IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMITTEE ON WAYS AND MEANS, UNITED STATES HOUSE OF REPRESENTATIVES, *Plaintiff*, v. UNITED STATES DEPARTMENT OF THE TREASURY, *et al.* *Defendants*, DONALD J. TRUMP, *et al.*, *Defendant-Intervenors.*	No. 1:19-cv-1974 (TNM)

DEFENDANTS' AND DEFENDANT-INTERVENORS' MOTION TO DISMISS

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), Defendants and Defendant-Intervenors, through their undersigned counsel, respectfully move the Court to dismiss the above-captioned action. The grounds for this motion are set forth in the accompanying memorandum of points and authorities in support of the motion, as well as the declarations of Frederick W. Vaughan and Sunita Lough (and the exhibits thereto). A proposed order is submitted herewith.

Dated: September 6, 2019

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
DEFENDANTS' AND DEFENDANT-INTERVENORS' MOTION TO DISMISS

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INTRODUCTION

This case presents the basic question of whether the Committee on Ways and Means of the House of Representatives may conscript the Judiciary on its side of a dispute with the Executive Branch over a congressional demand for information. The Constitution's structure, fundamental principles of Article III jurisdiction, and basic statutory construction all make clear it cannot. And the Judiciary's resolution of that question will have profound implications for our system of government that will transcend the political identities of the parties as well as the merits of this dispute between the Committee and the Executive Branch—merits which would, if reached, present additional novel and difficult issues of constitutional law concerning inter-branch relationships, and the autonomy and independence of the Executive Branch at its highest levels, requiring an "especially rigorous" examination. *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997). Most critically, the Committee's attempt to enlist the Judiciary on its side of this inter-branch dispute goes beyond well-established limits on Article III jurisdiction, presenting "fundamental separation of powers concerns relating to the restricted role of the Article III courts in our constitutional system of government." *Walker v. Cheney*, 230 F. Supp. 2d 51, 53 (D.D.C. 2002).

Judicial resolution of disputes directly between the Executive Branch and Congress has been virtually unknown in American history and is inconsistent with the Constitution's most fundamental mechanism for securing liberty—dividing authority among co-equal branches separately equipped with "the necessary constitutional means and personal motives to resist encroachments of the other." *The Federalist* No. 51 (James Madison). It is thus no surprise that the Founders rejected judicial supervision of political disputes between the political branches. *See Raines*, 521 U.S. at 828; *Barnes v. Kline*, 759 F.2d 21, 54-57 (D.C. Cir. 1984) (Bork, J., dissenting). And the Supreme Court has explained that using judicial power to "plunge[ ]" the courts "into . . . bitter political battle[s] being waged" between the political branches, *Raines*, 521 U.S. at 827,

could "damage . . . public confidence that is vital to the functioning of the judicial branch," *id.* at 833, and ultimately diminish "[t]he irreplaceable value of the [judicial] power . . . [to protect] the constitutional rights and liberties of individual citizens." *Raines*, 521 U.S. at 829. In light of these "overriding and time-honored concern[s] about keeping the Judiciary's power within its proper constitutional sphere," *id.* at 820, this Court should reject the Committee's attempt to invoke judicial authority as fundamentally "[in]consistent with [our] system of separated powers." *Allen v. Wright*, 468 U.S. 737, 752 (1984).

First, this dispute does not present a "Case[]" or "Controvers[y]" under Article III, because the Committee's asserted impairment of its ability to make judgments about the need for legislation is too abstract and amorphous to constitute a legally cognizable injury, and the dispute at issue is not one traditionally thought to be capable of resolution through civil litigation. Instead, for more than a century, with only a few, modern exceptions, the time-honored mechanism for Congress to enforce its subpoenas has been the one Congress itself created: certification of non-compliance by Congress and referral to the United States Attorney for institution of contempt-of-Congress criminal proceedings. 2 U.S.C. §§ 192, 194. There is no constitutional or statutory basis for a Committee of the House of Representatives to take on the role of enforcing its subpoenas in the Federal courts where the Executive Branch has decided not to do so. If Congress is dissatisfied with the Executive Branch's response to its subpoena, its recourse is the constitutionally mandated accommodation process and legislative tools assigned by the Constitution, not the deployment of lawyers wielding the Federal Rules of Civil Procedure.

Second, the Court lacks statutory jurisdiction. Congress has enacted a statute conferring subject matter jurisdiction over some, but not all, subpoena enforcement actions brought by the Senate and its committees, but Congress has not enacted a comparable source of subject matter jurisdiction for subpoena enforcement suits brought by committees of the House of

Representatives. The Committee cannot end-run these carefully crafted limitations by invoking the general grant of federal question jurisdiction under 28 U.S.C. § 1331.

Third, the Court should refrain from adjudicating this dispute so the parties can undertake the process of negotiation and mutual accommodation through which the elected branches for more than 200 years have resolved their recurrent disputes over access to information. The Committee has yet to genuinely explore the potential for accommodation of its professed interest in information regarding mandatory Internal Revenue Service ("IRS") audits of Presidential tax returns, and Defendants stand ready to engage in the accommodation process. If the Committee is, as it claims, truly interested in understanding how the IRS administers the Presidential audit process, then it has only scratched the surface of information available to inform that inquiry.

Finally, even if this dispute were justiciable, the Committee fails to state a claim on which relief can be granted. The principal claims asserted in the Complaint—for "subpoena enforcement" and enforcement of section 6103(f)—are deficient because Congress has not enacted a cause of action that would authorize the Committee to enforce those requests through a civil lawsuit. Indeed, where Congress has intended to create a cause of action in comparable circumstances, it has done so expressly and with carefully delineated limitations, as it did for subpoenas issued by the Senate Select Committee during the investigation of the Nixon administration, Pub. L. No. 93-190, 87 Stat. 736 (1973), and for certain informational requests issued by the Comptroller General, 31 U.S.C. § 716(a). But no such cause of action exists under section 6103(f), and although Congress has repeatedly considered whether to enact a cause of action for the House of Representatives to enforce its subpoenas in court, it has declined to do so. The Administrative Procedure Act ("APA") claims also fail because Congress has precluded judicial review of congressional informational requests under the APA through the enactment of these and other statutes specifying when and how such informational requests (purportedly) may

be enforced. Moreover, failing to provide information to a legislative body is not reviewable "agency action" under the APA, nor is a Congressional committee a "person" entitled to sue under its provisions. Finally, given the weighty constitutional questions implicated by the Committee's unprecedented request for the tax information of a sitting President, Plaintiff's mandamus and "ultra vires" claims are untenable as well.

For these and the reasons set forth below, this case should be dismissed.

BACKGROUND

I. Statutory and Regulatory Background

A. History of Section 6103 of the Tax Code.

Since the late 1800s, Congress has endeavored to protect the privacy interests of federal taxpayers. *See generally* George K. Yin, Preventing Congressional Violations of Taxpayer Privacy, 69 Tax Lawyer 103, 105, 119-136 (2015) [hereinafter "Preventing Congressional Violations"].[1] During the period following the enactment of the first personal income tax in 1862, the tax laws permitted unrestricted public access to individual taxpayer return information—a system that drew criticism for invading privacy rights and discouraging voluntary tax reporting. *Id.* at 154. Accordingly, in 1894, upon reenactment of the federal income tax, Congress made it a misdemeanor to disclose certain tax return information outside of the tax agency. *Id.* at 119. By 1921, Congress had tightened that protection to permit inspection of tax information "only by order of the President under rules prescribed by the Treasury Secretary." *Id.* (noting that "complete secrecy of returns was the order of the day unless the President ordered otherwise").

A few years later, Congress adjusted this framework to provide a direct right of access to tax return information for certain congressional committees. The 1924 act provided, in relevant part, that "the Committee on Ways and Means of the House of Representatives, the Committee on

[1] *Available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2628193.

Finance of the Senate, or a special committee of the Senate or House, shall have the right to call on the Secretary of the Treasury for, and it shall be his duty to furnish, any data of any character contained in or shown by the [tax] returns . . . that may be required by the committee[.]" Revenue Act of 1924, Pub. L. No. 68-176, § 257(a), 43 Stat. 253, 293 (1924).

Two years after this, however, in response to criticism that the 1924 amendment permitted Congressional committees to indulge "their malice or curiosity by pawing over the tax returns of every person and corporation, and making such use of the information as they see fit," Congress amended the law again. Preventing Congressional Violations, 69 Tax Lawyer at 125-26 (citation omitted). The 1926 amendment narrowed the provision in two ways: first, it limited access by nontax committees to "select" committees "specially authorized to investigate returns by a resolution of the Senate or House, or a joint committee so authorized by concurrent resolution." *Id.* at 126. Second, it required any committee to sit in executive session to receive the information. *Id.*

In 1976, Congress tightened the disclosure rules yet again in response to "publicity regarding possible misuse of return information" by the Nixon Administration and continued concerns that weak confidentiality protocols could discourage voluntary compliance with the tax system. Joint Committee on Taxation, Background Regarding the Confidentiality and Disclosure of Federal Tax Returns ("JCT Report") at 6 (Feb. 4, 2019);[2] *see also* S. Rep. No. 94-938, pt. 1, at 19, 317-18 (1976). Whereas tax returns had previously been deemed "public records," the 1976 act removed that designation and provided expressly that tax returns (and return information) "shall be confidential." Pub. L. No. 94-455 § 1202, 90 Stat. 1520, 1667 (1976), *codified at* 26 U.S.C. § 6103(a). Congress also codified the exceptions to nondisclosure—which previously had existed by virtue of regulation—and removed the ability of the Secretary or the President to

[2] *Available at* https://www.jct.gov/publications.html?func=startdown&id=5159.

promulgate new exceptions. *See* Preventing Congressional Violations, 69 Tax Lawyer at 131. That change eliminated Congress's oft-used practice of seeking access to tax returns by special order of the President. *Id.* at 130. The Senate Report explained that, "[w]hile the Congress, particularly its tax-writing committees, requires access in certain instances to returns and return information in order to carry out its legislative responsibilities, it was decided that the Congress could continue to meet these responsibilities under more restrictive disclosure rules than those provided under prior law." S. Rep. No. 94-938, pt. 1, at 320. The 1976 amendments also increased the civil and criminal penalties for certain unauthorized disclosures. 26 U.S.C. § 6103(p)(4).

B. The Current Framework.

The general framework established in 1976 persists today. Section 6103 provides that "tax returns" and "return information" "shall be confidential and, except as authorized by [the Internal Revenue Code] . . . no officer or employee of the United States . . . shall disclose any return or return information obtained by him in any manner[.]" 26 U.S.C. § 6103(a). "Return" and "return information" (collectively, "tax information") are defined broadly to encompass personal information collected by the IRS relating to tax reporting and tax administration. 26 U.S.C. § 6103(b)(1)-(2). A willful unauthorized disclosure of tax information is a felony, *id.* § 7213(a)(1)-(2), and a taxpayer whose information has been mishandled may, under certain circumstances, seek damages, *id.* § 7431.

The Secretary and the IRS Commissioner are the "gatekeepers of federal tax information." *Tax Analysts v. IRS*, 117 F.3d 607, 613 (D.C. Cir. 1997). Section 6103 sets forth "thirteen tightly drawn categories of exceptions" to the confidentiality of return information. *Elec. Privacy Info. Ctr. v. IRS*, 910 F.3d 1232, 1237 (D.C. Cir. 2018); *see* 26 U.S.C. § 6103(c)–(o). The exception for disclosure to congressional committees set forth in section 6103(f) is the exception at issue in this lawsuit. As relevant here, subsection (f) provides that, upon written request from the

Committee on Ways and Means of the House of Representatives, the Committee on Finance of the Senate, or the Joint Committee on Taxation (collectively, the "tax committees"), the Secretary "shall furnish" such committee with any specified tax information, except that, absent consent of the taxpayer, any such information "which can be associated with . . . a particular taxpayer shall be furnished to such committee only when sitting in closed executive session." 26 U.S.C. § 6103(f)(1). Tax information provided pursuant to this provision is generally in the form of statistical information or bulk master files. *See, e.g.*, JCT Report, app. C, at 3.

II. This Lawsuit

A. Prior Efforts to Compel Release of the President's Tax Returns.

During the 2016 presidential election campaign, then-candidate Donald J. Trump chose not to publicly release his tax returns. That choice quickly became a campaign issue, with his principal opponent charging that "[h]e refuses to do what every other presidential candidate in decades has done." ECF No. 1 ("Compl.") Ex. G ("April 23 Letter"), app. B, at 1; Congressional Committee's Request for the President's Tax Returns Under 26 U.S.C. § 6103(f) ("OLC Op."), 43 O.L.C. Op. __, at *7.[3] After the election, his political opponents continued to seek his tax returns. Days after the President took office, Representative Bill Pascrell, Jr., then a minority-party Member of the Ways and Means Committee, suggested that the Committee use its authority under section 6103(f)(1) to obtain the President's tax returns and "submit [them] to the House of Representatives—thereby, if successful, making them available to the public." April 23 Letter, app. A, at 1 (citing Letter for Kevin Brady, Committee Chairman, from Bill Pascrell, Jr. (Feb. 1, 2017), at 2). The House minority leadership took up the refrain, calling for the Committee "to demand [President] Trump's tax returns from the Secretary of the Treasury" and "hold a committee

[3] *Available at* https://www.justice.gov/olc/opinion/congressional-committee-s-request-president-s-tax-returns-under-26-usc-6103f.

vote to make those tax returns public." April 23 Letter, app. B, at 4; OLC Op. at 8 (citing Tr. of House Democratic Leadership Press Conference at 2017 Issues Conference Feb. 8, 2017).

