nature of the . . . conduct that the subpoenaed material might reveal, but, instead, on the nature and appropriateness of the [legislative] function in the performance of which the material was sought, and the degree to which the material was necessary to its fulfillment." 498 F.2d at 731; *see also Holder*, 2014 WL 12662665, at *2 (rejecting Committee's demand for privileged deliberative documents in investigation of alleged Executive Branch misconduct). Indeed, congressional investigations of Executive Branch activities often take place in politically charged atmospheres with frequent allegations of misconduct. The Executive Branch would have almost no ability to keep information confidential if executive privilege were unavailable whenever Congress claimed to be investigating wrongdoing. Allowing routine legislative encroachment on Executive Branch confidentiality whenever allegations of "wrongdoing" or "misconduct" are raised would grossly disrupt the separation of powers and vitiate the process of negotiation and accommodation through which the competing needs of Congress for information, and the Executive for confidentiality, have traditionally been met. *See AT&T I*, 551 F.2d at 394.

Second, even under the common-law deliberative process privilege, the Committee overstates the scope of the misconduct exception. The Committee relies exclusively on a single sentence of dicta from *Espy* stating that the common-law deliberative process "privilege disappears altogether when there is any reason to believe government misconduct occurred." 121 F.3d at 746. *See also* Pl.'s Opp.-Reply at 35. But that rule applies but only where misconduct is necessary to proving the plaintiff's legal claim. *See 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) (holding that the deliberative process privilege applies "where the governmental decisionmaking process is collateral to the plaintiff's suit," but not "when a plaintiff's cause of action turns on the government's intent"). Thus, for example, when the government is accused of discrimination, courts have held that it may not invoke the deliberative process privilege to withhold evidence of discriminatory intent. But courts do not apply the misconduct exception where proof of the alleged misconduct is not material to a plaintiff's claim. *See Convertino v. DOJ*, 669 F. Supp. 2d 1, 4 (D.D.C. 2009) (government misconduct exception did not apply to "various decisions defendant made" that were "collateral to [the] plaintiff's cause of action"); *Convertino v. DOJ*, 674 F. Supp. 2d 97, 104 (D.D.C. 2009) (similar); *Moore v. Valder*, No. 92-2288, 2001 WL 37120629, *3 (D.D.C. July 31, 2001); *see also Alexander v. FBI*, 193 F.R.D. 1, 10 n.14 (D.D.C. 2000) (similar). In sum, the government misconduct exception does not create an unlimited exception to the confidentiality of Executive Branch deliberations simply because misconduct is alleged.

Even if the government misconduct exception applied without modification to the deliberative process component of executive privilege—and it does not, *see Espy*, 121 F.3d at 753—the Committee has not established a blanket exception to the confidentiality of the deliberations in the priority documents. As a preliminary matter, the alleged misconduct is not central to the Committee's claims. Presuming a claim for enforcement of a Congressional subpoena is justiciable, Congress does not need to establish misconduct to enforce a subpoena. It need only show that the information sought is reasonably relevant to a topic of investigation on which legislation might be

had, *Mazars*, 940 F.3d at 740, and, where the information sought is privileged, demonstrate an overriding need, *Senate Select Comm.*, 498 F.2d at 731.

More fundamentally, even assuming that information about the allegedly "false rationale for adding a citizenship question to the census" were relevant to the merits of the Committee's subpoena-enforcement claims, Pl.s' Opp.-Reply at 35, which it is not, none of the privileged information withheld on the basis of deliberative process pertains to that topic, *see* Second Decl. of Anthony Foti ("2d Foti Decl."), ECF No. 18-7, ¶¶ 7, 9-10, 12, 18-25; Decl. of Elliott M. Davis ("Davis Decl."), ECF No. 18-1, ¶¶ 5, 7. Many of the documents contain no withheld information pertaining to the 2020 census at all. 2d Foti Decl. ¶¶ 24-28. Thus, the Committee cannot support its position that the government misconduct exception creates a blanket waiver of the deliberative process privilege.

b. Executive Privilege Over Attorney-Client Communications and Attorney Work Product

So far as the President has asserted executive privilege over confidential attorney-client communications and attorney work product contained in the priority documents, the Committee relies on the crime-fraud exception to the common-law attorney-client privilege and the equivalent exemption to the common-law attorney work product privilege. Pl.'s Opp.-Reply at 36-39. This position again presumes that these exceptions apply to claims of executive privilege precisely as they do to analogous common-law privileges. As discussed above, that is not the law. *See Senate Select Comm.*, 498 F.2d at 731; *cf. Espy*, 121 F.3d at 753 (explicitly declining to extend the court's holdings on a common-law privilege to interbranch disputes over information). But even if "crime-fraud" exceptions to executive privilege's protections of attorney-client communications and attorney work product existed, they would not apply here.

