[ORAL ARGUMENT SCHEDULED FOR FEBRUARY 23, 2021]

No. 19-5331

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

COMMITTEE ON THE JUDICIARY OF THE
UNITED STATES HOUSE OF REPRESENTATIVES,

Plaintiff-Appellee,

v.

DONALD F. MCGAHN, II,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Columbia

EN BANC BRIEF FOR APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies:

A. Parties and Amici

The defendant-appellant is Donald F. McGahn, II. The plaintiff-appellee is the Committee on the Judiciary of the United States House of Representatives. Amici curiae in this Court are: Republican legal experts, former government officials, and former members of Congress (Steve Bartlett, Jack Buechner, Tom Coleman, George Conway III, Mickey Edwards, Stuart Gerson, Gordon Humphrey, Bob Inglis, James Kolbe, Steven Kuykendall, Jim Leach, Mike Parker, Thomas Petri, Trevor Potter, Reid Ribble, Jonathan Rose, Paul Rosenzweig, Peter Smith, J.W. Verret, Dick Zimmer); James Murray; former members of Congress and former Executive Branch officials (Thomas Andrews, William Baer, Brian Baird, Michael Barnes, John Barrow, Douglas Bereuter, Howard Berman, Rick Boucher, Barbara Boxer, Bruce Braley, Carol Mosley Braun, Roland Burria, Lois Cappa, Jean Carnahan, Robert Carr, Rod Chandler, Linda Chavez, Bill Cohen, James Cole, Jerry Costello, Mark S. Critz, Joe Crowley, Tom Daschle, Lincoln Davis, Mark Dayton, John Dean, Dennis DeConcini, Chris Dodd, Byron Dorgan, Steve Driehaus, David Durenberger, Donna Edwards, Sam Farr, Vic Fazio, Barney Frank, Emil Frankel, Martin Frost, Richard Gephardt, Stuart Gerson, Wayne Gilchrest, Dan Glickman, Gene Green, Michael Greenberger, Jimmy Gurule, Colleen Hanabusa, Tom Harkin, Gary Hart, Paul Hodes, Elizabeth Holtzman, Steve Israel, J. Bennett Johnson, David Jolly, Steve Kagan, Leon Kellner,

Bob Kerrey, Mary Joy Kilroy, Paul G. Kirk, Jr., Ron Klein, Mike Kopetaki, Bob Krueger, Nick Lampson, Larry LaRocco, John LeBoutillier, Mel Levine, Matthew McHugh, Tom McMillen, Brad Miller, George Miller, Walt Minnick, Connie Morella, Leon Panetta, Earl Pomeroy, Trevor Potter, Silvestre Reyes, Max Sandlin, James Sasser, Claudine Schneider, Pat Schroeder, Allyson Schwartz, Christopher Shay, David Skaggs, Alan Steelman, Charlie Stenholm, Bart Stupak, John Tierney, Jim Turner, Henry Waxman, Kimberly Wehle, Robert Weiner, Christie Todd Whitman, Lawrence Wilkerson, Timothy Wirth, Dick Zimmer); former Department of Justice officials (Evan Caminker, Neil Kinkopf, Joseph Onek, Peter Shan, Judith Welch Wegner, Elliot Williams, William Yeomans); Lugar Center; Levin Center at Wayne Law; Niskanen Center; legal scholars (Cynthia Boyer, William Brooks, Ronald Chen, S. Alan Childress, Michael Collins, John Drobak, Mary Dudziak, Heather Elliott, Barry Friedman, Michael Gerhardt, Matthew Hall, Andrew Hammond, Christoph Henkel, Helen Hershkoff, Aziz Huq); Nixon impeachment scholars (Michael Dorf, Michael Genovese, Michael Gerhardt, Eric Lane, Alan Lichtman, Rick Perlstein, Kermit Roosevelt, Laurence Tribe); Morton Rosenberg; former general counsels of the United States House of Representatives (Stanley Brand, Geraldine Gennet, Kerry Kircher, Irvin Nathan, William Pittard, Steven Ross, Thomas Spulak, Charles Tiefer).

B. Rulings Under Review

The ruling under review is the November 25, 2019 order of the district court declaring that McGahn is not immune from compelled congressional process and

enjoining him to appear before the Committee pursuant to the subpoena that was issued to him. JA967-968. The opinion is published at *Committee on the Judiciary v. McGahn*, 415 F. Supp. 3d 148 (D.D.C. 2019) (JA847-966).

C. Related Cases

This case has previously been before a panel of this Court and the en banc Court. *See Committee on the Judiciary of the U.S. House of Reps. v. McGahn*, 951 F.3d 510, 513-15 (D.C. Cir.), *reh'g granted*, 968 F.3d 755, 761-62 (D.C. Cir.) (en banc), *remanded to* 973 F.3d 121 (D.C. Cir. 2020). There are no other related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

/s/ Courtney L. Dixon
COURTNEY L. DIXON

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INTRODUCTION

The Committee on the Judiciary of the U.S. House of Representatives brought this suit to compel the testimony of former Counsel to the President Donald F. McGahn, II. For several reasons, the Committee's suit should be dismissed.

As a threshold matter, this controversy will become moot on January 3, 2021, when the 116th Congress ends and the subpoena on which this litigation is based expires. *See* U.S. Const. amend. XX, § 1; *see also Committee on the Judiciary of the U.S. House of Representatives v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008) (per curiam). There is no reasonable likelihood that this controversy will recur in the future, and it is purely speculative at this time whether a new Congress will renew the same dispute and call on the courts to resolve the same legal issue.

Even assuming this case is not moot, the Committee's suit must be dismissed because Congress itself has foreclosed House committees from enforcing subpoenas through civil actions. As this Court has explained, "[p]rior to 1978 Congress had only two means of enforcing compliance with its subpoenas: a statutory criminal contempt mechanism and the inherent congressional contempt power." *In re Application of the U.S. Senate Permanent Subcomm. on Investigations*, 655 F.2d 1232, 1238 (D.C. Cir. 1981). In 1978, Congress enacted 28 U.S.C. § 1365, which governs jurisdiction over legislative subpoena enforcement suits. Section 1365 confers jurisdiction only for suits brought by the Senate—not the House—and it expressly excludes suits that involve Executive Branch assertions of "governmental privilege." 28 U.S.C.

§ 1365(a). Congress considered providing courts with jurisdiction over the type of suit that the Committee seeks to bring here, but deliberately declined.