In March 2017, Rep. Pascrell and then-Ranking Member Richard Neal introduced a resolution to direct the Secretary to provide the Committee with a decade of President Trump's tax returns. The resolution was voted down as an "abuse of authority" and "an invasion of privacy." H.R. Rep. No. 115-73, at 3 (2017). The Committee concluded that "the purpose of this resolution is to single out one individual," and explained that, if adopted, it "would be the first time the Committee exercised its authority to wade into the confidential tax information of an individual with no tie to any investigation within our jurisdiction." *Id.* Ranking Member Neal and Rep. Pascrell filed dissenting views condemning the President for "rebuk[ing] over 40 years of tradition [in] refus[ing] to release his individual tax returns to the public," and reiterating their "steadfast . . . pursuit to have [the President's] individual tax returns disclosed to the public." *Id.* at 8. In July 2017, Rep. Pascrell and Ranking Member Neal again introduced a similar resolution, which was voted down after the Committee concluded that the resolution would effectively direct the Secretary to "break current law by violating the confidentiality of tax return information." H.R. Rep. No. 115-309, at 4 (2017).

Political efforts to force disclosure of the President's tax returns continued throughout the 115th Congress.[4] Shortly before the mid-term elections, then-Minority Leader Nancy Pelosi announced that if her party won a majority in the House, demanding the President's tax returns would be "one of the first things we'd do." April 23 Letter, app. A, at 3.

[4] *See* OLC Op. at 9-10 (describing various resolutions, public statements, letters, and proposed amendments to pending bills); *see also* April 23 Letter, app. B. Various justifications were given for these efforts, including that they would require the President to "honor tradition," show "what the Russians have on Donald Trump," reveal a potential "Chinese connection," inform tax reform legislation, provide the "clearest picture of [the President's] financial health," and expose any alleged emoluments received from foreign governments. *See* April 23 Letter app. A, at 3-4.

B. Chairman Neal Invokes Section 6103(f) to Demand the President's Tax Returns.

After the 2018 elections, now-Chairman Neal confirmed that he would use his new authority to seek disclosure of the President's tax returns because "the public has reasonably come to expect that presidential candidates and aspirants release those documents." April 23 Letter, app. B, at 39 (citing Mark Sullivan, Powerful Ways and Means Chairman Neal to Pursue Trump's Tax Returns, Telegram & Gazette, Jan. 23, 2019[5]). The Chairman explained that "[w]e are now in the midst of putting together a case" to obtain the President's tax returns, but cautioned that "[w]e need to approach this gingerly and make sure the rhetoric that is used does not become a footnote to the court case." *Id.*

The Ways and Means Subcommittee on Oversight then held a hearing on February 7, 2019, to consider "whether a President, vice president, or any candidate for these office[s] should be required by law to make their tax return[s]" public. Legislative Proposals and Tax Law Related to Presidential and Vice-Presidential Tax Returns: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways & Means, 116th Cong., Serial No. 116-3, at 8 (Feb. 7, 2019) (statement of Chairman Lewis). In preparation for that hearing, the Joint Committee on Taxation prepared a report analyzing, *inter alia*, disclosure of tax returns by past Presidents, "instances in which Congress reviewed Federal tax information as part of its duties," and "the extent to which [such] information was provided to the public." JCT Report at 2. The Congressional Research Service also prepared a report analyzing the Committee's authority not only to obtain the President's tax records, but to release them to the public. *See generally* David Carpenter *et al.*, Cong. Research Serv., Congressional Access to the President's Federal Tax Returns (Mar. 15, 2019).[6]

[5] *Available at* https://www.telegram.com/news/20190123/powerful-ways-and-means-chairman-neal-to-pursue-trumps-tax-returns.

[6] *Available at* https://fas.org/sgp/crs/secrecy/LSB10275.pdf.

On April 3, 2019, Chairman Neal announced that the Committee had "completed the necessary groundwork for a request of this magnitude" and sent a letter to IRS Commissioner Charles Rettig invoking section 6103(f) to request that, within one week, the IRS produce tax returns and audit information for the President and eight related business entities for tax years 2013-2018. Compl. Ex. A ("April 3 Neal Letter") at 1-2. The Chairman stated that the information was necessary for the Committee to determine the "scope" of examinations of Presidential tax returns under the IRS policy mandating audits of Presidential income-tax returns, as set forth in the Internal Revenue Manual (the "Presidential audit program"). *Id.* at 1.

On April 10, 2019, the Secretary sent a letter to Chairman Neal remarking upon the unprecedented nature of the Chairman's request, and observing that the Committee had previously determined that the request was an "abuse of authority" that would "'set a dangerous precedent by targeting a single individual's confidential tax returns' . . . for political reasons," a view also shared by the Senate Finance Committee. Compl. Ex. D. The Secretary explained that the request "raises serious issues concerning the constitutional scope of Congressional investigative authority" with implications that "could affect protections for all Americans against politically motivated disclosures" having "no connection to ordinary tax administration." *Id.* In light of these concerns, the Secretary stated that he intended to consult with the Department of Justice "to ensure that our response is fully consistent with the law and the Constitution." *Id.* at 3.

On April 13, 2019, the Chairman responded that the Department could not "second guess the motivations of the Committee" and set a new deadline of April 23 to provide the requested information. Compl. Ex. E. On April 23, the Secretary informed the Committee that he was continuing to consult with the Department of Justice. April 23 Letter at 1. He reiterated that the Chairman's request for "the returns of a single individual taxpayer" was unlike the "overwhelming majority of [congressional] requests for tax return information," which "seek statistical data to

inform the drafting of tax legislation," and further noted that the asserted purpose was at odds with what the Chairman had "repeatedly said is the request's intent: to publicly release the President's tax returns." *Id.* at 4-5. In support, the Secretary attached 47 pages of appendices chronicling "a long-running, well-documented effort to expose the President's tax returns for the sake of exposure." *Id.* at 3; *see also id.* apps. A & B. He also noted the lack of fit between the requested tax information (most of which predates the President's time in office) and the Chairman's newly-acquired interest in the presidential audit process. *Id.* at 4-5. The Secretary emphasized, however, that "[t]o the extent the Committee wishes to understand, for genuine oversight purposes, how the IRS audits and enforces the Federal tax laws against a President," the Department was ready to "provid[e] additional information on the mandatory audit process." *Id.* at 5.

On May 6, after consulting with the Department of Justice's Office of Legal Counsel, the Department denied the Committee's requests. *See* Compl. Exs. I, J.[7] In a letter to Chairman Neal, Secretary Mnuchin explained that because (i) the Committee's constitutional authority to request tax information under section 6103(f) is bounded by the requirement that such a request serve a legitimate legislative purpose, and (ii) the Secretary, on advice of OLC, had determined that the Committee's request lacked such a legitimate purpose, he was not authorized to disclose the requested tax information. *Id.* at 1. But the Secretary renewed his offer to "provide information concerning the Committee's stated interest in how the IRS conducts mandatory examinations of Presidents[.]" *Id.*

Four days later, Chairman Neal served subpoenas on the Secretary and Commissioner Rettig for largely the same information contained in his prior section 6103(f) request. In a letter accompanying the subpoenas, the Chairman offered a new reason for seeking the information: "the Committee wants to be sure that IRS employees who determine the scope of the President's

[7] OLC subsequently memorialized its advice in a published opinion. *See supra* note 3.

audit, or who determine whether to continue previously-initiated audits, are protected in the course of their work." Compl. Ex. K at 1-2. But the Chairman continued to reject the Department's "offer for a briefing" on the operation of the Presidential audit program, stating that "[a] briefing . . . is not a substitute for the requested tax returns[.]" *Id.* at 3. On May 17, 2019, the Department declined to produce the records sought by the Committee. Compl. Ex. N. The Secretary once again offered, however, to provide "information that directly bears upon what the Committee has stated to be its legislative interest in this subject," namely, the scope and operation of the Presidential audit program. *Id.*

C. The June 10 Briefing and Aftermath.

On May 22, 2019, Committee staff sent an email to the Department inquiring about its earlier proposals to brief the Committee on the Presidential audit process. Decl. of Fritz Vaughan ("Vaughan Decl.") ¶ 30 & Ex. J. The Department responded on May 24, 2019, that it was willing to provide a detailed briefing. *Id.* ¶ 33 & Ex. J. The Committee declined the Department's invitation to specify in advance particular aspects of the program in which it was purportedly most interested; the briefing, nearly four hours long, took place on June 10, 2019. *Id.* ¶¶ 34, 42, 48. Various questions posed by Committee staff sought information concerning President Trump's tax returns. No member of the Committee attended the briefing.

Thereafter, on June 13, 2019, Committee staff sent the Department a list of nearly 300 questions, all of which had been prepared before the briefing, and many of which the Department had answered at the briefing. The Department asked the Committee to specify which answers it wanted prioritized (and in particular, which questions it believed the Department had not already answered), but Committee staff did not do so. Numerous questions provided by the Committee sought information specifically concerning President Trump's returns. On June 28, 2019, Chairman Neal sent a letter to Secretary Mnuchin and Commissioner Rettig that was critical of the

supposedly "limited" information provided during the June 10 briefing, but did not seek further information, and instead reiterated the Committee's demand for the President's tax returns and return information. Two business days later (and without awaiting a response), the Committee filed this action. *Id.* ¶¶ 56-57.

The Complaint asserts eight causes of action: one count for subpoena enforcement (count I); four counts under the APA (counts II-V); one count seeking a writ of mandamus (count VI); one count directly under 26 U.S.C. § 6103(f) (count VII); and one count seeking nonstatutory review of alleged ultra vires action (count VIII). As relief, the Committee seeks a declaration and injunction compelling the Department to produce the requested tax returns and return information.

LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(1), a plaintiff seeking to invoke the jurisdiction of a Federal court bears the burden of establishing that the court has jurisdiction to hear its claims. *See U.S. Ecology, Inc. v. U.S. Dep't of Interior*, 231 F.3d 20, 24 (D.C. Cir. 2000).[8] Under Rule 12(b)(6), a plaintiff must allege "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

ARGUMENT

I. The Court Should Dismiss This Case for Lack of Subject Matter Jurisdiction.

The exertion of Federal judicial power to declare victors in inter-branch disputes of this nature would be inconsistent with the limits of Article III and the separation-of-powers principles that inform them. In addition, even if Article III permitted judicial resolution of this action,

[8] In deciding whether a plaintiff has met that burden, a court may consider materials outside the pleadings. *See, e.g.*, *Manning v. Fanning*, 211 F. Supp. 3d 129, 133-34 (D.D.C. 2016) (on Rule 12(b)(1) motion, court "has broad discretion to consider materials outside the pleadings if they are competent and relevant" (citation omitted)).

Congress has not enacted a statute granting district courts statutory jurisdiction over such suits. The Court should therefore dismiss this case for lack of subject-matter jurisdiction.

A. The Court Lacks Jurisdiction under Article III.

At the outset, Article III requires that the Committee "establish that [it] ha[s] standing to sue." *Raines*, 521 U.S. at 818. "Article III's standing requirements are 'built on separation-of-powers principles' and serve 'to prevent the judicial process from being used to usurp the power of the political branches.'" *U.S. House of Representatives v. Mnuchin*, 379 F. Supp. 3d 8, 12 (D.D.C. 2019) (McFadden, J.) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013)), *appeal pending*, No. 19-05176 (D.C. Cir.). To have standing, a plaintiff must allege a "*personal injury*" that is "legally and judicially cognizable," and the dispute must be one "traditionally thought to be capable of resolution through the judicial process." *Raines*, 521 U.S. at 818-19.

In this case, as in *Raines*, "the italicized words" are "key ones." 521 U.S. at 819. Like the plaintiffs in *Raines*, the Committee has not brought this suit to vindicate some "private right" (like lost wages) "to which [it] *personally* [is] entitled," *id.* at 812, 821; it has come to court to vindicate solely an asserted "institutional injury" at the hands of the Executive Branch, *id.*; *accord id.* at 829. In assessing whether that sort of "institutional injury" suffices to supply standing in the circumstances of this case, the Court must consider historical practice as well as the implications of adjudicating the suit for the separation of powers established by the Constitution. *See id.* at 819-20, 826-29. The balance among the branches is imperiled when one political branch asks the Judiciary to take its side in a dispute with the other. *See, e.g.*, *U.S. House of Representatives*, 379 F. Supp. 3d at 22 ("*Raines* and *Arizona State Legislature* [*v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015)] caution federal courts to consider the underlying separation-of-powers implications of finding standing when one political branch of the Federal Government

sues another."); *Chenoweth v. Clinton*, 181 F.3d 112, 116 (D.C. Cir. 1999) (*Raines* "require[s] us to merge our separation of powers and standing analyses").

1. This Dispute Is Not of the Type Traditionally Thought Capable of Resolution Through the Judicial Process.

The Committee lacks standing first and foremost because centuries of historical practice demonstrate that the injury the Committee claims is not one traditionally deemed capable of redress through the judicial process. *See Raines*, 521 U.S. at 819. Since the Founding, the Executive Branch and Congress have clashed over Congress's access to Executive Branch information. For nearly that entire period, the courts refused to elevate themselves into the referees of that "political turf war," *see U.S. House of Representatives*, 379 F. Supp. 3d at 10, recognizing that in a government of three co-equal branches, the two political branches must do battle in the political arena, not appeal to a superior branch of government for a definitive resolution. *See id.* ("The 'complete independence' of the Judiciary is 'peculiarly essential' under our Constitutional structure, and this independence requires that the courts 'take no active resolution whatever' in political fights between the other branches." (quoting *The Federalist* No. 78 (Alexander Hamilton))).