This case involves no "crime" or "fraud" that would trigger such an exception. As the Supreme Court held, the decision to reinstate a citizenship question was authorized by the Census Act and supported by the evidence. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2569-73 (2019). The

Committee nevertheless argues that the district court's finding of bad faith in that case constitutes "a *prima facie* showing of misconduct that abrogates the" attorney-client and attorney work product components of executive privilege. Pl.'s Opp.-Reply at 37. This claim fails for at least two reasons.

First, purportedly advancing a pretextual rationale for the reinstatement of the citizenship question would not be the kind of severe misconduct that triggers the crime-fraud exceptions. *See Burger v. Litton Indus., Inc.*, No. 91 CIV. 0918(WK) AJP, 1995 WL 476712, at *3 (S.D.N.Y. Aug. 10, 1995) (pretextual basis for employee's termination not sufficient to invoke exception). Courts have found the exceptions to apply only in far more egregious circumstances. *See, e.g.*, *In re Grand Jury*, 475 F.3d 1299, 1306 (D.C. Cir. 2007) (attorney's knowing submission of "back-dated fraudulent document" to court); *In re Sealed Case*, 754 F.2d 395, 400 (D.C. Cir. 1997) ("pervasive and systematic scheme to destroy or alter subpoenaed evidence" done with "knowledge and participation of legal department"). The Committee does not cite any case where a court found that the exceptions applied in circumstances at all analogous to those presented here.

Second, the crime-fraud exceptions do not create the kind of blanket waiver that the Committee suggests. *See* Pl.'s Opp.-Reply at 37-39; *see also id.* at 39 (asking the Court to "reject Defendants' assertion of privilege at the outset," rather than considering the individual assertions of privilege). The exceptions do not apply to privileged information concerning "prior acts or confessions beyond the scope of the continuing fraud." *In re Sealed Case*, 754 F.2d at 403. Legal advice beyond the scope of a fraud "remain[s] within the protection of the attorney-client privilege." *Id.*; *see also In re Grand Jury Subpoenas*, 144 F.3d 653, 661 (10th Cir. 1998) ("[D]istrict courts should define the scope of the crime-fraud exception narrowly enough so that information outside of the exception will not be elicited . . . ."). None of the attorney-client communications and attorney work product subject to the President's claim of executive privilege concerns the reasons for reinstating the citizenship question, and none contains an attorney's advice on how to advance a pretextual reason for doing so. 2d Foti Decl. ¶¶ 6-28; Davis Decl. ¶ 5. Thus, even if the crime-fraud exceptions would apply to such

information, there would be no basis for applying the exception to the priority documents and certainly no basis for doing so without considering the nature of the information withheld.

2. The Priority Documents Are Protected from Disclosure by the President's Valid Assertion of Executive Privilege.

The Committee next goes so far as to argue that when Congress subpoenas information from the Executive Branch other than presidential communications, no valid claim of privilege may be raised at all. Pl.'s Opp.-Reply at 39-42. As Defendants have shown, however, the Executive Branch's role in enforcing the law requires that some materials remain confidential so that the Executive's proper functioning under the Constitution is preserved and protected. *See* Defs.' Mem.-Opp. at 40. In select cases, the President preserves this fundamental constitutional balance by asserting executive privilege, a constitutionally-based privilege that is a necessary corollary of the executive functions vested in the President by Article II of the Constitution, and which was expressly recognized in *Nixon* as "fundamental to the operation of Government and inextricably rooted in the separation of powers[.]" 418 U.S. at 712-13. Because of "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," *id.* at 705, the President may assert executive privilege not only to safeguard the confidentiality of presidential communications, but also to protect a variety of sensitive executive branch communications and information, including deliberative intra- and inter-agency communications, attorney-client communications, and attorney work product. *See* Defs.' Mem.-Opp. at 40-43.

The Committee's response is nothing short of remarkable. "[C]ommon-law privileges," the Committee argues, "do not defeat [its] constitutional authority" or "apply in a Congressional investigation." Pl.'s Opp.-Reply at 35, 39. The Committee refuses even to acknowledge that it is the President himself, not subordinate officials, who has invoked privilege here, and that the sole privilege asserted is executive privilege, a privilege rooted in "[t]he executive Power . . . vested in [the]

President," U.S. Const. art. II, § 1, cl. 1, not the common law. Once that plain reality is accepted, the foundation of the Committee's counter-arguments crumbles.