For similar reasons, the Committee lacks a cause of action to sue to enforce this subpoena, as the panel here correctly held. The Committee has attempted to infer a cause of action directly under Article I, but that contravenes Supreme Court precedent recognizing that Congress's subpoena power does not itself authorize Congress to judicially enforce a subpoena. *See Reed v. County Comm'rs of Del. Cty.*, 277 U.S. 376 (1928). Nor can the Committee infer a cause of action from Congress's grant of equity jurisdiction to the federal courts. Courts' equitable powers are "subject to express and implied statutory limitations," *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015), and are limited to relief "traditionally accorded by courts of equity," *Grupo Mexicano de Desarollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 319 (1999). Both of those principles foreclose inferring a cause of action in equity here, where the Committee's novel claim is precluded by legislation specifically addressing the enforcement of subpoenas and has no basis in historical tradition. The Committee likewise cannot rely on the Declaratory Judgment Act, which does not independently supply a cause of action to litigate a dispute that otherwise would not be adjudicated in federal court at all, as this Court and others have long held.

Finally, should the Court reach the merits of this dispute, the subpoena to McGahn exceeds the House's constitutional authority. The Committee's implied subpoena power is justified only as "an essential and appropriate auxiliary to the

legislative function," and the Committee's subpoena intruding on the President's interests in autonomy and confidentiality would impermissibly "transform the 'established practice' of the political branches." *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2034 (2020) (quoting *NLRB v. Noel Canning*, 573 U.S. 513, 524 (2016)).

STATEMENT OF JURISDICTION

The Committee's complaint asserted jurisdiction in district court under 28 U.S.C. § 1331, *see* JA18, which, as discussed *infra* Part II, is unavailable. On November 25, 2019, the district court issued an order declaring that McGahn is required to appear before the Committee and enjoining him to testify pursuant to its subpoena issued on April 22, 2019. *See* JA967. McGahn filed a timely notice of appeal on November 26, 2019. JA969. This Court has jurisdiction under 28 U.S.C. § 1292(a). *See Committee on the Judiciary of the U.S. House of Representatives v. Miers*, 542 F.3d 909, 910 (D.C. Cir. 2008).

STATEMENT OF THE ISSUES

1. Whether the Committee's suit to enforce a congressional subpoena to compel testimony under the authority of the 116th Congress will become moot when the 116th Congress ends and the subpoena expires on January 3, 2021.

2. Whether Congress has denied the federal courts statutory subject-matter jurisdiction to entertain, and House committees a cause of action to bring, a suit to enforce a congressional subpoena demanding testimony from an individual on matters related to his duties as an Executive Branch official.

3. Whether the House's implied constitutional authority to issue testimonial subpoenas permits the Committee to use the federal courts to compel testimony from a former Counsel to the President on matters related to his duties.

STATEMENT OF THE CASE

This case has previously been before the en banc Court, and we summarize the relevant background only briefly. *See Committee on the Judiciary of the U.S. House of Representatives v. McGahn*, 951 F.3d 510, 513-15 (D.C. Cir.) (*McGahn I*), *reh'g granted*, 968 F.3d 755, 761-62 (D.C. Cir.) (en banc) (*McGahn II*), *remanded to* 973 F.3d 121 (D.C. Cir. 2020) (*McGahn III*).

A. Enforcement of Congressional Subpoenas

In holding that "each House has power 'to secure needed information'" by issuing congressional subpoenas, the Supreme Court has emphasized that this power is "'justified solely as an adjunct to the legislative process.'" *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2032 (2020) (quoting *McGrain v. Daugherty*, 273 U.S. 135, 161 (1927); *Watkins v. United States*, 354 U.S. 178, 197 (1957)). When each Congress ends at the completion of its term—as the 116th Congress does on January 3, 2021—any outstanding subpoenas expire. *See* U.S. Const. amend. XX, § 1; *see also Committee on the Judiciary of the U.S. House of Representatives v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008) (per curiam) (explaining that when "the 110th Congress ends … the 110th House of Representatives will cease to exist as a legal entity, and the subpoenas it has issued will expire" (citing *United States v. AT&T Co.*, 551 F.2d 384, 390 (D.C. Cir. 1976)). There

are three recognized avenues for enforcing those subpoenas in cases involving private parties.

First, the "auxiliary powers [that] are necessary and appropriate" under Article I provide each House "'the essential and inherent power to punish for contempt'" in order to compel "disclosures by witnesses." *McGrain*, 273 U.S. at 172-73 (quoting *In re Chapman*, 166 U.S. 661, 671 (1897)). Based on this inherent contempt power, a congressional committee may initiate its own contempt proceedings based on Congress's "power of inquiry—with process to enforce it." *Id.* at 174.

Second, in 1857, Congress enacted a criminal contempt-of-Congress statute. A witness properly "summoned as a witness" before a congressional committee "to give testimony or to produce papers upon any matter under inquiry" who "willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry" is guilty of a misdemeanor. 2 U.S.C. § 192. Following a referral from Congress, the Executive Branch may prosecute that witness in a criminal proceeding. *Id.* § 194.

Third, in 1978, Congress enacted a statute authorizing the Senate to sue "to enforce … any subpena or order issued by the Senate or committee or subcommittee of the Senate," and vested the U.S. District Court for the District of Columbia with "original jurisdiction" over such suits. 28 U.S.C. § 1365(a); *see* 2 U.S.C. §§ 288b(b), 288d. To initiate a civil action, the Senate must adopt a resolution authorizing that suit. *See* 2 U.S.C. §§ 288b(b), 288d(a). That resolution must follow further statutory

procedures, including requirements to present to the full Senate a report describing the subpoena dispute. *Id.* § 288d(c)(2). In addition to restricting venue to the District of Columbia, Section 1365 restricts the remedies available. *See* 28 U.S.C. § 1365(b) (limiting judicial-enforcement remedies to civil, and not criminal, contempt). Of particular importance here, Section 1365 expressly provides that it "shall not apply to an action to enforce … any subpena or order issued to an officer or employee of the executive branch of the Federal Government acting within his or her official capacity, except that this section shall apply if the refusal to comply is based on the assertion of a personal privilege or objection" rather than an authorized "governmental privilege or objection." *Id.* § 1365(a). No analogous statute exists for the House.