Raines underscores the importance of historical practice in determining whether a dispute is capable of judicial resolution. In *Raines*, six Members of Congress brought suit seeking to declare the Line Item Veto Act unconstitutional. 521 U.S. at 814-16. The plaintiffs contended that the Act had injured them by "alter[ing] the legal and practical effect of [their] votes" and "divest[ing] [them] of their constitutional role in the repeal of legislation." *Id.* at 816. The Court held that the legislators lacked a judicially cognizable injury. *Id.* at 818, 829-30. As a critical part of that analysis, the Court emphasized the absence of any "historical practice" supporting the suit. *Id.* at 826. "It is evident from several episodes in our history," the Court observed, "that in analogous confrontations between one or both Houses of Congress and the Executive Branch, no

suit was brought on the basis of claimed injury to official authority or power." *Id.* The fact that past Congresses never resorted to the courts to resolve these and other inter-branch disputes underscored that the suit was not one "traditionally thought to be capable of resolution through the judicial process." *Id.* at 819. *Raines* thus teaches that in evaluating whether a suit between the political branches is justiciable, a federal court must evaluate whether such a suit is consistent with historical practice. *See, e.g., U.S. House of Representatives*, 379 F. Supp. 3d at 15 ("Consider first historical practice and precedent.").

With respect to disputes concerning Congress's access to information held by the Executive Branch, the history is clear: for two hundred years after the founding, such suits simply did not exist, even though disputes between the Legislative and Executive Branches over congressional requests for information have arisen since the beginning of the Republic. In 1792, the House and President Washington clashed over records relating to a military expedition led by Major General St. Clair, *see Nixon v. Sirica*, 487 F.2d 700, 733-34 (D.C. Cir. 1973) (MacKinnon, J., concurring in part and dissenting in part); in a separate matter two years later, President Washington responded to a Senate request for documents by withholding "those particulars which, in [his] judgment, for public considerations, ought not to be communicated," *History of Refusals by Executive Branch Officials to Provide Info. Demanded by Congress: Part I – Presidential Invocations of Exec. Privilege Vis-À-Vis Congress*, 6 Op. O.L.C. 751, 753 (1982). In 1796, President Washington refused to provide the House certain documents relating to the negotiation of a treaty with Great Britain. Mark J. Rozell, *Executive Privilege: The Dilemma of Secrecy and Democratic Accountability* 34-35 (1994). President Jackson similarly withheld information in certain contexts, *id.* at 38, as did President Tyler, at which point "the House vigorously asserted and President Tyler as vigorously denied the right of the House to all papers in possession of the Executive relating to subjects over which the jurisdiction of the House extended." 3 Hinds,

Precedents of the House of Representatives § 1884. In 1886, during the administration of President Cleveland, the Attorney General refused a demand for all papers relating to the removal of a U.S. Attorney. *Id.* § 1894. Similar disputes arose throughout the Twentieth Century, including during the administrations of Presidents Eisenhower, *see, e.g.*, Tom Wicker, Dwight D. Eisenhower 70 (2002), Reagan, *see Assertion of Exec. Privilege in Response to Congressional Subpoena*, 5 Op. O.L.C. 27 (1981), Clinton, *see Assertion of Exec. Privilege Regarding White House Counsel's Office Docs.*, 20 Op. O.L.C. 2 (1996), and George W. Bush, *see Assertion of Exec. Privilege Over Comms. Regarding EPA's Ozone Air Quality Standards and Cal.'s Greenhouse Gas Waiver*, 32 Op. O.L.C. 1 (2008).

While these disputes are commonplace in our constitutional history, for nearly two hundred years, the Legislative Branch never invoked the power of the Judiciary to decide which side should win in a political battle with the Executive. Indeed, even outside the context of disputes between the two political branches, the House itself has questioned whether its demands for information are ever justiciable: the House Judiciary Committee observed, in the midst of a 1960 dispute with the New York Port Authority over access to information, that "[w]hether a congressional grant to a committee of power to seek a declaratory judgment concerning [the validity of a subpoena] would be valid . . . is open to serious question" because it would position the court as "an 'advisor' on constitutional matters" regarding the committee's authority. 106 Cong. Record 16089-16094 (daily ed. August 23, 1960)) ("1960 House Memo").[9] Thus, prior to recent decades, the House shared the understanding that it would resolve its disputes over access to information using the tools assigned by the Constitution. "In the end, given that the Article I and Article II Branches have been involved in disputes over documents for more than two hundred years, what is most

[9] A copy of this excerpt of the Congressional Record is attached as Exhibit A.

striking about the historical record is the paucity of evidence that the instant lawsuit is 'of the sort traditionally amenable to, and resolved by, the judicial process.'" *Walker*, 230 F. Supp. 2d at 73-74 (quoting *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 774 (2000)); *cf. Printz v. United States*, 521 U.S. 898, 905 (1997) (if "earlier Congresses avoided use of this highly attractive power, we would have reason to believe that the power was thought not to exist"). This Court should not permit the Committee to supplant the centuries-old process of political negotiation and accommodation with zero-sum litigation in federal court.[10]

2. The Committee Fails to State a Cognizable Injury.

The conclusion that this dispute lies beyond the judicial power is supported not only by the absence of any historical practice of suits of this kind, but also by analysis of the nature of the Committee's claims. The Committee lacks standing because it has not asserted an injury that is "legally and judicially cognizable," as Article III requires. *Raines*, 521 U.S. at 819; *see also Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953 (2019). In *Raines*, the Court stressed that, under Article III, the plaintiff's injury must be "personal," to ensure "that he has a 'personal stake' in the alleged dispute." 521 U.S. at 819 (citations omitted). Yet in *Raines*, the injuries asserted—alteration of the legal and practical effect of the plaintiffs' votes in Congress—constituted a form of institutional injury, "a loss of political power, not loss of any private right," which stemmed exclusively from their status as members of Congress. *Id.* at 821. Thus, their injury was "not claimed in any private capacity but solely because they [were] Members of Congress." *Id.*

[10] That concern is not hypothetical. As the New York Times recently reported, "the House [of Representatives] is going to court at a tempo never seen before," a trend that "could change [the constitutional order] in a way that . . . legal scholars view as dangerous" and "heighten politicization of the judiciary." Charlie Savage and Nicholas Fandos, *The House v. Trump: Stymied Lawmakers Increasingly Battle in the Courts*, The New York Times (Aug. 13, 2019).

Here, the Committee maintains that it has been injured in two respects. *See generally* Compl. ¶¶ 87-98. *First*, it asserts that Defendants' failure to disclose the President's tax returns "interferes with [its] statutorily mandated right of access to [that] information" under § 6103(f). *Id.* ¶ 94. *Second*, it alleges that without the President's tax returns, it "cannot evaluate the fairness and effectiveness of the Presidential audit program or engage in fully informed consideration of related legislative proposals," *id.* ¶ 91; *see also id.* ¶ 92. Neither of these purported harms is sufficiently "concrete and particularized" to satisfy Article III. *Raines*, 521 U.S. at 819.

The Committee cannot rely on a theory of "informational standing" because it has no institutional interest in confidential tax information for its own sake. To be sure, the Supreme Court has held that an individual "suffers an 'injury in fact' when [that person] fails to obtain information which must be publicly disclosed pursuant to a statute." *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 21 (1998) (citations omitted). But the "informational standing" cases involve statutes enacted by Congress to provide private persons with unqualified legal rights to information. *See Akins*, 524 U.S. at 21; *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449 (1989); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-374 (1982). The cases thus hew closely to the traditional common-law model of suits by individuals vindicating concrete personal interests. *See Raines*, 521 U.S. at 832-34 (Souter, J., concurring). Courts in this district, however, have rejected efforts to seize on those cases to transform a Congressional interest in information into the kind of particularized and concrete injury that Article III contemplates, *see Walker*, 230 F. Supp. 2d at 66 & n.10 (no informational injury to Comptroller General, an agent of Congress, when he is denied information despite an alleged statutory right); *Cummings v. Murphy*, 321 F. Supp. 3d 92, 106-07 (D.D.C. 2018) (same, as to individual members of Congress), *appeal pending*, No. 18-5305 (D.C. Cir.), and the Court should do likewise here.

The "legislative Powers" that the Constitution grants to Congress, U.S. Const. art. I, § 1, do not include a "'general' power to inquire into private affairs and compel disclosures." *McGrain v. Daugherty*, 273 U.S. 135, 173 (1927). Though an "implied" power "to secure needed information" is an "attribute of [Congress's] power to legislate," *id.* at 161, 175, the power is an "auxiliary" one that exists only as "necessary and appropriate to make [Congress's] express powers effective," *id.* at 173. "[T]here is no congressional power to expose for the sake of exposure," *Watkins v. United States*, 354 U.S. 178, 200 (1957), and "no [Congressional] inquiry is an end in itself," *id.* at 187.

Because the Constitution confers on Congress no freestanding right to information, Congress cannot grant the Committee the sort of unconditioned statutory "right" to information at issue in *Akins*, 524 U.S. at 21, *Public Citizen*, 491 U.S. at 449, or *Havens Realty*, 455 U.S. at 373-74—let alone make such a "right" enforceable in federal court. Moreover, Congress did not even attempt to create such unconditioned rights for itself in section 6103. On the contrary, section 6103(f) *restricts* disclosure of tax-return information to the committees that "*require*[] access in *certain instances* . . . to carry out [their] legislative responsibilities[.]" S. Rep. No. 94-938 pt. 1, at 320. The Committee, therefore, has no lawful interest in tax-return information for its own sake.

Lacking a freestanding right to tax-return information, the Committee must rely on an injury to its express legislative function. *See Bethune-Hill*, 139 S. Ct. at 1954 (legislative body lacked standing because the challenged action "does not alter [its] . . . role" in the legislative process). The only injury arguably stated by Plaintiff's allegation that Defendants have "interfere[d]" with its "statutorily mandated right of access to tax return information," Compl. ¶ 94, is thus a theoretical impairment of the House's ability to evaluate the need for and to formulate legislation. *See Walker*, 230 F. Supp. 2d at 67. That essentially is the second of the two theories of injury articulated by the Committee, Compl. ¶¶ 90-92; *see supra* at 19. The Committee

alleges that it has been "imped[ed]" from "evaluat[ing] . . . the Presidential audit program," and "engag[ing] in fully informed consideration of the need for related legislative proposals." Compl. ¶¶ 91-92.

But these alleged harms to the Committee's legislative function are similarly deficient. As the Supreme Court held in *Raines*, "abstract dilution of institutional legislative power" is insufficiently "concrete and particularized" to sustain standing. 521 U.S. at 819, 821, 825-26. The legislator plaintiffs in *Raines* alleged that the Line Item Veto Act had injured them by "alter[ing] the legal and practical effect of [their] votes" and "divest[ing] [them] of their constitutional role in the repeal of legislation." *Id.* at 816. The Court rejected that argument and further rejected the plaintiffs' reliance on *Coleman v. Miller*, 307 U.S. 433 (1939), reading it as standing at most for the proposition that state "legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been *completely nullified*." *Raines*, 521 U.S. at 823 (emphasis added).[11] The *Raines* Court instead held that such "abstract dilution of institutional legislative power" fell well short of the absolute "vote nullification" necessary to satisfy Article III's injury-in-fact requirement. *Id.* at 825-26, 830. Here, the Committee alleges that Defendants' failure to provide it with the President's tax returns has "impede[d]" its ability to assess whether legislation of one kind or another is needed. Compl. ¶ 92. The Committee's claim, then, is not even that the effectiveness of its members' votes has been impaired, but that the ability

[11] The *Raines* plaintiffs were differently situated from the plaintiffs in *Coleman* because they were *federal* legislators, meaning that their suit would present "separation-of-powers concerns . . . not present in *Coleman*." *Raines*, 521 U.S. at 824 n.8. For that reason, the Court expressly reserved the question whether *Coleman* would "ha[ve] [any] applicability to a similar suit brought by federal legislators." *Id.*; *see also Harrington v. Bush*, 553 F.2d 190, 204 n.67 (D.C. Cir. 1977) ("A separation of powers issue arises as soon as the *Coleman* holding is extended to United States legislators.").

of its members to formulate sound legislative judgments has to some unspecified degree been impaired. Thus, Plaintiff's assertion of injury is at least one step removed from the claimed dilution of legislative power that *Raines* rejected as insufficiently concrete to establish legislative standing.

In that regard, *Walker v. Cheney*, *supra*, bears significant resemblance to this case. In *Walker*, the Comptroller General, exercising his "broad authority to carry out investigations and evaluations for the benefit of Congress," brought suit to compel the release of documents concerning the composition and conduct of the Vice President's National Energy Policy Development Group. 230 F. Supp. 2d at 53-55. Applying the analysis required by *Raines*, *Walker* concluded that "the institutional injury [the Comptroller] suffer[ed] . . . [was] insufficient to confer standing." *Id.* at 66. Because the Comptroller sought the records at issue to "assist Congress in determining whether and to what extent future legislation, relating . . . to national energy policy or openness in government, may be appropriate," and in "conducting oversight of the executive branch's administration of existing laws," the alleged harm was "too vague and amorphous"—at most an impairment of Congress's general interests in lawmaking and oversight—and represented no more than an "abstract dilution of institutional legislative power," as in *Raines*. *Id.* at 67-68; *accord Cummings*, 321 F. Supp. 3d at 107-113.