While the Committee argues that its Article I powers of inquiry supersede *common-law* privileges, it cites no authority for the proposition that *executive* privilege is limited to the protection of presidential communications, or that it may not be invoked to resist legislative demands for disclosure of internal agency deliberations and confidential communications. *See generally* Pl.'s Opp.-Reply at 39-42. Indeed, the sole court previously to address the question held otherwise, rejecting the very arguments the Committee makes here. *Comm. on Oversight & Gov't Reform v. Holder*, No. 12-1332, 2014 WL 12662665, at *1 (D.D.C. Aug. 20, 2014); *see also Comm. on Oversight & Gov't Reform v. Lynch*, 156 F. Supp. 3d 101, 104 (D.D.C. 2016). The conclusion reached in *Holder* is consistent both with *Nixon*, *see* Defs.' Mem.-Opp. at 40-41, and with decades of D.C. Circuit precedent, which recognizes both the common-law roots of the deliberative process privilege available to federal agencies and the constitutional roots of the President's separate authority to invoke executive privilege when necessary to protect important Executive Branch interests in the confidentiality of agency deliberations.[12]

The Committee largely ignores these precedents, and instead cites *Espy* for the proposition that "'the deliberative process privilege is primarily a common law privilege.'" Pl.'s Opp.-Reply at 39 (quoting *Espy*, 121 F.3d at 745). But, as already shown, *Espy* did not involve a congressional demand

[12] *See, e.g.*, *Jordan v. DOJ*, 591 F.2d 753, 772 (D.C. Cir. 1978) (referring to "the 'executive privilege' that attaches to predecisional communications which reflect . . . policymakers' deliberative processes"); *Black v. Sheraton Corp. of Am.*, 564 F.2d 531, 541 (D.C. Cir. 1977) (a "claim of executive privilege" over "the deliberations of high executive officials" "may have constitutional underpinnings"); *Soucie v. David*, 448 F.2d 1067, 1071-72 (D.C. Cir. 1971) (discussing application of "[t]he doctrine of executive privilege" to "agency records" "in the context of a congressional command to disclose information"). *See also Espy*, 121 F.3d at 735 n.2, 745 (explaining that the presidential communications and deliberative process privileges are both "closely affiliated" varieties of executive privilege "designed to protect executive branch decisionmaking"); *Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 909 (D.C. Cir. 1993) ("Th[e] Article II right to confidential communications attaches not only to direct communications with the President, but also to discussions between his senior advisers[,]" including "Department Secretaries[.]").

for agency records, and neither *Espy*, nor any other case, stands for the remarkable proposition that the President may not invoke executive privilege over confidential agency deliberations and communications simply because those records might also be protected by privileges based in the common law. *See* Defs.' Mem.-Opp. at 43-44. The Committee offers no response.[13]

The Committee argues instead that permitting the President to assert privilege over internal agency communications that do not involve presidential decisionmaking would result in a "sweeping" extension of privilege "in no way tethered to the President's 'unique status under the Constitution.'" Pl.'s Opp.-Reply at 41 (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982)). But to state that argument is to refute it. No claim of executive privilege can be "untethered" from the President because no claim of executive privilege can be advanced unless asserted by him. The picture painted by the Committee, in which lesser officials raise claims of common-law privilege to indiscriminately place large swaths of information beyond Congress's reach, *see id.*, is a red herring.[14]

In reality, it is the Committee's arguments that cannot be reconciled with the constitutional design. If accepted, the Committee's position would give Congress unfettered access to all Executive

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[13] For like reasons, the Committee's discussion of *United States v. Morgan*, 313 U.S. 409 (1941), *see* Pl.'s Opp.-Reply at 40, is equally beside the point. The Committee is also unaided by *Fitzgerald*. *See id.* Quite the opposite, in the passage cited by the Committee the *Fitzgerald* Court explained that while the common law may "determine the scope of [a subordinate] official's privilege, . . . Presidential privilege is rooted in the separation of powers under the Constitution." *Fitzgerald*, 457 U.S. at 753 (internal quotation marks omitted). That is the determinative distinction, between an agency official's assertion of common-law privilege, and the President's assertion of constitutionally based executive privilege, that the Committee refuses to acknowledge.

[14] The Committee again cites *Hannah v. Larche*, 363 U.S. 420 (1960)—which as shown could not be less pertinent here, Defs.' Mem.-Opp. at 45—as support for the proposition that Congress is entitled to determine for itself "whether its need for legislative evidence should yield to the interests served by non-constitutional privileges asserted in a legislative proceeding." Pl.'s Opp.-Reply at 42. But this is not a legislative proceeding, and the privilege asserted by the President is a constitutional one. While the Constitution provides that "[e]ach House [of Congress] may determine the Rules of its [own] Proceedings," U.S. Const. art. I, § 5, cl. 2, that authority "only empowers Congress to bind itself," *INS v. Chadha*, 462 U.S. 919, 955 n.21 (1983); it may not by such rules "ignore constitutional restraints," *United States v. Ballin*, 144 U.S. 1, 5, (1892); *see also Watkins*, 354 U.S. at 215-16; *id.* at 216-17 (Frankfurter, J., concurring) ("By . . . making the judiciary the affirmative agency for enforcing the authority that underlies the congressional power to [compel evidence], Congress necessarily brings into play the specific provisions of the Constitution[.]").