Neither the Supreme Court nor this Court has recognized that any of these three avenues for enforcing a subpoena is available against Executive Branch officials asserting government defenses. Section 1365 carves those officials out of subpoena-enforcement suits. *See* 28 U.S.C. § 1365(a). Criminal contempt requires Executive Branch prosecution, which would, in any case, be unavailable for a good-faith claim of testimonial immunity. *See Testimonial Immunity Before Cong. of the Former Counsel to the President*, 43 Op. O.L.C. ___, 2019 WL 2315338, at *14 (May 20, 2019). And there is no historical instance of inherent contempt of Congress being applied successfully to an Executive Branch official. *See infra* p. 25 n.3; *see also McGahn II*, 968 F.3d at 776 (recognizing no attempt "since 1917"). Thus, the question is whether the Committee

nevertheless can use the federal courts to seek civil enforcement of its subpoena against a close presidential advisor.

B. Factual and Procedural Background

1. In March 2019, the Committee announced a concern that "President Trump and his administration face wide-ranging allegations of misconduct." JA542. On April 22, based on that concern and after McGahn declined to provide documents, the Committee issued the present subpoena to require the production of documents and to require McGahn to testify at a congressional hearing set for May 21, 2019. JA618-29; *see* JA663-64. As this Court found, the purpose of the Committee's subpoena was to further: "the 'sole Power of Impeachment' vested in the House of Representatives under Article I, section 2, clause 5 of the Constitution"; its "consideration of the amendment or enactment of laws on ethical conduct by Executive Branch officials"; and its "oversight" of the U.S. Department of Justice and Federal Bureau of Investigation (collectively, DOJ) "to determine if they were operating with requisite independence." *McGahn II*, 968 F.3d at 761.

The Executive and Legislative Branches negotiated into July 2019 regarding accommodations for McGahn's testimony. JA718. No agreement on testimony resulted, but an "agreement was ultimately reached on the production of the subpoenaed documents," *McGahn II*, 968 F.3d at 762, such that the Counsel's Office would produce non-privileged materials. *See* JA718.

2. In August 2019, the Committee filed this suit. JA12. The complaint alleges that the "case arises under Article I of the Constitution of the United States," JA18, and that McGahn had "imped[ed] the Judiciary Committee's ability to facilitate the House's fulfillment of its Article I functions," JA17. The Committee asserted that judicial relief was warranted because efforts "to make reasonable accommodations for McGahn's testimony are at an impasse and McGahn continues to refuse to testify publicly before the Committee." JA63.

The Committee recognized, however, that, "because the House is not a continuing body, [its] investigation and the articles of impeachment referred to the Committee related to that investigation will necessarily end on January 3, 2021." JA62. The Committee further stated that, "[e]ven assuming a future Judiciary Committee were to decide to continue the investigation, it would have to reconsider any articles of impeachment and reissue similar requests and subpoenas." JA62-63.

In October 2019, the Committee and the Counsel's Office resumed negotiations concerning accommodations for McGahn's testimony, including through five meetings across several weeks. JA844. The negotiations did not reach a mutually acceptable accommodation. JA845.

3. On November 25, 2019, based on motions for summary judgment, the district court issued an order declaring that McGahn was "not immune from compelled congressional testimony" and "had no lawful basis for refusing to appear for testimony pursuant to the duly issued subpoena issued to him by the Committee

on the Judiciary of the United States House of Representatives on April 22, 2019." JA967. The court also entered an injunction requiring him "to appear before the Committee pursuant to th[at] subpoena." JA968. The court held that the Committee had Article III standing to bring suit. *See* JA894-924, 929-37. The court further concluded that the Committee had established subject-matter jurisdiction under 28 U.S.C. § 1331, had identified a cause of action to enforce its subpoena, and possessed the constitutional authority to compel a former Counsel to the President to testify about matters relating to his official duties. *See* JA889-93, 925-29, 937-64.

This Court issued an administrative stay of the order of the district court. *See* Order (Nov. 27, 2019).

C. This Court's Decisions

1. A panel of this Court initially held that the Committee lacked Article III standing to sue to enforce a congressional subpoena against a former Counsel to the President. *See McGahn I*, 951 F.3d at 531; *see id.* at 542 (Rogers, J., dissenting). On rehearing en banc, this Court disagreed, holding that "the Committee has Article III standing to seek enforcement in federal court of its duly issued subpoena in the performance of constitutional responsibilities." *McGahn II*, 968 F.3d at 778. The Court concluded, however, that "[c]onsideration of McGahn's other contentions—including threshold pre-merits objections that there is no subject matter jurisdiction and no applicable cause of action, and potential consideration of the merits if

reached—remain to be decided and are remanded to the panel to address in the first instance." *Id.*

2. On remand, the panel held that the Committee lacks a cause of action to enforce the subpoena at issue. *See McGahn III*, 973 F.3d at 123. The panel explained that "Congress has granted an express cause of action to the Senate—but not to the House," and "the Senate statute expressly *excludes* suits that involve executive-branch assertions of 'governmental privilege.'" *Id.* (citing 28 U.S.C. § 1365(a), (b)). "Congress's carefully drafted limitations on its authority to sue to enforce a subpoena," the panel explained, should not be "ignore[d]." *Id.*

The panel rejected the Committee's argument that it had an implied cause of action under Article I of the Constitution. *See McGahn III*, 973 F.3d at 123. The panel explained that, "time and again, the Supreme Court has warned federal courts to hesitate before finding implied causes of action—whether in a congressional statute or in the Constitution," and that "'separation-of-powers principles are or should be central to th[at] analysis.'" *Id.* (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017)). And here, "Congress has *declined* to authorize lawsuits like the Committee's." *Id.* (citing 2 U.S.C. § 288d; 28 U.S.C. § 1365(a), (b)).

The panel likewise rejected the Committee's argument that a cause of action could be implied from Congress's grant of equity jurisdiction to federal courts. *See McGahn III*, 973 F.3d at 123-24. Courts' equitable powers, the panel explained, "remain subject to express and implied statutory limitations, and are further limited to

relief that was traditionally accorded by courts of equity." *Id.* at 123-24 (quotations omitted). Here, "implied statutory limitations foreclose suits by the House and suits that implicate a governmental privilege," and "this [suit] checks both boxes." *Id.* at 124. Moreover, the panel found, "there is … nothing 'traditional' about the Committee's claim." *Id.*

Finally, the panel recognized that the Declaratory Judgment Act "does not itself provide a cause of action" absent "a judicially remediable right." *McGahn III*, 973 F.3d at 124 (quotation omitted). Judge Rogers dissented. *See id.* at 126.

3. This Court granted rehearing en banc. In its order doing so, it expressly directed the parties to address in their briefs "whether the case would become moot when the Committee's subpoena expires upon the conclusion of the 116th Congress." Order 2 (Oct. 15, 2020).