The same analysis applies here. The Committee claims to seek the President's tax-return information in order to "assess[ ] the need for and merits of future legislative changes." *Walker*, 230 F. Supp. 2d at 67; *accord Cummings*, 321 F. Supp. 3d at 108 (noting that "Plaintiffs tie their injury directly to their constitutional duties as legislators"); *see* Compl. ¶¶ 90-92. In so doing, it invokes authority delegated to it so it might gather information, for Congress's benefit, to "assist Congress in the discharge of its legislating and oversight functions." *Walker*, 230 F. Supp. 2d at 67; *see Watkins*, 354 U.S. at 200. Yet if the Committee wants to "entangle the Court 'in a power

contest'" over access to the President's tax-return information, *House of Representatives*, 379 F. Supp. 3d at 22 (quoting *Raines*, 521 U.S. at 833), it must demonstrate, at a minimum, that concrete harm to the House's Article I powers is at stake. And just as in *Walker* and *Cummings*, the abstract injury the Committee asserts is insufficiently "'distinct and palpable'" to confer standing. *Walker*, 230 F. Supp. 2d at 67-68 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)).[12]

3. Lawsuits of This Kind Imperil the Constitution's Allocation of Power Among the Branches of the Federal Government.

The historical absence of congressional lawsuits seeking executive branch information is no coincidence. Such suits threaten the separation of powers and its system of checks and balances that has served the Nation well for 230 years, and "the law of Art. III standing is built on a single basic idea—the idea of separation of powers." *Raines*, 521 U.S. at 820 (internal quotation omitted); *see also U.S. House of Representatives*, 379 F. Supp. 3d at 22.

The Supreme Court made clear in *Raines* that our constitutional system contemplates a "restricted role for Article III courts," which is to protect "'the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action.'" 521 U.S. at 828-29 (citation omitted). "'It is this role, not some amorphous general supervision of the operations of government, that 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.* at 829. If it were otherwise, the federal courts would be "not the last but the first resort," *Barnes*, 759 F.2d at 53 (Bork, J., dissenting), *vacated sub nom.*, *Burke v. Barnes*, 479

[12] This Court's recent decision in *House of Representatives* reserved the question whether a congressional committee might, under certain circumstances, possess an injury that suffices to enforce its informational inquiries through a civil lawsuit. 379 F. Supp. 3d at 16-18 & 17 n.4. For the reasons just stated, Defendants submit that no such injury exists here.

U.S. 361 (1987), such that "the system of checks and balances [would be] replaced by a system of judicial refereeship," *Moore v. U.S. House of Representatives*, 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia, J., concurring in result), *abrogated by Raines*, 521 U.S. 811.[13]

It is, therefore, doubtful Congress could constitutionally endow itself or its committees with a general right of action against the Executive Branch even if it wanted to. As the Supreme Court has observed, the "power to seek judicial relief . . . cannot possibly be regarded as . . . in aid of the legislative function." *Buckley*, 424 U.S. at 138; *see also Springer v. Gov't of Philippine Islands*, 277 U.S. 189, 202 (1928) ("Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them[.]" (citing *Myers v. United States*, 272 U.S. 52 (1926))); *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 817 (1987) (Scalia, J., concurring) (Congress's "dependen[ce] on the Executive . . . for enforcement of the laws it enacts" is "a carefully designed and critical element of our system of Government"). Congress "cannot grant to an officer under its control"—or to a subcomponent of itself like a committee—"[power] it does not possess." *Bowsher v. Synar*, 478 U.S. 714, 726 (1986); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1224 (2015) (similar). Any other conclusion would invite Congress to use the courts, rather than its Article I tools, to resolve disagreements with the Executive Branch at the expense of the Constitution's carefully wrought framework. *See, e.g.*, *House of Representatives*, 379 F. Supp. 3d at 22.

Judicial resolution of political disputes might sometimes be more expedient than "political struggle and compromise," *Barnes*, 759 F.2d at 55 (Bork, J., dissenting), but the separation-of-

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

powers stands against expediency, not for it. Indeed, political struggle and compromise are its defining feature, not some defect to be removed or avoided. *See INS v. Chadha*, 462 U.S. 919, 959 (1983) ("[T]he Framers ranked other values higher than efficiency."); *Cummings*, 321 F. Supp. 3d at 117 ("[T]he fact that a political remedy is hard to achieve does not automatically swing open the door to the federal courts."). The process of negotiation and accommodation, even if contentious or difficult, protects the political branches from excessive judicial interference and the Judiciary from the undue politicization that would result from "repeated use of [its] power to negate the actions of the representative branches[.]" *Walker*, 230 F. Supp. 2d at 65.

The framers designed the Constitution to empower the political branches to resolve their differences themselves. *See Campbell v. Clinton*, 203 F.3d 19, 23 (D.C. Cir. 2000); *United States v. AT&T*, 567 F.2d 121, 127 (D.C. Cir. 1977) ("*AT&T II*"). That is why the Constitution provides Congress with numerous, powerful political tools. Congress can legislate change within the Treasury Department, *see McGrain*, 273 U.S. at 173-74, or slash the budget in an area of concern, *see Barenblatt v. United States*, 360 U.S. 109, 111 (1959), or bring its case to the people through the electoral process, *see id.* at 132-33. The availability of these remedies to redress any perceived institutional injury underscores why courts should not intervene in ways that would unsettle the allocation of powers. *See U.S. House of Representatives*, 379 F. Supp. 3d at 22 ("Congress has several political arrows in its quiver to counter perceived threats to its sphere of power.").

Moreover, if a committee of Congress can sue the Executive Branch on the basis of a claimed loss of power in a political dispute, then there is little question that the Executive Branch is equally entitled to sue Congress. *See Raines*, 521 U.S. at 828. Yet the House has vociferously contended that allowing lawsuits against it "at the behest of the President" would "rais[e] glaring separation of powers concerns," and is "precisely what the Framers of the Constitution wished to guard against." *Trump v. Committee on Ways & Means*, No. 19-2173, ECF No. 22, at 3 (D.D.C.

July 30, 2019); *see also Trump v. Committee on Ways & Means*, No. 19-2173, Hr'g Tr. at 47 (D.D.C. July 29, 2019) (counsel for the Committee: "I cannot emphasize enough that the framers did not intend [the] judiciary to be able to haul Congress into court and issue a decision against it.").[14] Thus, as the House sees things, it may enlist the Judiciary in its attacks on the Executive Branch, but "glaring separation of powers concerns" that the House "cannot emphasize enough" forbid the President or Executive Branch from doing the same in return. That is plainly not the law: permitting judicial resolution of these disputes only when Congress is the plaintiff would distort the balance of powers by furnishing Congress (and apparently only Congress) with a new weapon for inter-branch combat that the Constitution did not contemplate.

4. The House of Representatives Cannot Authorize a Lawsuit Without Specifically Voting to Do So.

Even if the dispute here could result in some form of injury sufficient to establish a justiciable case or controversy, the Committee has no standing to sue because it lacks the constitutionally required authority to seek redress for any such injury. Among the other reasons why the *Raines* plaintiffs lacked standing, the Supreme Court "attach[ed] some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in this action," 521 U.S. at 829; *cf. Bethune-Hill*, 139 S. Ct. at 1956 ("One House of [Virginia's] bicameral legislature cannot alone continue the litigation against the will of its partners in the legislative process."). In an attempt to demonstrate that they are suing with the authorization of the entire House, the Committee alleges that the Bipartisan Legal Advisory Group ("BLAG") voted to authorize this litigation. *See* Compl. ¶ 98. The BLAG consists of five members of Congress, of whom only three—Speaker Pelosi and Reps. Hoyer and Clyburn—voted to authorize this suit. *See also id.* ¶ 98 n.128. The vote of this small group is sufficient, the Committee says,

[14] An excerpt of this transcript is attached as Exhibit B.

because of a House resolution declaring that "a vote of the Bipartisan Legal Advisory Group to authorize litigation . . . is the *equivalent* of a vote of the full House of Representatives." *See* H. Res. 430 (emphasis added).[15] That is not adequate for constitutional purposes. The full House has not specifically authorized the filing of this lawsuit, and, in any event, authorization by the House does not create an Article III injury.

Most simply, the full House has not authorized this lawsuit. Nor has the full House determined that lack of access to the particular information at issue here would impair its legislative functions—a judgment that is, by its nature, case-specific. Just as the House could not by resolution delegate to a subset of its members the authority to pass legislation, *cf. Chadha*, 462 U.S. at 959 (Constitution reflects "unmistakable expression of a determination that legislation by the national Congress be a step-by-step, deliberate and deliberative process"), it cannot provide the BLAG blanket, pre-emptive authority to file whatever litigation it might devise. If lawsuits seeking to enforce congressional demands for information are ever justiciable, the Constitution requires at a minimum that the entire House authorize the suit. As Judge Mehta explained, "[i]nsisting on approval from the institution *as a whole* ensures that only fully considered inter-branch conflicts enter the judicial realm." *Cummings*, 321 F. Supp. 3d at 115 (emphasis added). Indeed, under the House's rules, compliance "with a subpoena issued by a committee or subcommittee . . . may be enforced *only as authorized or directed by the House*." House Rules, R. XI, cl. 2(m)(3)(C) (emphasis added), https://rules.house.gov/sites/democrats.rules.house.gov/files/116-1/116-House-Rules-Clerk.pdf. The D.C. Circuit has explained that such rules are

[15] On July 24, 2019, the House adopted House Resolution 509, which in turn adopted House Resolution 507. *See* H.R. Res. 509, 116th Cong. (2019). House Resolution 507 provided that the House "ratifies and affirms" certain investigations and subpoenas concerning the President, his family, and the White House, and related entities. *See* H.R. Res. 507, 116th Cong. (2019). It did not address the Ways and Means Committee's request for the President's tax returns or purport to approve the filing of this lawsuit.

necessary to prevent a "wayward committee [from] acting contrary to the will of the House" and to safeguard against "aberrant subcommittee or committee demands." *United States v. AT&T*, 551 F.2d 384, 393 & n.16 (D.C. Cir. 1976) ("*AT&T I*") (citing *Wilson v. United States*, 369 F.2d 198 (1966)). Relying on those principles, this Court has held that a prospective authorization to sue is inadequate even when that authorization is set forth in a *statute*. *See Walker*, 230 F. Supp. 2d at 69-70 ("[T]he highly generalized allocation of enforcement power to the Comptroller General twenty-two years ago hardly gives this Court confidence that the current Congress has authorized this Comptroller General to pursue a judicial resolution of the specific issues affecting the balance of power between the Article I and Article II Branches that have crystalized during the course of this dispute and lawsuit."); *see also Cummings*, 321 F. Supp. 3d at 116 (similar).

While a few post-*Raines* cases have (erroneously) permitted House committees to judicially enforce subpoenas against the Executive Branch, in every one of them the House voted to authorize the specific lawsuit.[16] Thus, in each case, it was apparent that a majority of the House had "fully considered" the issue, *Cummings*, 321 F. Supp. 3d at 115, and decided that the House should bring it before the judiciary. Here, by contrast, the House has not authorized this lawsuit in the same manner. The question was put not to all its members but only to five, and so the Court has no way of knowing whether the initiation of this suit actually reflects the will of the House as

[16] Before initiating suit in *Miers*, the House passed a resolution authorizing the Judiciary Committee to initiate lawsuits seeking to compel compliance "with any subpoena that is a subject of House Resolution 979 issued to such individual by the Committee as part of its investigation into the firing of certain United States Attorneys and related matters." H.R. Res. 980, 110th Cong. (2008); *see Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 71 (D.D.C. 2008) (House "explicitly authorized this suit"). Similarly, before filing suit in *Holder*, the House passed a resolution authorizing the Oversight Committee to initiate lawsuits seeking to compel compliance "with any subpoena that is a subject of the resolution accompanying House Report 112-546 issued to him by the Committee as part of its investigation into the United States Department of Justice operation known as 'Fast and Furious' and related matters." H.R. Res. 706, 112th Cong. (2012); *see Comm. on Oversight & Gov't Reform v. Holder*, 979 F. Supp. 2d 1, 21 (D.D.C. 2013) ("[T]he House of Representatives has specifically authorized the initiation of this action to enforce the subpoena. Twice.").

a whole. As in *Cummings*, "Plaintiffs did not secure approval from the full House before bringing suit—indeed, they did not even try to." *Id*. at 116. And as in *Cummings*, this Court should not reach out to resolve an inter-branch conflict when one of the branches has not clearly voiced its desire to join the field.

To be clear, for all the reasons explained in Parts I.A.1-3, *supra*, even if the full House had voted to authorize this suit, the Committee would still lack standing. *See Cummings*, 321 F. Supp. 3d at 115 ("None of this is meant to suggest that authorization to sue, by itself, is enough to confer standing."). Nonetheless, as *Cummings* recognized, "there are good reasons for courts to look to the presence of authorization as a necessary, even if not sufficient, factor in evaluating standing in cases that pit the Executive and Legislative Branches against one another." 321 F. Supp. 3d at 115. The lack of House authorization for this suit is alone enough to defeat jurisdiction.

B. The Court Lacks Statutory Subject Matter Jurisdiction.

Even if the Committee's suit were a justiciable case or controversy under Article III—and it is not—that would not end the Court's jurisdictional analysis. While Article III limits the outer bounds of potential jurisdiction, Congress must also pass a statute conferring jurisdiction. *See Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 366 F. Supp. 51, 55 & n.5 (D.D.C. 1973) (it is "settled that federal courts may assume only that portion of the Article III judicial power which Congress, by statute, entrusts to them" (citing cases)). It has not done so.