Branch information other than presidential communications, allowing it to pry into confidential deliberative processes of Executive Branch officials, ongoing law-enforcement investigations, and sensitive matters concerning national security and the conduct of foreign relations. Handing every committee of Congress such absolute power to compel disclosures from Executive Branch agencies would induce paralysis and make it impossible for Executive officials to perform their assigned functions effectively, disrupting both the constitutional separation of powers and well over two centuries of dealings between the political branches. To preserve the constitutional balance of powers and the vitality of the negotiation and accommodation process, neither branch can be permitted to wield absolute power in informational disputes. *See* The Federalist No. 49, at 314 (James Madison) (Clinton Rossiter ed., 1961) (where the political branches come into conflict, "neither of them . . . can pretend to an exclusive or superior right of settling the boundaries between their respective powers.").

B. The President Properly Invoked Executive Privilege Over the Priority Documents at Issue in this Case.

The Committee maintains that Defendants have not demonstrated that the priority documents constitute pre-decisional, deliberative communications, confidential attorney-client communications, or attorney work product over which privilege may properly be asserted. Pl.'s Opp.-Reply at 42-47. The Committee's arguments in support of this position fail.

The Committee first reasserts the baseless argument that executive privilege does not apply to the deliberative material in the priority documents concerning the reinstatement of a citizenship question, because the decision had purportedly been made to reinstate the question by early 2017, meaning that these later communications were neither pre-decisional nor deliberative. *Id.* at 43-44. These arguments are contrary to binding precedent holding that agency "decisions do not become final until they are released." *Checkosky v. SEC*, 23 F.3d 452, 490-91 (D.C. Cir. 1994). The Committee's attempt to distinguish *Checkosky* because it dealt with an adjudication rather than a policy decision is unavailing because the protection for internal agency deliberations applies to "the deliberative

processes leading to a final agency determination, whether such determination be a formal adjudication or the formulation of agency policy." *Aug v. Nat'l R.R. Passenger Corp.*, 425 F. Supp. 946, 950 (D.D.C. 1976). This is why, contrary to the Committee's arguments, courts regularly apply the principle recited in *Checkosky* in cases not involving adjudications. *See, e.g.*, *Public Citizen, Inc. v. U.S. Dep't of Educ.*, 388 F. Supp. 3d 29, 48-49 (D.D.C. 2019) (document was predecisional in part because it "predated a formal decision" on how to implement guidance by a government official).

Next, the Committee functionally concedes that deliberations concerning topics unrelated to the reinstatement of the citizenship question are properly privileged. As Defendants previously explained, the deliberative process component of executive privilege "covers deliberations about the many interim decisions that agencies and their employees must make." Defs.' Mem.-Opp. at 50. As a result, information that "would reveal decision-making processes about issues ancillary to the decision to reinstate a citizenship question," including information "wholly unrelated to that decision," would be privileged even if the Court accepted the Committee's ill-founded arguments based on the timing of Secretary Ross's informal decisionmaking. *Id.* In response, the Committee states that its arguments apply only "to the extent [the withholdings] reflect inputs, advice, or the crafting of explanations regarding the addition of a citizenship question." Pl.'s Opp.-Reply at 45. There is no genuine dispute, therefore, that privilege was properly asserted over the deliberations in the priority documents concerning issues other than whether to reinstate the citizenship question.

Finally, the Committee contends that Defendants have not justified the assertion of executive privilege over "the Uthmeier Memo and accompanying note" as attorney-client communications. Pl.'s Opp.-Reply at 45.[15] But the Committee's arguments in support of this contention are clearly wrong

[15] Although the Committee states that these documents are merely an "example" of Defendants' purported failure to support the President's assertions of executive privilege over attorney-client communications, the Committee's brief is devoid of any other examples or any arguments that could apply to other documents. *See generally* Pl.'s Opp.-Reply at 45-46. By failing to raise such arguments, the Committee has once again conceded that the privilege properly applies. *See Hopkins v. Women's Div., Gen. Bd. of Global Ministries*, 284 F. Supp. 2d 15, 25 (D.D.C. 2003).

in light of the record and relevant case law. Indeed, it would be bizarre to hold otherwise, given the district court's finding in *New York v. Department of Commerce* that the draft memorandum was subject to the attorney-client privilege following *in camera* review. *See* Defs.' Mem.-Opp. at 6.