SUMMARY OF ARGUMENT

I. This subpoena-enforcement action between the House Judiciary Committee and McGahn will become moot on January 3, 2021, when the current 116th Congress terminates. *See* U.S. Const. amend. XX, § 1. As this Court has recognized, when the 116th Congress ends, any outstanding subpoena expires. *See Committee on the Judiciary of the U.S. House of Reps. v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008) (per curiam); *United States v. AT&T Co.*, 551 F.2d 384, 390 (D.C. Cir. 1976). This suit does not fall within the mootness exception for cases that are "capable of repetition yet evading

review." It is purely speculative at this time whether a newly composed Committee will renew this same dispute and call on the courts to resolve it.

II. Even setting aside mootness, this Court cannot properly adjudicate the Committee's suit because Congress itself has foreclosed civil enforcement of House subpoenas.

As this Court has recognized, "[p]rior to" the enactment of 28 U.S.C. § 1365, "Congress had only two means of enforcing compliance with its subpoenas: a statutory criminal contempt mechanism and the inherent congressional contempt power." *In re Application of the U.S. Senate Permanent Subcomm. on Investigations*, 655 F.2d 1232, 1238 (D.C. Cir. 1981). In Section 1365, Congress provided the federal courts only with limited subject-matter jurisdiction over suits by the Senate or its committees to enforce testimonial subpoenas against persons not objecting based on their service as federal executive officials. Congress has not provided jurisdiction for suits by the House or its committees (like the Judiciary Committee) to enforce testimonial subpoenas, let alone subpoenas against persons (like McGahn) as to whom the Executive Branch has asserted a governmental objection.

Nor does the Committee have a cause of action to enforce its subpoena. The Committee has insisted that a cause of action can be inferred under Article I, inferred from Congress's grant of equitable jurisdiction to federal courts, or found in the Declaratory Judgment Act. As the panel here correctly recognized, however, each of

those arguments is not only wrong on the merits, but foreclosed by decisions of the Supreme Court and this Court.

III. In all events, the Committee's subpoena attempting to compel McGahn's testimony is constitutionally invalid. The House's subpoena power is implied under the constitutional structure, and that structure bars extending this incidental power to compel testimony from a former Counsel to the President on matters related to his duties as a close presidential advisor. That extension is a dramatic departure from historical practice, and the burdens imposed by such a subpoena would impede the President's necessary reliance on his immediate advisors in exercising his Article II powers and duties.

STANDARD OF REVIEW

This Court reviews a district court's "grant and denial of summary judgment *de novo*." *Mayo v. Reynolds*, 875 F.3d 11, 19 (D.C. Cir. 2017).

ARGUMENT

I. THE COMMITTEE'S ENFORCEMENT SUIT WILL BECOME MOOT ONCE THE SUBPOENA EXPIRES ON JANUARY 3, 2021

When the term of the current Congress ends on January 3, 2021, the present subpoena will expire, and the present controversy over the subpoena will become moot. The "capable of repetition yet evading review" exception to the mootness doctrine does not apply here to enable this Court to address the validity and enforceability of the expired subpoena thereafter. That exception requires a

reasonable likelihood that the controversy will recur in the future, and it is purely speculative at this time whether a new Congress will renew the same dispute and call on the courts to resolve the same legal issues.

A. The district court has required McGahn to testify "pursuant to the duly issued subpoena issued to him by the Committee on the Judiciary of the United States House of Representatives on April 22, 2019," during the 116th Congress. JA967. However, the term of the 116th Congress will expire on January 3, 2021. *See* U.S. Const. amend. XX, § 1. When the 116th Congress ends its term, the subpoena that underlies this litigation will also expire and have no continuing legal effect. *See Committee on the Judiciary of the U.S. House of Representatives v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008) (per curiam) (holding that when "the 110th Congress ends … the 110th House of Representatives will cease to exist as a legal entity, and the subpoenas it has issued will expire"); *United States v. AT&T Co.*, 551 F.2d 384, 390 (D.C. Cir. 1976) (holding that "this House ends with its adjournment on January 3, 1977," and "[t]hereupon the subpoena here at issue expires").

The Committee has therefore itself recognized that, "because the House is not a continuing body," the Committee's "investigation will necessarily end on January 3, 2021." JA62. As the Supreme Court has explained, the legislative power to subpoena witnesses to give testimony is an incident of Congress's underlying authority to take legislative action. *See, e.g.*, *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927). Thus, when the legislative power of the current Congress comes to an end, its incidental authority

to compel witnesses to provide evidence in support of that power necessarily terminates as well. *See Marshall v. Gordon,* 243 U.S. 521, 542 (1917) (holding that Congress's power to hold persons in custody for contempt "may not be extended beyond the session of the body in which the contempt occurred"); *Anderson v. Dunn,* 19 U.S. (6 Wheat.) 204, 231 (1821) (holding that such "imprisonment must terminate with that adjournment" because "the legislative body ceases to exist").[1]

On January 3, 2021, this case will inevitably become moot. Accordingly, at that time, because the mootness will be attributable to the fortuity of timing, this Court should vacate the district court's judgment and remand with instructions to dismiss the suit for lack of jurisdiction. *See U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994) (citing *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950)).

B. This case is not among the "exceptional situations" that satisfies the "exception to the mootness doctrine for a controversy that is 'capable of repetition, yet evading review.'" *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (quoting *Spencer v. Kemna*, 523 U.S. 1, 17 (1998)). That exception requires that "(1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same

[1] *See also Continuing Effect of a Congressional Subpoena Following the Adjournment of Congress*, 6 Op. O.L.C. 744 (1982); *Legal Effectiveness of Congressional Subpoenas Issued after an Adjournment* Sine Die *of Congress*, 20 Op. O.L.C. 372 (1996).

complaining party will be subjected to the same action again." *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1540 (2018) (quotation omitted). Neither prong is met.

As an initial matter, this controversy is not of the sort that "evades review." The constitutional term of Congress provides two full years in which to resolve the validity and enforceability of subpoenas such as those at issue in this case. Though "orders of less than two years' duration *ordinarily* evade review," *Burlington N. R.R. Co. v. Surface Transp. Bd.*, 75 F.3d 685, 690 (D.C. Cir. 1996) (emphasis added), this is not an ordinary controversy. Given the important separation-of-powers questions presented in this interbranch suit, expedited treatment was available and provided. *Cf. Morrison v. Olson*, 487 U.S. 654, 668 (1988) (resolving separation-of-powers challenges to independent counsel law within thirteen months after challenges first raised as defense to grand jury subpoenas); 28 U.S.C. § 1657 (providing courts "shall expedite the consideration of any action" regarding recalcitrant grand jury witnesses under 28 U.S.C. § 1826 and based on any other "'good cause'"). Indeed, in this case, the district court reached final judgment and the initial panel decided this appeal within seven months; the case has not yet been resolved only on account of two separate en banc proceedings. This case thus cannot be said to be one that "evades review" in any meaningful sense.