The Committee points to two statutory bases for subject-matter jurisdiction: the federal-question statute, 28 U.S.C. § 1331, and the mandamus act, 28 U.S.C. § 1361. Compl. ¶ 10. But these general provisions do not apply to this sort of extraordinary inter-branch litigation. Rather, Congress has enacted only certain limited provisions purporting to provide subject matter jurisdiction over informational disputes between Congress and the Executive Branch, and those statutes do not apply here. For example, 28 U.S.C. § 1365 purports to create jurisdiction over

certain Senate subpoena enforcement actions, but excludes cases concerning "any subp[o]ena or order issued to an officer or employee of the executive branch of the Federal Government acting within his or her official capacity, . . . if the refusal to comply is based on . . . a governmental privilege or objection the assertion of which has been authorized by the executive branch of the Federal Government." *See also* Pub. L. No. 93-190, 87 Stat. 736 (Dec. 18, 1973) (jurisdiction for the Senate Select Committee investigating the Watergate scandal to judicially enforce its subpoenas). Notably, in 1996, Congress amended 28 U.S.C. § 1365 to add language providing that the statute would confer jurisdiction in cases in which an executive official's refusal to comply was based upon a *personal* privilege. *See* Pub. L. No. 104-292, § 4, 110 Stat. 3459 (Oct. 11, 1996). Congress enacted that amendment some twenty years *after* it amended 28 U.S.C. § 1331 to eliminate the amount-in-controversy requirement for suits against the government and government officials, *see* Pub. L. No. 94-574, 90 Stat. 2721 (Oct. 21, 1976), and some sixteen years *after* it amended § 1331 to remove the amount-in-controversy requirement for all federal question cases, *see* Pub. L. No. 96-486, § 2(a), 94 Stat. 2369 (Dec. 1, 1980). If § 1331 already applied to all suits by Congress seeking to enforce its demands for information—as the Committee claims here—then the 1996 amendments to § 1365 would have been entirely superfluous.

But these amendments were not superfluous, of course, because the specific provisions addressing federal subject matter jurisdiction over congressional information access suits control over the general federal question statute. *See, e.g.*, *Howard v. Pritzker*, 775 F.3d 430, 441 (D.C. Cir. 2015) ("Specific terms prevail over the general in the same or another statute which otherwise might be controlling." (citation omitted)). Indeed, in 1977, after Congress removed the amount-in-controversy requirement from § 1331 for actions brought against the United States and its officials, it openly acknowledged that it still lacked general authority to enforce subpoenas via civil actions filed in district court. *See* S. Rep. 95-170, at 16 (1977) ("Presently, 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."). Nor is that surprising: the 1976 amendment was not intended to vest the courts with plenary authority to hear disputes between Congress and the Executive Branch; rather, it was meant to remove a "technical barrier[] to the consideration on the merits of *citizens'* complaints against the Federal Government," H.R. Rep. No. 94-1656, at 3 (1976); *see* S. Rep. No. 94-996, at 2 (1976), which had precluded "aggrieved *private* persons" from bringing their claims. H.R. Rep. No. 94-1656, at 15 (emphasis added); *see* S. Rep. No. 94-996, at 15. Neither of the reports accompanying the legislation discussed congressional subpoena enforcement actions like this one. *See* H.R. Rep. No. 94-1656; S. Rep. No. 94-996. That Senate report also recognized 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." *Id.* at 89; *see also In re Application of the U.S. Senate Permanent Subcomm. on Investigations*, 655 F.2d 1232, 1238 (D.C. Cir. 1981) ("Prior to 1978 Congress had only two means of enforcing compliance with its subpoenas: a statutory criminal contempt mechanism and the inherent congressional contempt power." (footnotes omitted)).

In providing jurisdiction over some congressional subpoena-enforcement actions but not others, Congress has confirmed that a specific grant of jurisdiction is necessary before a body of Congress can bring this sort of suit. *See Keene Corp. v. United States*, 508 U.S. 200, 207 (1993) ("Congress has the constitutional authority to define the jurisdiction of the lower federal courts, . . . and, once the lines are drawn, limits upon federal jurisdiction . . . must be neither disregarded nor evaded." (citations omitted)). Reading either the general federal question statute or the mandamus statute to authorize this suit would render pointless both 28 U.S.C. § 1365 and the precise limitations therein, a result that cannot be squared with "the canon against interpreting any

statutory provision in a manner that would render another provision superfluous." *Bilski v. Kappos*, 561 U.S. 593, 607-08 (2010). Because this case falls outside the bounds of the carefully drawn jurisdictional regime Congress has created, the Court lacks statutory subject matter jurisdiction. *See In re Application of the U.S. Senate Permanent Subcomm.*, 655 F.2d at 1238 & n.28 (explaining that the Act creating § 1365 is "relatively simple" and "does not . . . include civil enforcement of subpoenas by the House of Representatives"); Cong. Research Serv., Cong.'s Contempt Power and the Enforcement of Cong. Subpoenas 22-23 (2012) ("Although the Senate has existing statutory authority to pursue such an action, there is no corresponding provision applicable to the House.").[17]

C. Decisions Suggesting that Subpoena Enforcement Suits Are Justiciable Either Have Been Abrogated By *Raines v. Byrd* or Were Wrongly Decided.

Notwithstanding the numerous reasons why suits of this kind lie far afield of the courts' jurisdiction, certain decisions have suggested that they may be justiciable. To the extent those decisions predate *Raines*, they are no longer good law. And those decisions post-dating *Raines* were, with respect, wrongly decided.

1. Cases Pre-Dating *Raines v. Byrd* Are No Longer Good Law.

Prior to the Supreme Court's decision in *Raines*, the D.C. Circuit occasionally suggested in passing that Congress might have standing to seek judicial enforcement of subpoenas against the Executive Branch. *See U.S. House of Representatives*, 379 F. Supp. 3d at 17 (noting this case law). In particular, in *AT&T I*, the Executive Branch brought suit against a private telephone company to prevent the release of national security information subpoenaed by a House subcommittee, and the House, by resolution, designated the subcommittee chairman to intervene on behalf of the House and appeal the judgment. 551 F.2d at 391. The Court of Appeals observed

[17] *Available at* https://crsreports.congress.gov/product/pdf/RL/RL34097.

in a single sentence, without citation, that "the House as a whole has standing to assert its investigatory power, and can designate a member to act on its behalf." *Id.* And in *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974) (en banc), the Court of Appeals reached the merits of a Senate committee suit against the President to compel the production of tape recordings, without addressing, much less deciding, whether the Senate committee had standing. *Id.* at 725. Neither case discusses the jurisdictional limits imposed by Article III, and the Supreme Court has been clear that "drive-by jurisdictional rulings of this sort . . . have no precedential effect." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998).

Moreover, to the extent *AT&T I* and *Senate Select Committee* suggest that Congress has standing to sue the Executive Branch, these decisions do not survive *Raines*. As the D.C. Circuit has recognized, the permissive doctrine of legislative standing that prevailed at the time of *AT&T I* and *Senate Select Committee* has been eclipsed by *Raines* and its progeny, which have "place[d] greater emphasis upon the separation of powers concerns underlying the Article III standing requirement." *Chenoweth*, 181 F.3d at 114. Like the broader doctrine of legislative standing that *Raines* explicitly repudiated, cases such as *AT&T I* and *Senate Select Committee* are now "untenable" as authority for Congress's standing to sue the Executive Branch. *Id.* at 115.

But even if it survives *Raines*, *AT&T I* is distinguishable. Although the court characterized the case as a "clash of the powers of the legislative and executive branches," the suit was brought by the Executive Branch against a private entity concerning the latter's "legal duty" as the recipient of a congressional subpoena. 551 F.2d at 389. The court thus did not hold in *AT&T* that courts have jurisdiction over congressional subpoena enforcement actions brought against Executive Branch officials. Because the case required a determination of the legal obligations of a private party to the case to disclose information pursuant to a congressional subpoena, the case hinged on an "adjudication of individual rights" that is absent here. *Cf. Barnes*, 759 F.2d at 67 (Bork, J.,

dissenting) ("There was, in *Chadha* as in the cases the Court cited, an aggrieved individual who sought relief that ran only against the Executive Branch: that satisfied the injury-in-fact, causation, and redressability requirements of article III."). Moreover, in *AT&T I*, by the time the D.C. Circuit commented on the House's standing, the district court had quashed the subpoena. *See* 551 F.2d at 385. Although quashing a subpoena likely does not constitute "nullification" of a legislative interest within the meaning of *Coleman* as construed by *Raines* and *Bethune-Hill* (many years after *AT&T I*), there is no question that the House's ability to issue subpoenas or request information is not nullified where, as here, the subpoena or other legislative request remains in force and simply has not been satisfied. In short, *AT&T I* involved "at most" whether the House could appeal from a district court order invalidating its request for information in a case that was properly in court, and that decision should not be extended to this much different factual context, especially in light of *Raines* and *Bethune-Hill*. *Cf. Raines*, 521 U.S. at 823-26 (narrowly construing *Coleman*).[18]

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

Following *Raines*, neither the D.C. Circuit nor the Supreme Court has suggested that Congress has standing to sue the Executive Branch, to enforce information demands or otherwise. Yet twice in the past eleven years, courts in this district have held such disputes justiciable, over the objections of administrations of both parties. *See Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008); *Comm. on Oversight & Gov't Reform v. Holder*, 979 F. Supp. 2d 1 (D.D.C. 2013). Those cases were wrongly decided, and this Court should not repeat their errors.

[18] The D.C. Circuit also noted in *AT&T I* that jurisdiction existed under § 1331. For the reasons stated above, the procedural posture of *AT&T I* makes it inapposite: it was a suit brought by the Executive against a private party, not a suit brought by Congress against the Executive Branch that can be heard, if at all, only under the specific jurisdictional provisions that Congress has enacted to govern such disputes. The decision also long predated the 1996 amendments to 28 U.S.C. § 1365, which further confirmed that that 28 U.S.C. § 1331 would not apply to lawsuits brought by Congress against the Executive Branch.

1. In *Miers*, the House Committee on the Judiciary asked the "Court to declare that [a] former White House Counsel . . . must comply with a subpoena and appear before the Committee to testify regarding an [oversight] investigation . . . , and that [the White House] must produce a privilege log in response to a congressional subpoena." *Miers*, 558 F. Supp. 2d at 55. Denying the Executive Branch's motion to dismiss, the Court held that "this lawsuit involves a basic judicial task—subpoena enforcement—with which federal courts are very familiar." *Id.* at 56. The Court read *AT&T I* as "establish[ing] that the committee has standing to enforce its duly issued subpoena through a civil suit," *id.* at 68, and declined to read *Raines* as abrogating *AT&T I*, interpreting *Raines* as a decision solely about the standing of "individual" Members, such that a suit by the institution as a whole, or by an individual authorized by the institution, would be justiciable. *See id.* at 69-70. The *Miers* court also held that because the dispute concerned enforcement of a subpoena, the "asserted interest[s] [were] more concrete than the situation in *Raines*, where the purported injury was wholly hypothetical." *Id.* at 70.

The *Miers* court erred in key respects. First, while the House had formally authorized the lawsuit in *Miers*, such authorization is neither sufficient to overcome the constitutional infirmities inherent in suits of this kind nor present here in any event. Second, the *Miers* court suggested that the service of a subpoena made the dispute more concrete than the dispute in *Raines*, *see* 558 F. Supp. 2d at 70, but formalities of process cannot dictate the boundaries of Article III. The "deeply rooted" authority for courts to "enforce subpoenas," such as grand jury subpoenas, subpoenas "to compel testimony or produce documents pursuant to Fed. R. Civ. P. 45, or subpoenas issued by administrative agencies of the United States pursuant to Fed. R. Civ. P. 81(a)(5)," *Miers*, 558 F. Supp. 2d at 71, does not mean that *Congress* can invoke the Judiciary's aid against the Executive simply by issuing something called a "subpoena." There was no suggestion in *Raines* that the Supreme Court was unfamiliar with the task of adjudicating the constitutionality of an act of

Congress—indeed, the following term it held the Line Item Veto Act unconstitutional in *Clinton v. City of New York*, a suit by private parties who had suffered concrete and particularized injuries to their personal interests. 524 U.S. 417, 429-36 (1998). But the Court refused to reach that issue in *Raines* because the dispute was not one "traditionally thought to be capable of resolution through the judicial process." 521 U.S. at 819. The *Miers* court should have done the same.

2. In *Holder*, the House sought judicial enforcement of a subpoena calling for the Attorney General to produce certain records relating to the Fast and Furious gunwalking operation. Holding that "Article III of the U.S. Constitution does not bar the federal courts from exercising their jurisdiction under the circumstances presented in this case," the Court explained that the case before it "involves the application of a specific privilege to a specific set of records responsive to a specific request, and the lawsuit does not invite the Court to engage in the broad oversight of either of the other two branches." *Id.* at 14. The Court further held that statutory subject matter jurisdiction was available under 28 U.S.C. § 1331, reasoning that "the chronology of events surrounding the enactment of section 1365 reveals that the jurisdictional gap it was meant to cure was not a lack of jurisdiction over actions like this one." *Id.* at 18.

The *Holder* court largely followed "the reasons set forth in *Miers*," 979 F. Supp. 2d at 4, and so *Holder* can be no more reconciled with *Raines* than can *Miers* itself. In addition, *Holder* relied heavily on *United States v. Nixon*, 418 U.S 683 (1974), but that case involved the enforcement of a *trial* subpoena arising "in the regular course of a federal criminal prosecution," which is a matter "within the traditional scope of Article III power." *Id.* at 697. Although *Nixon* implicated separation-of-powers concerns, at bottom it involved information necessary to the Executive Branch's criminal prosecution of a citizen—a matter that implicated "the constitutional rights and liberties of individual citizens," *Raines*, 521 U.S. at 829, and was thus "within the traditional scope of Art. III power," *Nixon*, 418 U.S. at 697. *Nixon* does not suggest that federal

courts may also entertain civil suits by one co-equal branch against another concerning the scope of their respective powers.

The *Holder* court also erred in finding jurisdiction under § 1331. The Court acknowledged that when Congress enacted 28 U.S.C. § 1365 in 1978, it had already removed the amount-in-controversy requirement from § 1331 for suits against the United States, 979 F. Supp. 2d at 18-19, but it failed to grapple with the consequences of that chronology, *i.e.*, that § 1331 must not have already provided jurisdiction for the very subpoena enforcement suits it enacted 28 U.S.C. § 1365 to create. And, the opinion ignores the 1996 amendment to § 1365, a revision that would be inexplicable if Congress thought § 1331 already granted federal courts plenary jurisdiction to entertain congressional subpoena enforcement actions against the Executive Branch.