On this point the Committee argues that the protection for attorney-client communications was waived when Department of Commerce attorney James Uthmeier provided a draft of his memo and the accompanying note to then-Acting Assistant Attorney General for Civil Rights John Gore. Pl.'s Opp.-Reply at 45-46. That is so, the Committee asserts, because Defendants have not established either that an attorney-client relationship existed between Mr. Gore and the Department of Commerce, or that the documents sought legal advice from Mr. Gore. *Id.* at 46. The Committee's argument is unavailing, however, because one agency's disclosure of an attorney-client communication to another does not constitute a waiver so long as the communication was shared to assist one of the two agencies in carrying out its statutory mission. *Animal Welfare Inst. v. Nat'l Oceanic & Atmospheric Admin.,* 370 F. Supp. 3d 116, 133 (D.D.C. 2019). Accordingly, no waiver occurred when the memo and note were circulated to the Department of Justice, because they were shared with Mr. Gore to further the statutory mission of the Department of Commerce to administer the census. Foti Decl. ¶¶ 7, 16. It was not necessary, therefore, that the documents be given to Mr. Gore to obtain legal advice. *See Animal Welfare Inst.,* 370 F. Supp. 3d at 133.

In sum, the Committee has functionally conceded that most of the withholdings in the priority documents are properly privileged. As to the rest, the Committee has failed to provide any valid arguments that would invalidate the application of executive privilege.

C. The Committee Has Not Made a Sufficient Demonstration of Particularized Need for the Priority Documents to Overcome the President's Assertion of Executive Privilege.

The parties agree on this much: in the face of a valid assertion of privilege over the priority documents, the Committee must make a sufficient showing of need for the information they contain in order to compel the documents' production. *See* Defs.' Mem.-Opp. at 54; Pl.'s Opp-Reply at 47.

To ascertain the applicable standard of need, the Court must look, as explained in *Espy*, to "the case most directly on point." 121 F.3d at 755. In this situation, the precedent most directly on point is *Senate Select Committee*, in which the D.C. Circuit held that a congressional committee could not obtain access to tape recordings of presidential conversations because it had not shown that "the subpoenaed evidence [was] *demonstrably critical to the responsible fulfillment of the Committee's functions,*" 498 F.2d at 731 (emphasis added). *See* Defs.' Mem.-Opp. at 54-55. Although agency records of the kind at issue here may not ordinarily implicate confidentiality interests of the same order as presidential communications, the President nevertheless determined in this instance that he must interpose a formal claim of executive privilege to protect the interests of Executive Branch confidentiality at stake. Because the claim of privilege here emanates from the Executive Branch "at its highest level," *Cheney v. U.S. Dist. Ct. for the Dist. of Columbia*, 542 U.S. 367, 385 (2004), the Committee should be required to make a showing of need akin to the "demonstrably critical" standard required in *Senate Select Committee*, 498 F.2d at 731. *See* Defs.' Mem.-Opp. at 55-57.

The Committee argues that it is "irrelevant that the claim of privilege here was made by the President," and that the Court should apply the same standard of need employed when routine claims of deliberative process privilege are made by subordinate Executive Branch officials. Pl.'s Opp.-Reply at 49 (internal quotation marks omitted). That is so, according to the Committee, because it "seeks no documents from [the President]." *Id.* But that observation misses the point. The President, as the single individual situated at the pinnacle of authority within the Executive Branch, *see Espy*, 121 F.3d at 751, concluded that it was necessary and appropriate to assert executive privilege over the specific documents in question to protect interests in the effective functioning of the Executive Branch for which he alone is ultimately responsible. "Courts traditionally have recognized the President's constitutional responsibilities and status as factors counseling judicial deference and restraint" when called to sit in judgment of his actions. *Fitzgerald*, 457 U.S. at 753 & n.34. As taught in *Cheney*, "th[is] high respect owed to the office of the Chief Executive" is the "control[ling]"

consideration when the Executive Branch at its highest levels asserts its constitutionally protected interests in confidentiality. 542 U.S. at 385. *See also* Defs.' Mem.-Opp. at 56-57. Even though the priority documents do not implicate presidential decisionmaking, because the President personally asserted executive privilege over these records, the Committee must demonstrate that they are "critical to the responsible fulfillment of [its legislative] functions." *Senate Select Comm.*, 498 F.2d at 731.[16]

Under any standard, however, the Committee's effort to demonstrate that its need for the priority documents exceeds the Executive's need for confidentiality only shows otherwise. The Committee maintains that access to unredacted versions of the priority documents "is critical" to "understand[ing] the Executive Branch's misconduct in seeking to add a citizenship question to the census and in providing false testimony about those efforts." Pl.'s Opp-Reply at 50. But, of the eleven priority documents (or sets of documents) at issue, the information redacted from *six* of them has nothing to with reinstating a citizenship question (and in four of those six cases, nothing to do with the census at all). 2d Foti Decl. ¶ 19 (Ross Subpoena documents (b), (c)); *id.* ¶ 24 (documents (d), (e), (g), (h)). With respect, it is risible to argue that the Committee has a "critical" need for these irrelevant documents.