In any event, even if the "evading review" requirement were satisfied, the present controversy is not one that is likely "capable of repetition." The "capable of repetition" prong "requires a reasonable expectation or a demonstrated probability

that the same controversy will recur involving the same complaining party." *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 463 (2007) (quotation omitted). While another controversy *could* recur in the future, it would involve at least one different party: a Committee of the 117th Congress. The Judiciary Committee of the 116th House "will never again be subject to" McGahn's or any other Executive Branch official's refusal to testify at a hearing. *United States v. Juvenile Male*, 564 U.S. 932, 938 (2011).

Moreover, there are far too many political contingencies to establish "a reasonable expectation or a demonstrated probability" that any future Congress would reissue the same subpoena to request McGahn's testimony, resulting in the same controversy. *Wisconsin Right to Life, Inc.*, 551 U.S. at 463 (quotation omitted). The Committee has consistently emphasized that it needed this subpoena "particularly" because it "inform[s] impeachment." Comm. Suppl. En Banc Br. 14,(Apr. 16, 2020); *see* Comm. Suppl. Br. 5 (Dec. 23, 2019) ("McGahn's testimony would inform the House's decision-making regarding the presentation of the Articles and evidence to the Senate."); JA59, 62 (discussing need for McGahn's testimony for impeachment purposes). Those impeachment proceedings have been completed, and there is no prospect that there will be a renewed impeachment inquiry after January 3, 2021.

To be sure, the Committee has also asserted that McGahn's testimony is "needed to conduct oversight of" DOJ. JA60. But the new 117th Congress will, presumably, have its own legislative priorities that it wishes to pursue, depending on

who may compose the next Congress and Committee, and who may be running DOJ. It is entirely speculative whether the Committee's successor will pursue the same legislative agenda as the current Committee, let alone that it will view a subpoena directed to McGahn as necessary in pursuing that legislative agenda. The current Committee has acknowledged that a future Committee would need to "reconsider" the current subpoena, and that one could only "assum[e] [that] a future Judiciary Committee [would] decide to continue the investigation." JA62-63.

It is also purely speculative whether, even if a subpoena were issued, the new Committee and the Executive Branch would come to an impasse in terms of accommodations or compromise with respect to testimony before Congress. *See AT&T*, 551 F.2d at 394 ("The legislative and executive branches have a long history of settlement of disputes that seemed irreconcilable."). Indeed, in *Miers*, the only litigated case in the court of appeals involving a subpoena issued to a close presidential advisor, the successor Committee and the Executive Branch reached an agreement on accommodations without judicial intervention after the Committee that issued the subpoena terminated. *See* Unopposed Mot. for Voluntary Dismissal at 2, *Miers*, No. 08-5357 (D.C. Cir. Oct. 8, 2009).

Given the number and nature of contingencies, it is impossible to conclude at this point that there is a "reasonable expectation" or a "demonstrated probability" that the present controversy will recur and that this Court will find itself again called on to decide the issues that are now before it. Particularly in light of the fact that

"constitutional confrontation[s] between the two branches should be avoided whenever possible," *Trump v. Mazars*, 140 S. Ct. 2019, 2035 (2020) (quotation omitted), this Court should not speculate about a future Committee's actions when there is no reason to set two "coequal branches of the Government" on a potentially needless "collision course," *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 389 (2004).

II. CONGRESS ITSELF HAS FORECLOSED HOUSE COMMITTEES FROM ENFORCING SUBPOENAS THROUGH CIVIL ACTIONS

Even setting aside mootness, the Committee's suit fails at the threshold because Congress has deprived district courts of statutory subject-matter jurisdiction over suits by House committees to enforce subpoenas demanding testimony from Executive Branch officials on matters related to their duties. And even if statutory subject-matter jurisdiction were to exist, Congress has denied the Committee a cause of action to enforce its subpoena, as the panel here correctly held. *See McGahn III*, 973 F.3d 121.

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

1. As this Court has recognized, "[p]rior to 1978 Congress had only two means of enforcing compliance with its subpoenas: a statutory criminal contempt mechanism and the inherent congressional contempt power." *In re Application of the U.S. Senate Permanent Subcomm. on Investigations*, 655 F.2d 1232, 1238 (D.C. Cir. 1981); *see* S. Rep.

No. 95-170, at 16 (1977) ("Presently, Congress can seek to enforce a subpena 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."). In 1978, Congress enacted a provision purporting to create subject-matter jurisdiction over *some* subpoena-enforcement actions brought by Congress. *See* Pub. L. No. 95-521, 92 Stat. 1824 (1978). That statute, now codified (as amended) at 28 U.S.C. § 1365 and 2 U.S.C. §§ 288b and 288d, authorizes jurisdiction only over the *Senate's* subpoena-enforcement actions, and it specifically excludes cases concerning "any subpena or order issued to an officer or employee of the executive branch of the Federal Government acting within his or her official capacity, … if the refusal to comply is based on … a governmental privilege or objection." 28 U.S.C. § 1365(a). Section 1365 contains specific procedural requirements governing the subpoena-enforcement suits that it authorizes. *See, e.g.*, *id.* (suit must be filed in United States District Court for the District of Columbia); *id.* § 1365(b) (violation of court order to comply enforceable only through civil rather than criminal contempt); *id.* § 1365(c) (procedures on adjournment *sine die*); *see also* 2 U.S.C. §§ 288b(b), 288d(c) (steps needed to obtain Senate authorization to initiate action under Section 1365).

Congress's choice not to create subject-matter jurisdiction for subpoena-enforcement suits by the House was a considered and deliberate decision. The Senate had proposed a bill that would have conferred jurisdiction to enforce subpoenas issued by both the Senate and the House, but the House did not support that version

of the proposal. *See* H.R. Rep. No. 95-1765, at 80 (1978). As the House Report explained, "[t]he appropriate committees in the House … have not considered the Senate's proposal to confer jurisdiction on the courts to enforce subpenas of House and Senate committees." *Id.* Despite the House's reluctance, "[t]he Senate … twice voted to confer such jurisdiction on the courts and desire[d] … to confer jurisdiction on the courts to enforce Senate subpoenas." *Id.* Congress ultimately passed, and the President signed, a version of the bill creating jurisdiction only for Senate subpoenas, not House ones. And "[w]here Congress includes [an authorization] in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the [authorization] was not intended." *Russello v. United States*, 464 U.S. 16, 23-24 (1983).