The *Holder* court also pointed to a Senate report that it characterized as standing for the proposition that the enactment of § 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.'" *Holder*, 979 F. Supp. 2d at 19 (quoting S. Rep. 95-170 at 91-92)). The Senate Report, however, described a Senate bill that would have conferred jurisdiction to enforce subpoenas issued by either the Senate *or* the House. *See* S. Rep. 95-170 at 91 (Senate bill creates jurisdiction "over any civil action brought on behalf of Congress, a House of Congress or a committee of Congress to enforce a subp[o]ena or order issued by that entity."). But although the Senate would have created jurisdiction to enforce subpoenas issued by *both* houses of Congress, the House would not have included such a jurisdictional grant for *either* House of Congress. At a conference committee, the two houses compromised by agreeing that only the Senate would be given jurisdiction to enforce its subpoenas. *See* H.R. Rep. 95-1756 at 80 (1978) (Conf. Rep.) ("The appropriate committees in the House also have not considered the Senate's proposal to confer jurisdiction on the courts to enforce subp[o]enas of House and Senate

committees. The Senate has twice voted to confer such jurisdiction on the courts and desires at this time to confer jurisdiction on the courts to enforce Senate subp[o]enas."). The *Holder* court's reading of § 1331 renders this careful and well-documented compromise entirely superfluous.

* * *

Article III's time-honored concerns about preserving the vigor of the judicial power within its proper constitutional sphere preclude the exercise of federal judicial power to intervene in political conflicts between the elected branches. And even if that constitutional bar did not exist, Congress itself has yet to enact legislation permitting a federal court to hear this case.

II. In Light of Separation of Powers Concerns, This Court Should Refuse to Grant the Committee's Request for Relief in Order to Allow the Constitutionally Mandated Accommodation Process to Proceed.

Even if this inter-branch dispute met the constitutional minima of a justiciable case or controversy, and even if Congress had conferred jurisdiction on the courts over disputes of this kind, the Court should not now proceed with an attempt to resolve this dispute by adjudication, given the acute separation-of-powers concerns presented by judicial intervention in political disputes between the elected branches and the structure of checks and balances central to the Constitution's design. At a minimum, the Court should refuse to referee this dispute until the parties have earnestly pursued and exhausted the constitutionally contemplated processes of negotiation and mutual accommodation.

Courts have declined to decide suits filed by legislators attempting "to bring . . . essentially political dispute[s] into a judicial forum." *Chenoweth*, 181 F.3d at 114; *see also Vander Jagt v. O'Neill, Jr.*, 699 F.2d 1166, 1174-75 (D.C. Cir. 1982) (dismissing case out of "proper respect for the political branches and a disinclination to intervene unnecessarily in their disputes") (internal quotation omitted). This principle includes inter-branch informational disputes. *See AT&T I*, 551 F.2d at 394 (choosing "a judicial suggestion of compromise rather than historic confrontation" as

the option most "suitab[le]" to resolution of an inter-branch dispute over access to national security information); *AT&T II*, 567 F.2d at 130.

The accommodation process represents more "than the mere degree to which ordinary parties are willing to compromise." *AT&T II*, 567 F.2d at 130. Although sometimes described in terms of equitable discretion, the D.C. Circuit has made clear that the respect for the accommodation process extends much further than typical notions of equitable restraint. Because "[t]he Constitution contemplates such accommodation," "[n]egotiation between the two branches should thus be viewed as a dynamic process affirmatively furthering the constitutional scheme." *Id.* "Under this view . . . each branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation." *Id.* at 127. This approach, therefore, has dominated conflicts between the political branches over requests by Congress for information from the Executive Branch. *See AT&T I*, 551 F.2d at 394.

Even accepting the Committee's purported interest in the Presidential audit process, the accompanying declaration of Frederick W. Vaughan ("Vaughan Declaration") makes clear that the Committee brought suit before genuinely exploring the possibilities both for accommodation and for gathering additional information about the Presidential audit program.

a. *Efforts prior to April 3, 2019*: Between January 3 (when the 116th Congress convened) and April 3, 2019, *no one* associated with the Committee requested from the Department information about the process by which the IRS audits and enforces the Federal tax laws against a sitting President. Vaughan Decl. ¶ 9. Indeed, during testimony at a March 14, 2019, Committee hearing, Secretary Mnuchin received numerous questions about the Department's potential response to a request for President Trump's tax returns; none of the Committee's 42

Members, however, asked even a single question regarding the process by which the IRS audits and enforces the Federal tax laws against a President. *Id.* ¶¶ 4-6 & Ex. A.

b. *Chairman Neal's section 6103(f) request and the Department's accommodation efforts*: Although the Department had received no prior indication of the Committee's purported interest in the mandatory Presidential audit process prior to Chairman Neal's April 3 letter, the Department promptly expressed its willingness to work with the Committee to accommodate any genuine interest the Committee might have in that process. In his April 23, 2019, letter to Chairman Neal, the Secretary made clear that "[t]o the extent the Committee wishes to understand, for genuine oversight purposes, how the IRS audits and enforces the Federal tax laws against a President, we would be happy to accommodate that interest by providing additional information on the mandatory audit process." Vaughan Decl. ¶¶ 15-18 & Ex. E. Receiving no response to this offer, the Secretary reiterated in his May 6, 2019, letter to Chairman Neal (in which Commissioner Rettig separately concurred) the Department's willingness to "provide information concerning . . . how the IRS conducts mandatory examinations of Presidents . . . [i]f the Committee is interested[.]" *Id.* ¶ 21 & Ex. F.

c. *The Committee's response to the Department's multiple offers of accommodation*: As noted above, the Committee did not respond to the Department's initial offer to provide information concerning the mandatory audit process (other than to demand the requested tax returns and return information, *see* Vaughan Decl. ¶¶ 18-25 & Ex. G). Likewise, following the Secretary's and the Commissioner's May 6 letters, the Committee did not immediately take up the Department on its second offer to provide such information. Instead, four days later, the Committee served Secretary Mnuchin and Commissioner Rettig with subpoenas. *Id.* ¶ 24 & Ex. G. In a letter accompanying the subpoena, Chairman Neal did not address the Department's offer of information about the Presidential audit program until the final paragraph, where he dismissed

it as "no substitute for the requested tax returns and return information." *Id.* On May 17, 2019, Secretary Mnuchin responded by letter to Chairman Neal's May 10 letter and subpoenas, explaining again that the Department was not authorized to disclose the requested returns and return information, but offering again to accommodate the Committee's purported interest by providing information about the audit program. *Id.* ¶¶ 26-28 & Ex. H. IRS Commissioner Rettig responded to Chairman Neal in a similar letter the same day. *Id.* ¶ 29 & Ex. I

d. *The Department provides an initial briefing on the Presidential audit program to the Committee*: On May 22, 2019, the Department received an email from Committee staff regarding the Department's earlier proposals to brief the Committee on the mandatory audit process. Vaughan Decl. ¶ 30 & Ex. J. The Department responded on May 24, 2019, expressing the agency's willingness "to provide a detailed briefing to the Committee on the mandatory audit process" but asking Committee staff to "let us know what particular aspects of the audit process you would like the briefing to focus on" so that the Department could ensure that it had "the right experts available to provide the information you're interested in." *Id.* ¶ 33 & Ex. J. The Committee's response did not specify particular features of the program in which it was supposedly interested. *See id.* ¶ 34 & Ex. J. Nonetheless, on June 10, 2019, IRS and Treasury officials briefed Committee staff for approximately three hours, during which time they addressed more than 150 questions from Committee staff. *Id.* ¶ 46. That afternoon, the Department sent to Chairman Neal a letter that summarized the briefing and noted that, although "IRS officials answered most of your staff's questions about the mandatory examination process," staff had "committed to send us a list of follow-up questions, which we look forward to receiving." *Id.* Ex. M.

e. *The Committee abruptly abandons the accommodation process and files suit*: On June 13, 2019, in apparent response to the Department's June 10 letter, Committee staff sent the

Department a list of 291 questions concerning the audit program; the questions, however, had been prepared prior to the June 10 briefing. Vaughan Decl. ¶¶ 51-52. The Department responded by noting that many of the questions had been asked and answered at that briefing and requested that the Committee "[p]lease let us know which of the questions you would like us to prioritize." *Id.* Ex. O. Committee staff, however, neither specified which of the 291 questions they believed were not answered at the briefing nor identified which questions were a priority for the Committee. *Id.* ¶ 53.

Instead, Chairman Neal sent another letter to Secretary Mnuchin on June 28, 2019, in which he disparaged the briefing the Committee staff had received as "limited," and contended that the Department had failed to answer most of the questions posed during the briefing. *Id.* Ex. Q. Like the response from Committee staff, Chairman Neal's letter did not actually identify which questions were a priority for the Committee, or even *ask* the Department to provide answers to any of them. Instead, Chairman Neal again demanded production of the requested tax returns and return information. *Id.* Two business days later, the Committee filed this action. *Id.* ¶ 56.

Whatever the Committee's belated, half-hearted, and quickly abandoned response to the Department's multiple offers to supply it with additional information about the Presidential audit process may suggest about the Committee's actual purpose, for now it suffices to note that the Committee plainly did not exhaust the possibilities for accommodation before filing suit. This case stands in stark contrast to *Miers*, where the Court noted that "no rush to the courthouse by either political branch [was] evident." 558 F. Supp. 2d at 96. As the record summarized above makes clear, the Committee asked for just a single introductory briefing about the audit program before it filed this lawsuit, without so much as inquiring about the status of the Department's responses to the questions it submitted afterward.

This Court, facing the Committee's appeals for a judicial resolution of this dispute "that might disturb the balance of power between the two branches and inaccurately reflect their true needs," *AT&T II*, 567 F.2d at 123, should not accept the idea that, after so limited an opportunity for negotiation and exchange of information, the Department and the Committee have already reached the point of impasse. Indeed, *AT&T* presented a situation where litigation ensued after negotiations between the Executive and Legislative Branches had actually "broke[n] down," *AT&T I*, 551 F.2d at 387, yet the Court refused to "select a victor," or "tilt the scales," when the political branches' "long history of settlement of disputes that seemed irreconcilable" gave reason to believe that "[a] compromise worked out between them [was] most likely to meet their essential needs and the country's constitutional balance." *Id.* at 394. Instead, the Court dispatched the parties "to attempt to negotiate a settlement" of their differences, *id.* at 395, negotiations which did not succeed in resolving their dispute, but which "did narrow the gap between the parties and provide a more informed basis for further judicial consideration." *AT&T II*, 567 F.2d at 130.

Assuming for this discussion that the Committee's purported legislative interest in the Presidential audit process is the purpose behind its request, the Department remains willing to provide the Committee additional information with which it might pursue a legislative agenda related to that process—as it was in the midst of doing when the Committee prematurely filed suit. As the accompanying Declaration of Sunita Lough makes clear, the Presidential audit process is multi-faceted and the Department is prepared to assist the Committee in better understanding how the process works, to the extent the Committee decides to engage earnestly in the accommodations process. Accordingly, even if this Court concludes that it has jurisdiction to entertain this suit and that the Committee has stated a claim on which relief can be granted, the Court should dismiss—or at the very least, stay[19]—this action to allow the accommodation process to go forward.

[19] Defendants acknowledge that any dismissal on this ground would be without prejudice.

III. This Case Must Be Dismissed for Failure to State a Claim on Which Relief Can Be Granted.

Even if the federal courts could entertain suits of this nature without upending the constitutional order; even if this Court had statutory subject-matter jurisdiction over the Committee's claims; and even if the Committee had exhausted the potential for negotiation and mutual accommodation with the Department, the Committee would still not have a cause of action to enforce demands for individual tax-return information in federal court. "[R]ights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). Indeed, as the Supreme Court has recognized, the "[a]uthority to exert the powers of [Congress] to compel production of evidence *differs widely from authority to invoke judicial power for that purpose*." *Reed v. Cty. Comm'r of Del. Cty., Pa.*, 277 U.S. 376, 389 (1928) (emphasis added). It is thus insufficient for the Committee to point to statutory or subpoena language "phrased in . . . explicit rights-creating terms"; the Committee must also show that Congress has created for its benefit "not just a private right" to information, "but also a private remedy." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002) (citation and emphasis omitted). As explained below, the Committee fails to identify a cause of action to litigate a claimed right to access the President's tax-return information.

A. The Committee Lacks a Cause of Action to Enforce Its Subpoenas (Count I) and Section 6103(f) Requests (Count VII).

Counts I and VII of the Committee's Complaint, styled "Subpoena Enforcement" and "Violation of 26 U.S.C. § 6103(f)," respectively, assert simply that Defendants are legally required to produce the President's tax returns to the Committee, without reference to any statute purporting to provide the Committee with a cause of action to vindicate those purported rights in court. *See* Compl. ¶¶ 99-104, 131-135. No such cause of action exists.

Congress knows how to enact a cause of action for legislators, and it has done so on certain occasions, such as the cause of action for "either House of Congress" to challenge census methodologies, *see* Pub. L. No. 105–119, § 209, 111 Stat. 2440, 2482 (1997), or the cause of action it enacted attempting to authorize Members of Congress to challenge the Line Item Veto Act, *see Raines*, 521 U.S. at 815-16. Indeed, as noted above, Congress has enacted legislation purporting to authorize the Judiciary to entertain certain subpoena enforcement actions brought by the Senate, 28 U.S.C. § 1365, but Congress has not taken that step with respect to subpoenas issued by the House of Representatives. *See supra* at 29-32, 37-38.