The Committee's attempts to demonstrate a particularized need for the remaining priority documents are no more availing:

- The Committee argues that it requires the drafts of the Uthmeier memorandum (documents (a) and (f), *see* 2d Foti Decl. ¶¶ 5, 6), because it must review the memo's analysis of potential sources of legal authority for including a citizenship question in order to "determine whether the Census Bureau is operating with sufficient independence from improper influences." Pl.'s Opp.-Reply at 51. That is not a

[16] The Committee suggests ominously that applying the standard of need articulated in *Senate Select Committee* would "relegate Congress in wielding its Article I authorities" to a "lesser position than that of FOIA requesters, grand juries, and civil litigants seeking overcome seeking to overcome the constitutionally based Presidential communications privilege." Pl.'s Opp.-Reply at 50. That is patently not the case. Defendants are not suggesting that Congress (or any other litigant) should have to make a greater showing of need for disclosure of internal agency deliberations than for access to presidential communications. The point is that a greater showing of need must be demanded of any litigant when the President himself has specifically asserted executive privilege over the agency records in question.

demonstration of need; it is a *non sequitur*. The Committee does not explain how a legal analysis written in August 2017, *see* 2d Foti Decl. ¶ 6, could shed light on whether the Census Bureau is operating under unspecified "improper influences" today, much less that scrutinizing the draft memos' contents is critical to the enactment of any hypothetical legislation concerning the census.

- The Committee contends "[f]or the same reason" that it must be permitted to review the drafts of the Gary Letter to understand the different ways in which the letter's rationale for reinstating a citizenship question might have been presented. Pl.'s Opp.-Reply at 51. But none of the drafts "contain[ ] substantive differences in the rationale" presented in the final letter, only "technical, stylistic, and messaging suggestions of subordinates within the Department [of Justice.]" Davis Decl. ¶¶ 11, 12. It is fanciful to maintain that "technical, stylistic, and messaging suggestions" made in December 2017 by employees of another agency would reveal any "improper influences" on the Census Bureau today.

- The Committee maintains it must know with whom the Department of Commerce consulted in 2017 about reintroducing a citizenship question, Pl.'s Opp.-Reply at 51, information redacted from document (i), *see* 2d Foti Decl. ¶ 20. In point of fact, however, the individuals identified in this e-mail with whom the Department of Commerce has been able to locate a record of consulting about the citizenship question have already been identified in the public record as such. The Department's interactions with a number of these individuals, such as Kris Kobach and A. Mark Neuman, are recounted in detail in the Committee's opening brief. *See* Pl.'s Mem., ECF No. 17, at 8-13. The Committee has made no showing of need for internal agency deliberations about these individuals..

- Finally, "to discern whether current law provides sufficient accountability," the Committee insists that it is "absolutely entitled to know" how Executive Branch officials interpreted congressional notification requirements when the Department of Justice submitted its December 12, 2017, request for reinstatement of a citizenship question (*i.e.*, the Gary Letter) to the Census Bureau. But the Committee already knows how the Commerce Department construed its notification obligations, because in fact it did not notify Congress of a forthcoming change to the 2020 census questionnaire in December 2017; rather, it provided the required notification to Congress in March 2018, when the Secretary's decision memorandum was released. Again, the Committee has no need to scrutinize inter-agency deliberations that led to that understanding.

No matter how vigorously the Committee argues that the priority documents hold a key to unlocking mysteries about the reinstatement of the citizenship question that the Committee seeks to understand, the objective facts and circumstances lend no support to that conviction. The President's claim of privilege over these documents therefore must prevail.

V. Enforcement of the Subpoenas' Catch-All Requests Would Be Premature, and Unconstitutionally Burdensome on the Executive Branch.

For reasons Defendants have explained, the Committee's request for enforcement of the subpoenas' catch-all requests for all communications having to do with reinstatement of a citizenship question must also be denied, at least at this time. Under the D.C. Circuit's decision in *AT&T I*, disputes over those documents are not yet appropriate for judicial resolution, because the parties have not yet engaged in a good faith effort to negotiate over production of these documents, in order to accommodate their respective interests. Furthermore, the separation of powers does not allow the Committee to burden the President, his senior advisors, and other senior Executive Branch officials, with the burden of making thousands of individualized determinations of executive privilege within the immense body of documents swept up by the Committees' dragnet subpoenas.

A. Disputes over the Non-Priority Documents Are Not Appropriate for Judicial Resolution Because the Parties Have Not Engaged in a Negotiation and Accommodation Process Concerning Those Documents.