Likewise, Congress's choice to carve out subpoenas against Executive Branch officials from the scope of Section 1365 was a considered and deliberate one. Prior to 1978, Congress had considered legislation that lacked such a carve-out. *See, e.g.*, S. 495, 94th Cong. § 1364(a) (1976); S. 2170, 94th Cong. § 343(b)(1); S. 2731, 94th Cong. § 6 (1976). In hearings on these bills, the Executive Branch relayed its view that such provisions would raise constitutional concerns because "the Supreme Court should not and would not undertake to a[d]judicate the validity of the assertion of Executive privilege against the Congress." *Executive Privilege: Secrecy in Government: Hearings Before the Subcomm. on Intergovernmental Relations of the Comm. on Gov't Operations of the U.S. Senate*, 94th Cong. 116 (1975) (statement of Ass't Att'y Gen. Scalia); *id.* at 84

("[T]he courts are precisely not the forum in which this issue should be resolved.").[2] Congress heeded these concerns. *See, e.g.*, 123 Cong. Rec. 2970 (1977) (statement of Sen. Abourezk) ("[T]he Department argued vigorously that bringing such suits would be unconstitutional …. Due to this opposition to that section, it was deleted by the Senate Government Operations Committee when the bill was reported."). The Senate bill that would eventually add Section 1365 thus contained a clear carve-out for suits against Executive Branch officials. *See* S. 555, 95th Cong. § 1364 (1978) (as introduced Feb. 1, 1977); *see also* S. Rep. No. 95-170, at 103 ("Under no circumstances is it intended that this subsection be utilized to authorize the Counsel to bring any action against the executive branch … to challenge a claim of executive privilege.").

2. Because Section 1365 plainly does not grant jurisdiction over this type of suit, the Committee instead rests its claim to jurisdiction on 28 U.S.C. § 1331, which provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." *See* JA18. But the Committee cannot avoid Section 1365's limitations—jurisdiction only for the

[2] *See also Watergate Reorganization and Reform Act of 1978: Hearings Before the Comm. on Gov't Operations of the U.S. Senate*, 94th Cong., 1st Sess. 15 (1975-1976) (statement of Ass't Att'y Gen. Uhlmann) ("To ask the courts to weigh the competing interests of the executive and legislative branches when executive privilege is asserted in response to a congressional subpena would put the courts in an uncomfortable and perhaps impossible situation. It is significant, we think, that while precedents for the exercise of executive privilege go back to the Presidency of George Washington, no formal institutional mechanism of the sort proposed here has ever been established. Nor does the Department believe it should be now.").

Senate, and not for suits against the Executive Branch—by relying on the general federal-question jurisdiction statute. Where "a general authorization and a more limited, specific authorization exist side-by-side," "[t]he terms of the specific authorization must be complied with." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). As a result, "general grants of subject matter jurisdiction such as 28 U.S.C. § 1331" do not "control over the specific limitation of subject matter jurisdiction contained" in other provisions. *Gila River Indian Cmty. v. U.S. Dep't of Veterans Affairs*, 899 F.3d 1076, 1081 (9th Cir. 2018). If the Committee were permitted to rely on the general federal-question jurisdiction statute, Section 1365's specific jurisdictional grant would be superfluous, and its specific jurisdictional limitations would be nullities.

The Committee has attempted to avoid the plain implication of its jurisdictional assertion by observing that, when Section 1365 was enacted in 1978, Section 1331 had an amount-in-controversy requirement for suits against non-federal parties, but not for suits against federal officials. *See* Resp. Br. 29. According to the Committee, the scheme set forth in Section 1365 and its related provisions was intended only to "eliminate[] the amount-in-controversy requirement for the enforcement of Senate subpoenas against private parties," and is now an anachronism. *Id.* That interpretation is untenable. As discussed above, at the time Section 1365 was enacted, it was well understood that Congress otherwise lacked the authority to sue to enforce its subpoenas. *See supra* pp. 19-20. Moreover, that theory fails to explain why

Congress would have decided to expressly carve out suits to enforce (Senate) subpoenas against federal executive officials from Section 1365's specific jurisdictional grant. If such suits were already covered by Section 1331's jurisdictional grant, that carve-out would be pointless. Indeed, the Committee's theory would result in the perverse effect that it would be *easier* for the Senate to sue an executive official than a private party, because the Senate could presumably, under the Committee's view, sue an executive official under Section 1331 without needing to satisfy any of Section 1365's various procedural requirements for suits against private parties. The simpler explanation is instead that Congress in Section 1365 conferred jurisdiction on the courts only for actions to enforce Senate subpoenas against non-federal parties.

The 1996 amendments to Section 1365 further refute the Committee's argument. In that year—well after Congress had completely eliminated Section 1331's amount-in-controversy requirement in 1980, *see Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506 (2006)—Congress amended Section 1365 to make clear that an Executive Branch official's refusal to comply based upon a personal (rather than governmental) privilege does *not* defeat jurisdiction. *See* Pub. L. No. 104-292, § 4, 110 Stat. 3459, 3460 (1996). That amendment's sponsors could not have been clearer about the point of Section 1365's exclusion of controversies over executive defenses: "The purpose is to keep disputes between the executive and legislative branches out of the courtroom." 142

Cong. Rec. 19,412 (1996) (statement of Sen. Specter); *see also id.* at 19,413 (statement of Sen. Levin) (purpose is "to keep interbranch disputes out of the courtroom").[3]

Under the Committee's theory, however, the 1996 amendment to Section 1365 was pointless, because Section 1331's general jurisdictional grant already applied to all suits to enforce congressional subpoenas, regardless of whether a federal executive official was resisting a Senate subpoena based on personal or governmental privilege. It would be an extraordinary assumption to believe that, all along, congressional committees could simply invoke Section 1331 to initiate the precise sort of litigation