Congress has likewise declined to enact a cause of action for the enforcement of requests for tax information under section 6103(f). Congress's silence on that topic is particularly notable because the Internal Revenue Code sets forth a comprehensive scheme governing judicial proceedings, under which the only "[a]ctions permitted" by "Persons Other than Taxpayers" are those for wrongful levy of property, claims for surplus or substituted proceeds, and actions for substitution of value. *See* 26 U.S.C. § 7426(a). Moreover, the Code expressly *provides* a cause of action for taxpayers seeking redress for unauthorized disclosure and inspection of confidential tax information. 26 U.S.C. § 7431. The fact that Congress enacted a cause of action to vindicate rights against *unauthorized* disclosure and inspection under section 6103, while declining to enact a reciprocal cause of action to force a purportedly required disclosure, demonstrates that Congress knew how to create such a cause of action and chose not to create one for the latter situation.[20] This conclusion is reinforced by the central concern of section 6103, which is to provide strict limits on the circumstances in which tax return information can be disclosed. Neither the text, structure, nor history of the provision supports any authorization for private suits to force

[20] Indeed, in the limited instance where Congress sought to permit a lawsuit to force disclosure under Title 26, it did so clearly and with carefully delineated protocols designed to account for the interests of affected taxpayers. *See* 26 U.S.C. § 6110(f)(4).

disclosure of taxpayer information. *See, e.g.*, *Int'l Union, Sec., Police & Fire Prof'ls of Am. v. Faye*, 828 F.3d 969, 972 (D.C. Cir. 2016) ("Absent statutory intent to create a cause of action, . . . 'courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.'").

To the extent the Committee claims that a judicially enforceable right to sue the Executive Branch to enforce a congressional subpoena or section 6103(f) can be implied under Article I of the Constitution, *see* Compl. ¶¶ 88, 93, that is plainly wrong. As courts have long recognized, "it is up to Congress to create federal causes of action," *Farrington v. Nielsen*, 297 F. Supp. 3d 52, 63 (D.D.C. 2018) (citing *Sandoval*, 532 U.S. at 286), and creation of the "judge-made remedy" of an implied cause of action in equity pursuant to Congress's statutory grant of federal question jurisdiction is available only in "some circumstances" that present a "proper case." *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015). Such a remedy is only proper where the "relief . . . requested . . . was traditionally accorded by courts of equity," *Grupo Mexicano de Desarrolo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 319 (1999), and it is "subject to express and implied statutory limitations," *Armstrong*, 13 S. Ct. at 1385. "Indeed, the Supreme Court has recently emphasized that judicially inferring a cause of action that goes beyond "traditional equitable powers" is a "significant step under separation-of-powers principles." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856 (2017); *see also Jesner v. Arab Bank PLC*, 138 S. Ct. 1386, 1398 (2018) (where "litigation implicates serious separation-of-powers . . . concerns," the existence of a right to bring such litigation must be "subject to vigilant doorkeeping"). Again, the Committee's attempt to use a civil lawsuit to force the disclosure of information held by the Executive Branch has no historical foundation, much less a strong tradition in equity, and the express cause of action for certain subpoena enforcement actions by the Senate precludes a more general implied cause of

action for the House. *See Abbasi*, 137 S. Ct. at 1862 (courts should not imply a cause of action where Congress's failure to create one is "more than mere oversight").[21]

Nor can the Committee rely on the Declaratory Judgment Act, 28 U.S.C. § 2201, to enforce its demands for the President's tax returns in the absence of a cause of action. *See* Compl. ¶ 10 (citing 28 U.S.C. §§ 2201, 2202), Prayer for Relief ¶ A. The Declaratory Judgment Act does not itself "provide a cause of action." *Ali v. Rumsfeld*, 649 F.3d 762, 778 (D.C. Cir. 2011). It simply "enlarge[s] the range of remedies available in the federal courts" for cases that already can be litigated there. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950). A "cause of action," by contrast, refers to the legal authority that allows a plaintiff to "'*enforce in court* the . . . rights and obligations' identified in his complaint" and is "'analytically distinct and prior to the question of what relief, if any, [he] may be entitled to receive." *John Doe v. U.S. Parole Comm'n*, 602 F. App'x 530, 532 (D.C. Cir. 2015) (citations omitted). As this Circuit has long held, "the availability of relief" under the Declaratory Judgment Act "presupposes the existence of a judicially remediable right.'" *C & E Servs., Inc. of Wash. v. D.C. Water & Sewer Auth.*, 310 F.3d 197, 201 (D.C. Cir. 2002).

B. The APA Claims (Counts II-V) Fail as a Matter of Law.

Counts II-V of the Complaint purport to assert claims for violation of the Administrative Procedure Act, seeking to "compel agency action unlawfully withheld," Compl. ¶ 106, and to "hold unlawful and set aside" agency action as arbitrary and capricious and contrary to law, *id.*

[21] The contrary holdings in *Miers* and *Holder* predated the Supreme Court's decisions in *Armstrong* and *Abbasi* and cannot be reconciled with the Supreme Court's teachings in those cases. Moreover, while *Miers* and *Holder* emphasized the recognition in *McGrain*, 273 U.S. at 175, that Congress possesses an auxiliary power of inquiry under the Constitution, *Holder*, 979 F. Supp. 2d at 22, that reliance was in error. The mere existence of Congress's limited power of inquiry is not to be confused with the power to enforce that authority through a civil lawsuit. *See Reed*, 277 U.S. at 389.

¶ 112, "contrary to constitutional right, power, privilege, or immunity," *id.* ¶ 117, and "in excess of statutory jurisdiction [or] authority," *id.* ¶ 122. *See* 5 U.S.C. § 706(1), (2)(A)-(C). The Committee's theory that it may proceed under the APA to vindicate a "right" under § 6103(f), Compl. ¶¶ 30, 35, or the Constitution, *id.* ¶ 119, is mistaken. Indeed, Defendants are not aware of any instance since the APA was enacted in 1946, in which either house of Congress, or any of their committees, have successfully invoked the APA to seek relief against the Executive Branch.

The APA authorizes judicial review of "agency action" at the behest of "person[s]" who have "suffer[ed] legal wrong because of agency action, or [are] adversely affected or aggrieved by agency action." 5 U.S.C. § 702. As explained below, the Committee cannot proceed under the APA, for at least three reasons. *First*, an array of statutes specifying the circumstances and manner in which Congress, its committees, and agents may secure access to information precludes APA review of the Secretary's response to the Committee's demands for the President's tax-return information. *See* 5 U.S.C. § 701(a)(1) (providing that the APA's provisions on judicial review apply "except to the extent that … statutes preclude [such] review"). *Second*, even if APA review were not precluded, failing to turn over information to Congress does not fall within the APA's definition of "agency action" as interpreted by the D.C. Circuit. *See Nat. Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288, 318 (D.C. Cir. 1988). *Third*, the Committee likewise is not a "person" entitled to review as that term is defined by the APA. *See id.* §§ 551(2), 701(b)(2).

1. APA Review Is Precluded by Statute.

At the outset, APA review is precluded by the panoply of statutes governing enforcement of Congress's requests for information. "Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the

administrative action involved." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984). An intent to preclude review "may also be inferred from . . . the collective import of legislative and judicial history behind a particular statute." *Id.* at 349 (citing *Heikkila v. Barber*, 345 U.S. 229 (1953)).[22] In short, APA review is unavailable "whenever the congressional intent to preclude judicial review is fairly discernible . . . in the detail of the statutory scheme." *Id.* at 350-51.

An intent to preclude APA review in matters involving Legislative Branch demands for information can be "fairly discern[ed]" from the "collective import of legislative and judicial history" of the intricate statutory scheme governing enforcement of Congressional requests for information. *Block*, 467 U.S. at 349, 351. As discussed above, Congress has adopted elaborate procedures and specific statutes to enforce requests for information through the subpoena process. Congress has purported to authorize the Senate and its committees to bring civil lawsuits to enforce certain subpoenas in federal court, but it has stopped short of authorizing such lawsuits by the House of Representatives or with respect to subpoenas "issued to an officer or employee of the executive branch." 28 U.S.C. § 1365(a). Thus, the House's only means to enforce a subpoena using the judicial process is pursuant to the criminal contempt statute that Congress created for that purpose. 2 U.S.C. § 192. To invoke that statute under House Rules, once a subpoena has issued, it "may be enforced *only* as authorized or directed by the House." House Rules, R. XI, cl. 2(m)(3)(C) (emphasis added). And once the House has authorized enforcement of a particular subpoena, it must certify the matter for prosecution by the appropriate United

[22] For example, *Heikkila* concluded that APA review of Attorney General deportation orders was precluded by the Immigration Act of 1917, because it spoke in terms similar to earlier immigration statutes that had been construed to foreclose judicial review. 345 U.S. at 232-35. A similar comparative analysis was employed in *Armstrong v. Bush*, 924 F.2d 282, 289-91 (D.C. Cir. 1991), concluding that review of the President's compliance with the Presidential Records Act was impliedly precluded given the absence of detailed recordkeeping requirements of the kind imposed on agencies by the Federal Records Act.

States Attorney as a contempt of Congress, 2 U.S.C. § 194; *see id.* § 192; *Wilson v. United States*, 369 F.2d 198, 199-203 (D.C. Cir. 1966), rather than initiate a civil action in its own behalf.

This careful scheme governing the enforcement of House subpoenas via contempt prosecution supplies no basis to believe that "it was nevertheless the legislative judgment" that a committee's demand for information, whether by subpoena, or request made under § 6103(f), could be laid directly before the courts for enforcement in a civil action under the APA. *Block,* 467 U.S. at 347. To the contrary, given the express provision within this scheme for judicial enforcement of congressional subpoenas via criminal prosecution under 2 U.S.C. § 192, "the omission of [similar] provision[s]" for civil suits initiated by House committees themselves is "sufficient reason to believe that Congress intended to foreclose" such actions. *Id.* at 346-47; *see id.* at 349 ("[W]hen a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded."). Indeed, the Supreme Court observed in *Reed* that since the enactment of 2 U.S.C. § 192 in 1857, it had become the "customary" and "established practice" of Congress to rely on these prosecutorial means of enforcement to vindicate its rights of access to evidence and information, in light of which the Court presumed that a special Senate investigatory committee did not have power to sue to enforce one of its subpoenas in the absence of a "specific[] grant[]" of such authority. 277 U.S. at 388-89. That same presumption *against* review should apply in the circumstances here.

Permitting individual committees to sue directly under the APA to enforce compliance with subpoenas or § 6103(f) requests "would severely disrupt [Congress's] complex and delicate . . . scheme" for subpoena enforcement by providing "a convenient device for evading . . . [the institutional and] statutory requirement[s]" that House Rules and 2 U.S.C. § 194 would otherwise require them to observe before drawing the courts into these disputes, *see Block*, 467 U.S. at 348,

and render the longstanding procedures by which committees of the House of Representatives may seek to compel production of information from the Executive Branch completely superfluous. "Congress is unlikely to intend [such] radical departures from past practice without making a point of saying so." *Jones v. United States*, 526 U.S. 227, 234 (1999); *accord, e.g.*, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."). Nor is it possible to find such a departure here given the Supreme Court's recognition that the "APA did not significantly alter the 'common law' of judicial review of agency action." *Heckler v. Chaney*, 470 U.S. 821, 832 (1985). As discussed above, Congressional committees unquestionably could not enforce their demands for information through civil litigation prior to the enactment of the APA. *See supra* at 29-31. Thus, the import of Congress's silence on the question must be to preclude APA litigation that "would effectively nullify" the scheme for subpoena enforcement on which Congress has relied for more than 160 years, *see Block*, 467 U.S. at 348.

The conclusion that Congress did not intend judicial superintendence of Congressional demands for information is buttressed by additional statutes addressing access by the Legislative Branch to information held by Federal agencies, some of which provide for judicial review and others of which do not. For example, Congress has directed Federal agencies to furnish such information as the Congressional Research Service and the Congressional Budget Office might request; in neither case, however, do the authorizing statutes refer to judicial action to enforce those requests. *See* 2 U.S.C. §§ 166(d), 601(d). And as discussed above, although Congress has permitted the tax committees to request tax information under section 6103(f), it has not enacted a cause of action to enforce those requests. In contrast, Congress not only authorized the Comptroller General to request information of Federal agencies, 31 U.S.C. § 716(a), but also

expressly purported to authorize the Comptroller General to bring civil actions to enforce that authority subject to a number of criteria and exceptions. *Id.* §§ 716(b)(1)-(2) & (2)(A), (d)(1).

The upshot is that when Congress wants to authorize judicial enforcement of Legislative Branch requests for information in the possession of the Executive Branch, it does so expressly and with significant qualification and procedural safeguards. The omission of any statutory provision for enforcement of House committee subpoenas, or requests presented under § 6103(f), compels the conclusion that Congress never intended for disputes over these requests to be settled in court. *Cf. Switchmen's Union of N. Am. v. Nat'l Mediation Bd.*, 320 U.S. 297, 306 (1943) (where Congress provides for judicial review in a "highly selective manner . . . it dr[aws] a plain line of distinction"); *see also Block*, 467 U.S. at 347. APA review of the Secretary's refusal to produce individual tax-return information is therefore unavailable.

2. Declining to Provide Information to Congress Is Not "Agency Action" Under the APA.

Even if judicial review were not precluded, the Committee would still be unable to proceed under the APA. The APA permits judicial review over "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Agency action is defined to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). But, as numerous courts have recognized, this definition does not extend to interactions arising solely between Congress and the Executive Branch.