The Committee's contention that the parties have reached an impasse with regard to the non-priority documents—documents over which the President has not conclusively invoked executive privilege and about which the Executive Branch remains willing to negotiate—is completely at odds with the D.C. Circuit's holding in *AT&T I*.

Initially, the Committee incorrectly characterizes the *AT&T I*'s holding as requiring Congress and the Executive Branch to engage in good faith negotiations to accommodate the branches' respective interests "only in the rare circumstance when the record 'demonstrate[s] the proximity of the parties to a workable compromise.'" Pl.'s Opp.-Reply at 51 (quoting *AT&T I*, 551 F.2d at 386) (alteration in original); *see also id.* at 52-53. But, although the D.C. Circuit noted that the parties in *AT&T* had taken meaningful steps towards a compromise, this reference does not suggest that a court may only stay or dismiss an action when the parties are already near an agreement. Such a requirement would be particularly inappropriate where, as here, the Committee served extraordinarily broad

subpoenas on Defendants, and then filed suit before meaningfully exploring the possibility of accommodations with regard to the vast majority of the documents at issue. The Committee cannot refuse to comply with its "implicit constitutional mandate to" pursue mutually acceptable accommodations with the Executive Branch to resolve or at least narrow the scope of the two branches' disputes, and then rely on the distance between the parties to obtain judicial resolution of those disputes. *United States v. AT&T*, 567 F.2d 121, 127 (1977). The Executive Branch remains willing to engage the Committee in good faith negotiations about the non-priority documents—documents about which the parties have not engaged in any specific negotiations. Accordingly, any judicial consideration of disputes about those documents would be premature.

The Committee is wrong to complain that no "compromise is possible in this case" because Defendants have "refuse[d], outright, to provide documents which they are legally obligated to produce as a lever to extract concessions." Pl.'s Opp.-Reply at 51-52. A dispute between the parties about what documents the Committee may require and what documents the Executive Branch is legally obligated to produce is not the end of the accommodation process; it is the state of affairs that necessitates such a process. If the parties agreed from the outset about the scope of the Executive Branch's legal obligations, then there would be no dispute to resolve. Ultimately, the Committee's position is that, because it claims an absolute entitlement to any information it wants, anything short of total Executive Branch capitulation to the Committee's demands constitutes an impasse that the courts may resolve. This position is flatly inconsistent with *AT&T I*.

The Committee goes on to recite a one-sided history of the parties' interactions that makes it seem as though the Committee fully engaged in the accommodation process and that the parties have reached a genuine impasse with regard to the catch-all documents. *See* Pl.'s Opp.-Reply at 52. That is not the case. To the contrary, the parties were engaged in negotiations over documents Defendants would produce, during which time Defendants made rolling productions of catch-all documents that included redactions for privilege. Decl. of Megan Greer, ECF No. 18-8 ("Greer Decl.") ¶ 4; Decl. of

Anthony Foti, ECF No. 18-2 ("Foti Decl.") ¶ 4. In response, the Committee took the position that no privileges are available to Defendants in response to congressional subpoenas. Greer Decl. ¶ 19; Foti Decl. ¶ 23. Productions and negotiations continued until Defendants declined the Committee's ultimatum to produce the privileged priority documents (in unredacted form) in exchange for a postponement of contempt votes against Secretary Ross and Attorney General Barr. Greer Decl. ¶¶ 4-36; Foti Decl. ¶¶ 4-36. The Committee and the House then voted to hold Secretary Ross and Attorney General Barr in criminal contempt, referred them to the U.S. Attorney for criminal prosecution, and authorized the instant lawsuit. Greer Decl. ¶¶ 36-40; Foti Decl. ¶¶ 43-44. Defendants halted their productions only at that point, although additional documents were provided in response to a separate request. Greer Decl. ¶ 29; Foti Decl. ¶ 46.

Defendants paused their productions of catch-all documents because they understood those drastic actions to mean that the Committee was uninterested in anything less than total disclosure of all documents falling within the reach of the Committee's expansive subpoenas, without regard for any specific claims of executive privilege. Continued large-scale production of redacted documents would have been inefficient and enormously wasteful if forthcoming litigation determined that some or all of the withholdings could not be sustained. The fact that the Committee waited nearly five months to file its lawsuit is not a circumstance for which Defendants can be faulted. Notably, since the July 2019 contempt vote by the House, the Committee *never once* raised continued production of responsive, non-privileged information, targeting its catch-all requests, or resolving outstanding claims of privilege. Greer Decl. ¶ 42. The parties resumed discussions only following the initiation of this lawsuit, and those discussions have been exceedingly limited.