[3] Refusing to recognize congressional suits for subpoena enforcement would in effect keep interbranch subpoena disputes out of federal courts, because, for Executive Branch officials with respect to actions taken to protect the prerogatives of the Executive Branch, criminal contempt prosecution is unavailable, *see Testimonial Immunity Before Cong. of the Former Counsel to the President*, 43 Op. O.L.C. ___, 2019 WL 2315338, at *14 (May 20, 2019), and so is inherent contempt arrest authority on the part of Congress. Regarding inherent contempt, because Congress has no express contempt power under the Constitution, any such "implied power[]" of contempt of Congress must be "auxiliary and subordinate," limited to cases "of necessity," and informed by "the history of the practice of our legislative bodies." *Anderson*, 19 U.S. at, 225-26, 228, 231. Those criteria are not satisfied in a case like this one. Legislative authority to arrest Executive officials for actions properly taken to protect the prerogatives of the Executive Branch is the type of "great substantive and independent power[]" that the Constitution would not have left to mere implication, *NFIB v. Sebelius*, 567 U.S. 519, 559 (2012) (Roberts, C.J.), and it is unnecessary where Congress has long had political remedies available to induce compliance, *see Mazars*, 140 S. Ct. at 2029-30, 2035. Moreover, the Legislative Branch has sought to arrest Executive Branch officials only twice in the Nation's history, and neither effort was ultimately successful. *See Marshall v. Gordon*, 243 U.S. 521, 545, 548 (1917); *see also* H.R. Rep. No. 45-141, at 3 (1879). Indeed, as this Court has observed, "Congress has not exercised its inherent contempt authority against an Executive Branch official since 1917." *McGahn II*, 968 F.3d at 776.

Congress sought to keep "out of the courtroom," 142 Cong. Rec. 19,412, let alone without complying with the procedures Congress adopted even for those suits it was willing to allow into court. This Court must "presume that Congress has used its scarce legislative time to enact statutes that have some legal consequence." *Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872, 877 (D.C. Cir. 2006); *see West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 100 (1991) (statutory provisions should be construed "to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law").

This Court's opinion in *AT&T*, 551 F.2d 384, which noted that the Court has jurisdiction under Section 1331 in a suit by the United States to enjoin a private company from complying with a legislative subpoena, is not to the contrary. That case was not a suit by *Congress* or a *congressional committee* to enforce a subpoena against the Executive Branch. Nor did the Court even have the occasion in *AT&T* to address the clear implication of Section 1365. Congress enacted Section 1365 two years after that case was decided, and then amended the statute in 1996 to clarify and preserve Section 1365's carve-out for suits against Executive Branch officials. *AT&T* thus casts no doubt on Congress's explicit decision in Section 1365 to define and delimit the circumstances in which federal courts may entertain civil actions to enforce congressional subpoenas.

3. At a minimum, Section 1331 does not *unambiguously* confer jurisdiction over the Committee's suit in light of Section 1365. Accordingly, the constitutional-

avoidance canon requires construing Section 1331 not to confer jurisdiction, because that statutory resolution will pretermit the "significant separation of powers issues" the Committee's suit presents. *Mazars*, 140 S. Ct. at 2033; *see Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 466-67 (1989). If Congress truly wants to put courts in the middle of disputes between its committees and the Executive, it must say so clearly. *Cf. United States v. Rumely*, 345 U.S. 41, 48 (1953) ("Grave constitutional questions are matters properly to be decided by this Court but only when they inescapably come before us for adjudication.").

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

Even if this Court were to conclude that subject-matter jurisdiction exists, the Committee still lacks a cause of action to enforce its subpoena. Congress has provided an express cause of action to the Senate to enforce its subpoenas against persons who do not present objections based on their service as federal executive officials. *See* 28 U.S.C. § 1365; 2 U.S.C. § 288d(a); *see also supra* pp. 20-22. And Congress has granted the Executive Branch authority to bring contempt prosecutions to enforce congressional subpoenas. *See* 2 U.S.C. § 192. But Congress has not authorized House committees to enforce any subpoenas, much less one seeking testimony from an Executive Branch official concerning matters related to his duties.

Despite this lack of authorization, the Committee has asserted in this litigation a grab-bag of theories for why it has a cause of action to enforce its subpoena. Each

is foreclosed by decisions of the Supreme Court and this Court, as the panel here correctly recognized. *See McGahn III*, 973 F.3d 121.

1. The Committee does not have an implied cause of action under Article I to bring suit to enforce its subpoenas.

As the Supreme Court explained almost a century ago, the "[a]uthority to exert the powers of [Congress] to compel production of evidence differs widely from authority to invoke judicial power for that purpose." *Reed v. County Comm'rs of Del. Cty.*, 277 U.S. 376, 389 (1928). In *Reed*, the Senate had authorized a special committee to issue subpoenas for an investigation related to the nomination of Senate candidates, "and to do such other acts as may be necessary in the matter of said investigation." *Id.* at 386-87. The special committee argued that this authorization meant it was "authorized by law to sue" to enforce the subpoena—thus satisfying the grant of subject-matter jurisdiction that it invoked—but the Supreme Court disagreed. *See id.* at 386, 388-89.

The Court explained that the Senate's authorization must "be construed having regard to the power possessed and customarily exerted by the Senate." *Reed*, 277 U.S. at 388. The Court recognized that Article I empowered the Senate "to take such steps as may be appropriate and necessary to secure information upon which to decide concerning elections" of its members, and that "[b]y means of its own process or that of its committee, the Senate is empowered to obtain evidence relating to matters committed to it by the Constitution." *Id.* But the Court explained that the authority

to issue subpoenas "differs widely from authority to invoke judicial power for that purpose," and it would be a departure from "established practice" for the Senate "to invoke the power of the Judicial Department" to enforce a subpoena, rather than "rely on its own powers." *Id.* at 389. The Court thus held that the Senate's authorization for the special committee to issue subpoenas and perform "such other acts as may be necessary" in the course of its investigation, *id.* at 386, was "not intend[ed] to authorize the committee" to sue, *id.* at 389.

Reed's holding that the Senate was not "authorized by law to sue" despite being authorized to take any "necessary" action in connection with the subpoena, *Reed*, 277 U.S. at 388, necessarily means that the Constitution itself does not impliedly authorize a cause of action to enforce any authorized legislative subpoena. Indeed, given that the Constitution takes pains to explicitly define the relationship between the Executive and Legislative Branches, it would be remarkable to find an implied cause of action directly under Article I for a House committee to sue the Executive Branch. *Cf. INS v. Chadha*, 462 U.S. 919, 945 (1983) ("Explicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process").