As the D.C. Circuit has explained, the nature of an agency's response to a Congressional request for information "is quite distinct from the prototypical exercise of agency power" where "the agency whose action is challenged . . . is exercising legislative functions (via formal or informal rulemaking) or adjudicatory functions that have been specifically ordained by Congress." *Hodel,* 865 F.2d at 318. In those circumstances, "Congress has seen fit to provide broadly for

judicial review of those actions, affecting as they do the lives and liberties of the American people." *Id.* Where an agency responds to congressional requests for information, however, "the designated Executive Branch officer is simply reporting back to the source of its delegated power in accordance with the Article I branch's instructions," which is not a circumstance that amounts to "agency action" under the APA. *Id.*; *see also, e.g.*, *Guerrero v. Clinton*, 157 F.3d 1190, 1195 (9th Cir. 1988) (reporting to Congress "not agency action of the sort . . . typically subject to judicial review" because report had no "determinative or coercive effect upon the action of" any third party and no "legal consequences flow[ed]" therefrom (citations omitted)); *Am. Trucking Ass'n v. United States*, 755 F.2d 1292, 1296 (7th Cir. 1985) (reports to Congress not "agency action" under APA because they do not "impose an obligation, determine a right or liability or fix a legal relationship"); *Nat. Res. Def. Council v. Lujan*, 768 F. Supp. 870, 882 (D.D.C. 1991); *see also Taylor Bay Prot. Ass'n v. EPA*, 884 F.2d 1073, 1081 (8th Cir. 1989).[23] As these cases recognize, construing the term "agency action" in the APA to extend to interactions between an agency and Congress makes little sense because Congress "is not powerless to vindicate its interests or ensure Executive fidelity to Legislative directives" as "part of [its] ongoing relationship[]" with the Executive Branch. *Hodel*, 865 F.2d at 319. As explained above and below, that "ongoing relationship" presumes that each branch acts pursuant to powers assigned under the Constitution, rather than by recourse to rights of action intended for private parties.

[23] Although these cases involved Congressional reporting requirements rather than specific requests for information, their logic applies equally to a request for taxpayer information under section 6103(f). A request under section 6103(f) "involve[s] basic interrelationships between the Article I and Article II branches," rather than an agency's exercise of delegated authority affecting regulated parties among the general public. *Hodel*, 865 F.2d at 317. Indeed, the Court in *Hodel* took a broad view of Congressional reporting and expressly noted that its analysis would extend, inter alia, to statutory directives that an agency "provide 'specific information' to Congress." *Id.* at 317 n.30. That description squarely encompasses a request under section 6103(f).

3. The Committee Is Not a "Person" Within the Meaning of the APA.

The text and structure of the APA, and basic separation of powers principles, also foreclose any assertion that the Committee is entitled to invoke the APA's provisions for judicial review. The APA creates a cause of action for any "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute[.]" 5 U.S.C. § 702. It thus incorporates "the universal assumption" that laws authorizing suits by "'person[s] adversely affected or aggrieved'" are generally intended to redress injuries of "private parties." *Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding*, 514 U.S. 122, 132 (1995). That assumption reflects the general rule that the word "person" in a statute is generally presumed not to include an instrumentality of a sovereign, absent affirmative indication otherwise. *See, e.g.*, *United States v. Mine Workers*, 330 U.S. 258, 275 (1947); *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 780 (2000). Although the APA defines the word "person" to include "public . . . organizations," it contains no indication that Congress intended to include itself or its committees as such "person[s]." *See* 5 U.S.C. § 551(2); *see id.* § 701(b)(2). Indeed, construing the word "person" to include Congress or its committees would produce absurd results.

First, Congress made clear that the defendant-in-interest in a lawsuit brought under the APA is the United States Government itself, which includes Congress. *See* 5 U.S.C. § 702; *Stockton E. Water Dist. v. United States*, 583 F.3d 1344, 1362 (Fed. Cir. 2009), *on reh'g in part*, 638 F.3d 781 (Fed. Cir. 2011) ("'United States[]' [is] a term that of course includes Congress"). The Committee's claim that it is a "person" entitled to sue the United States Government under the APA is in significant tension with the principle that Congress is part of the same Government that the Executive Branch is defending in the suit. *See Buckley*, 424 U.S. at 139.

Second, the APA's definition of "person" is not limited to judicial review, but extends to a wide variety of administrative processes. *See* 5 U.S.C. §§ 551(2), 701(b)(2). As a result, if a congressional committee were a "person" that could seek judicial review under section 702, it would also be a "person" entitled as a "party" (*see id.* § 551(3)) to participate in formal agency rulemaking proceedings, *id.* §§ 553(b), 556, 557, or a "person" entitled to "petition for the issuance, amendment, or repeal of a rule," *id.* § 553(e). Under our Constitution's separated powers, however, Congress has no authority to involve itself in the processes by which agencies administer regulatory schemes. Rather, "once Congress makes its choice in enacting legislation, its participation ends." *Bowsher*, 478 U.S. at 733; *Consumer Energy Council of Am. v. Fed. Energy Regulatory Comm'n*, 673 F.2d 425, 474 (D.C. Cir. 1982) (Congress may not "'participate prospectively in the approval or disapproval of . . . [regulations] 'enacted' by the executive branch'" (citation omitted)); *House of Representatives*, 379 F. Supp. 3d at 23 ("legal standing to superintend execution of laws is not among" Congress's prerogatives.).[24] Thus, when consideration is given to the roles that "person[s]" may play in the APA's statutory scheme as a whole, it becomes clear that Congress intended the term "person" to encompass only individuals or entities whose "lives and liberties" can be affected by agencies' exercise of the functions that Congress has assigned them to perform. *Cf. Hodel*, 865 F.2d at 318. A congressional committee is not such an entity.

Congress's past statements about its ability to bring civil lawsuits reinforce this conclusion. The House has expressly disclaimed any power to bring "suit under the myriad of general laws authorizing aggrieved persons to challenge agency action" and dismissed as "speculative" the possibility that it would attempt "to afford itself broad standing to challenge the lawfulness of

[24] Of course, *individual legislators* may participate in the rulemaking process along with the general public, but they would do so as individuals, not on behalf of "Congress" or one of its sub-institutions (like the Committee).

Executive conduct." Brief for U.S. House of Representatives at 17, 22 & n.25, *U.S. Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1998), 1998 WL 767637 (citation omitted). The Senate too has narrowly delineated the circumstances in which the Senate Legal Counsel is authorized to represent its interests in civil litigation, and they do not include an action under the APA. *See* 2 U.S.C. § 288b.

If Congress intends to test the scope of the judicial power to resolve disputes between the political branches by including itself among the types of "person[s]" authorized to sue under the APA, it needs to say so clearly. *Cf. Dellmuth v. Muth*, 491 U.S. 223, 231 (1989) (where Congress intends a result with serious separation of powers implications, it should speak with "unmistakable clarity"); *Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991) (similar); *see also Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992) (requiring an "express statement by Congress" before subjecting President to APA review in light of separation-of-powers concerns). The APA lacks such an express statement—whether in its definition of "person" or otherwise—and doctrines of constitutional avoidance thus compel the conclusion that Congress did not intend the APA to confer a right of action on itself. *Armstrong*, 924 F.2d at 289.

C. The Committee's Mandamus Claim (Count VI) Fails as a Matter of Law.

Count VI of the Complaint asserts that section 6103(f) imposes a non-discretionary duty on Defendants to provide the requested tax-return information to the Committee that is enforceable by mandamus. Compl. ¶ 107; *see also id.* ¶ 10 (citing 28 U.S.C. § 1361). This claim also should be rejected as a matter of law. A writ of mandamus sought by a plaintiff in federal district court is "'a drastic [remedy], to be invoked only in extraordinary circumstances.'" *Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 189 (D.C. Cir. 2016) ("*Am. Hosp. Ass'n I*") (quoting *Power v. Barnhart*, 292 F.3d 781, 784 (D.C. Cir. 2002)); *see also Am. Hosp. Ass'n v. Price*, 867 F.3d 160, 165 (D.C. Cir. 2017) ("*Am. Hosp. Ass'n II*") (consideration of mandamus "starts from the premise that

issuance of the writ is an extraordinary remedy, reserved only for the most transparent violations of a clear duty to act" (citation and quotation marks omitted)). To show entitlement to mandamus, a plaintiff must, at a minimum, demonstrate: "(1) a clear and indisputable right to relief, (2) that the government agency or official is violating a clear duty to act, and (3) that no adequate alternative remedy exists." *Am. Hosp. Ass'n I*, 812 F.3d at 189 (citing *United States v. Monzel*, 641 F.3d 528, 534 (D.C. Cir. 2011)).[25] The Committee's request for the President's tax returns meets none of these requirements.

First, the Committee lacks a "clear and indisputable" right in all cases to individual tax-return information. Rather, as discussed above, Congress has no freestanding right to information under the Constitution, and Congress's "auxiliary power" to compel access to otherwise private information may be wielded only as "necessary and appropriate to make [its] express powers more effective." *McGrain*, 273 U.S. at 173. Thus, any request for tax records under section 6103(f)(1) can be sustained *only* in aid of a legitimate investigation and only where Congress's interest in the information overcomes any constitutional interests of the individual resisting the inquiry. *See, e.g.*, *Watkins*, 354 U.S. at 187-88. In light of these weighty threshold questions, *see* OLC Op. at 16-22, whatever right the Committee may possess to access individual tax-return information is, at the very least, not "clear and indisputable."

For similar reasons, any response by the Department to a Committee request to produce tax-return information necessarily requires that the Department make threshold determinations about the propriety of the request, and is not, therefore, "nondiscretionary." As the D.C. Circuit

[25] Courts have sometimes treated these three requirements as elements of a mandamus claim and other times as elements of the court's jurisdiction under 28 U.S.C. § 1361. *See Lovitky v. Trump*, No. CV 19-1454 (CKK), 2019 WL 3068344, at *11 (D.D.C. July 12, 2019); *In re Cheney*, 406 F.3d 723, 729 (D.C. Cir. 2005) (en banc). Even where the three threshold requirements are satisfied, "a court may grant relief only when it finds compelling equitable grounds." *Am. Hosp. Ass'n I*, 812 F.3d at 189 (citation omitted).

has recognized, the Secretary and the IRS Commissioner are the "gatekeepers of federal tax information" under section 6103. *Tax Analysts*, 117 F.3d at 613. That responsibility flows from the fact that the Constitution requires the Executive Branch to "take care that the Laws be faithfully executed," U.S. Const. art. II, § 3, including the taxpayer confidentiality requirements of section 6103(a). Thus, Congress cannot constitutionally impose a non-discretionary duty on Defendants "to expose the private affairs of individuals," *Watkins*, 354 U.S. at 187, that supersedes the Executive Branch's duty (and authority) to ensure that all requests are in furtherance of a proper legislative purpose.

Mandamus also is unavailable because the Committee has not exhausted alternate avenues of relief. *Pittston Coal Grp. v. Sebben*, 488 U.S. 105, 121 (1988). Among other things, the Committee could pursue an accommodation (indeed, is constitutionally obligated to do so). *See supra* Part II. Absent exhaustion of that process, and the other mechanisms that the Committee, and the House as a whole, have at their disposal to enforce their informational demands, *see supra* at 49-50, the extraordinary remedy of mandamus is not available.

D. The Non-Statutory Review Claim (Count VIII) Fails as a Matter of Law.

Finally, in Count VIII, Plaintiff invokes the non-statutory ultra vires doctrine, Compl. ¶ 137 —"essentially a Hail Mary pass" that "in court as in football . . . rarely succeeds." *Nyunt v. Chairman, Broad. Bd. of Governors*, 589 F.3d 445, 449 (D.C. Cir. 2009) (Kavanaugh, J.). It is well-settled that this doctrine "is intended to be of extremely limited scope.'" *Cause of Action Inst. v. Eggleston*, 224 F. Supp. 3d 63, 76 (D.D.C. 2016) (quoting *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 190 (D.C. Cir. 2006)); *see also Schroer v. Billington*, 525 F. Supp. 2d 58, 65 (D.D.C. 2007) ("Non-statutory review is a doctrine of last resort."). It applies, if at all, only when a government official "acts 'without any authority whatever.'" *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 n.11 (1984) (quoting *Fla. Dep't of State v. Treasure Salvors, Inc.*,

458 U.S. 670, 697 (1982)). Accordingly, the "agency error [must] be 'so extreme that one may view it as jurisdictional or nearly so.'" *Nyunt*, 589 F.3d at 449 (quoting *Griffith v. FLRA*, 842 F.2d 487, 493 (D.C. Cir. 1988)).

Here, the Committee does not allege that the Department has taken action outside of its jurisdiction, without any authority whatsoever, *Pennhurst*, 465 U.S. at 101 n.11, but contends merely that it erred in the manner it exercised its authority over the Committee's section 6103(f) request. As noted above, the Secretary and the IRS Commissioner are the "gatekeepers" of confidential taxpayer information, *Tax Analysts*, 117 F.3d at 613, and responding to congressional requests for such information (whether by providing or withholding certain documents) is squarely within their jurisdiction under section 6103(f). The parties simply disagree about whether the Committee's request was valid and whether the Department could look to the overwhelming record to conclude that it was not. Such a dispute about constitutional and statutory authority is inadequate to support a claim of ultra vires agency action. As the *Griffith* court stressed, "[g]arden-variety errors of law or fact are not enough." 842 F.2d at 493; *see also Dart v. United States*, 848 F.2d 217, 231 (D.C. Cir. 1988) ("[A]n agency action allegedly 'in excess of authority' must not simply involve a dispute over statutory interpretation or challenged findings of fact."); *Physicians Nat'l House Staff Ass'n v. Fanning*, 642 F.2d 492, 496 (D.C. Cir. 1980) (en banc) ("That the Board may have made an error of fact or law is insufficient; the Board must have acted without statutory authority."). Count VIII, like all of the Committee's claims, fails to state a claim on which relief can be granted.

CONCLUSION

For all the foregoing reasons, this case should be dismissed.

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