Given the lack of substantive negotiations over the catch-all documents, the negotiation and accommodation process may yet succeed in resolving or substantially narrowing the parties' differences over those documents. Accordingly, even if the parties' dispute were justiciable, the Court nonetheless should defer ruling on the Committee's request to enforce the catch-all provisions of its

subpoenas, and in accordance with *AT&T I*, instruct the parties to reengage in the constitutionally mandated process of negotiation and accommodation.

B. The Separation of Powers Requires that the Committee Narrow Its Catch-All Demands Before the President Can Be Required to Make Further Individualized Determinations of Executive Privilege.

Underscoring the critical importance of the negotiation and accommodation process, the Committee's decision to leapfrog that process and file suit before the parties could engage in a meaningful give-and-take over the catch-all documents means that literally thousands of redactions made in these documents to preserve the confidentiality of internal agency deliberations and attorney-client communications remain unresolved. *See* Defs.' Mem.-Opp. at 7-10. As Defendants have shown, the separation-of-powers principles articulated in *Cheney* prohibit the Committee saddling the President, his senior aides and advisors, and other high-level Executive Branch officials, with the task of determining whether to make individualized assertions of executive privilege over these thousands of pieces of information, unless and until the Committee narrows its demands to documents and information that are demonstrably pertinent and necessary to its investigation. *Id.* at 62-65.

The Committee has little to say in response, except to observe that *Cheney* "did not involve a Congressional subpoena," and that the Committee's catch-all demands for documents do not include presidential communications. Pl.'s Opp.-Reply at 55, 56. Neither observation has any bearing on the issue here. An overbroad subpoena or other request for information is just as capable of "interfer[ing] with the [Executive Branch] in the discharge of [its] duties and imping[ing] on the President's constitutional prerogatives," *Cheney*, 542 U.S. at 372-73, regardless of whether it was served by private litigants or a committee of Congress. The burden of making thousands of individualized determinations of executive privilege is the same, regardless of whether or not the underlying documents include presidential communications. Nor is Congress licensed by the Constitution to impose such burdens on the Executive Branch. "[T]he separation of powers doctrine requires that [one] branch not impair another in the performance of its constitutional duties." *Loving*, 517 U.S. at

757; *see also Cheney*, 542 U.S. at 382; *Mistretta v. United States*, 488 U.S. 361, 383-84 (1988); *Morrison v. Olson*, 487 U.S. 654, 685 (1988).[17]

Lacking a valid justification for its overreaching demands, the Committee tries to denigrate the President's protective assertion of privilege. The Committee claims to find it "troubling" that, in its view, Defendants may have "leveraged" the President's protective assertion of privilege to "withhold documents as to which there is not even a plausible confidentiality interest," and suggests "that the resort to privilege in this case was not undertaken with due regard for its constitutional significance." Pl.'s Opp.-Reply at 57-58. If nothing else, the Committee must be commended for its chutzpah.

As the Committee well knows, the President's protective assertion of privilege over the catch-all documents was necessitated by the sudden decision of the Committee and the House to hold the Secretary and the Attorney General in criminal contempt—with little warning, and even less room for negotiation—and then to refer them to the U.S. Attorney's Office for prosecution based on their alleged failure to comply with the Committee's subpoenas. *See* Defs.' Mem.-Opp. at 10-12, 63 n.20; Foti Decl. ¶¶ 35-45; Greer Decl. ¶¶ 39-41. Under these extreme circumstances, a Presidential assertion of privilege was essential to protect both the Secretary and the Attorney General from potential criminal liability under the contempt of Congress statutes, 2 U.S.C. §§ 192, 194, which multiple administrations have long understood do not apply (and could not constitutionally apply) to Executive Branch officials who withhold subpoenaed documents based on a Presidential claim of executive privilege. *See* Foti Decl. ¶ 45 & Exh. FF; Greer Decl. Exh. Z. The protective assertion of privilege in this case was also consistent with longstanding Executive Branch policy and practice, with full

[17] The Committee also remarks that "[n]either judicial nor Executive Branch precedent contemplates that [the] President . . . will personally review thousands of documents" in order to make the requisite assertions of privilege. Pl.'s Opp.-Reply at 56. Nor was it contemplated in *Cheney* that the Vice President himself would be required to review each potentially privileged document, or piece of information contained therein. *See Cheney*, 542 U.S. at 387-90. Nevertheless, the Supreme Court held that the "Executive Branch" could not be required "to bear the onus" of invoking privilege against "unnecessarily broad" subpoenas and document requests. *Id.* at 388, 389.

appreciation that executive privilege must be asserted only in the most compelling circumstances, after careful review. *See* Defs.' Mem.-Opp. at 63 n.20. Criticism of actions that Defendants necessarily took after the Committee's own headlong rush to contempt is, in a word, misplaced.

CONCLUSION

The Court should grant Defendants' motion to dismiss, or, in the alternative, enter summary judgment in Defendants' favor.

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