Neither *McGrain*, *supra*, nor *Quinn v. United States*, 349 U.S. 155 (1955), demonstrates otherwise. *See McGahn III*, 973 F.3d at 125. The Committee has made much of *McGrain*'s statement that the "power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." 272 U.S. at

174. But *McGrain*'s "process to enforce" language was referring merely to the fact that Congress can go beyond voluntary requests and issue compulsory process enforceable through inherent contempt arrests or criminal contempt prosecutions. *Id.* at 167-68. All of the historical examples and precedent *McGrain* relied upon to support Congress's implied "auxiliary" enforcement power involved, like *McGrain* itself, the enforcement of subpoenas exclusively through contempt. *See id.* at 154, 168-74; *see also Reed*, 277 U.S. at 388-89 (citing *McGrain* in reasoning that allowing the Senate to sue to enforce a subpoena would be a "depart[ure]" from "established practice"). Similarly, *Quinn* involved a criminal contempt prosecution brought by the Executive Branch, and in referring to Congress's ability to "compel testimony … through judicial trial," *Quinn* cited another case involving such a prosecution for criminal contempt. 349 U.S. at 161 & n.20 (citing *In re Chapman*, 166 U.S. 661 (1897)). As the panel here correctly explained, those cases "do not demonstrate that Article I creates a cause of action for the Committee" to sue, but rather "show that Congress has long relied on its own devices—either its inherent contempt power, or the criminal contempt statute enacted in 1857." *McGahn III*, 973 F.3d at 125.

More generally, where a constitutional provision "is silent regarding who may enforce federal laws in court," the Constitution does not itself confer a right to sue. *See Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 325, 327 (2015) (concluding the Supremacy Clause, which "is silent about who may enforce federal laws in court, and in what circumstances they may do so," "certainly does not create a cause of

action"). Instead, the question is whether statutory jurisdictional grants carry an implied cause of action, either in equity, *Armstrong*, 575 U.S. at 327; or, in extremely rare cases, for damages, *see Ziglar v. Abbasi*, 137 S. Ct. 1843, 1846 (2017). Article I does not expressly confer a right on congressional committees to sue to enforce subpoenas, and thus it does not itself provide such a right of action. *Armstrong*, 575 U.S. at 320, 325, 327.

2. The Committee cannot infer a cause of action from Congress's grant of equity jurisdiction, as the panel correctly held. *See McGahn III*, 973 F.3d at 123-24; *see also Armstrong*, 575 U.S. at 327-328.

The Supreme Court has repeatedly admonished that, when "a party seeks to assert an implied cause of action under the Constitution itself," "separation-of-powers principles are … central to the analysis," and "most often," Congress—not "the courts"—"should decide" whether to permit a suit. *Abbasi*, 137 S. Ct. at 1857. Those principles are not limited to only actions that seek to imply a damages remedy under the Constitution: the separation of powers is equally "central to the analysis" when the Judiciary creates an implied cause of action for equitable relief that extends beyond "traditional" equity practice. *Id.* at 1856-57. In "determining whether traditional equitable powers suffice to give necessary constitutional protection," or whether something additional is needed—either "a damages remedy," *id.* at 1856, or relief that extends beyond that "traditionally accorded by courts of equity," *Grupo Mexicano*, 527 U.S. at 319—there are "a host of considerations that must be weighed and appraised,"

Abbasi, 137 S. Ct. at 1857. That task generally "should be committed to those who write the laws rather than those who interpret them." *Id.* at 1857; *see Grupo Mexicano*, 527 U.S. at 322 ("When there are indeed new conditions that might call for a wrenching departure from past practice, Congress is in a much better position than [the courts] both to perceive them and to design the appropriate remedy."). Congress's grant of equity jurisdiction to the federal courts is thus limited to the relief that "was traditionally accorded by courts of equity." *Grupo Mexicano*, 527 U.S. at 318-19, 329. A "substantial expansion of past practice" is "incompatible with [the courts'] traditionally cautious approach to equitable powers, which leaves … to Congress" such policy judgments. *Id.*

Here, the "relative recency" of lawsuits to enforce congressional subpoenas, *McGahn II*, 968 F.3d at 777, all but forecloses their being within the scope of federal courts' implied equitable authority. *See Grupo Mexicano*, 527 U.S. at 319, 322. Unlike traditional equitable suits, in which private parties seek to enforce *personal* interests based on violations of federal *laws*, *see, e.g.*, *Armstrong*, 575 U.S. at 326-27, the Committee here seeks to enforce an *institutional* prerogative based on non-compliance with a federal *subpoena*, *see McGahn III*, 973 F.3d at 124 ("[T]here is … nothing 'traditional' about the Committee's claim."). Given that the Supreme Court in *Grupo Mexicano* characterized the relatively subtle distinction between suits by post-judgment creditors and pre-judgment creditors as "a wrenching departure from past practice" that "Congress [was] in a much better position" to address through legislation, 527

U.S. at 322, it follows *a fortiori* that Congress must decide the much weightier issue of whether to provide a House Committee with a novel cause of action here.

The Supreme Court's decision in *Mazars* only underscores the significant separation-of-powers concerns here. Even in that suit brought by the President in his personal capacity, the Court stressed that suits "involving congressional efforts to seek official Executive Branch information" implicate the separation of powers, and that the Judiciary has "a duty of care to ensure that [it] not needlessly disturb the compromises and working arrangements that" the political branches have amongst themselves to resolve such disputes. *Mazars*, 140 S. Ct. at 2031 (quotations omitted). The separation-of-powers concerns that animated *Mazars* are even more acute here, where a committee of Congress seeks to bring suit against a former close presidential advisor, and asks the Judiciary to imply a novel cause of action under the Constitution to allow it to do so, even though Congress has "*declined* to authorize" such a suit. *See McGahn III*, 973 F.3d at 123 (citing 2 U.S.C. § 288d; 28 U.S.C. § 1365).

In any event, and just as fundamentally, a court's equitable powers remain "subject to express and implied statutory limitations." *Armstrong*, 575 U.S. at 327. Where, as here, Congress has had "specific occasion to consider" the means for enforcing congressional subpoenas, *Abbasi*, 137 S. Ct. at 1865, its decision to authorize suits by the Senate—but not the House—and its decision to *exclude* suits that involve Executive Branch assertions of "governmental privilege," 28 U.S.C. § 1365(a), "suggest[] that Congress intended to preclude" the suit the Committee

seeks to bring here, *Armstrong*, 135 S. Ct. at 1385; *see supra* pp. 19-22. It would turn the statutory scheme on its head to conclude that, when Congress specifically addressed the means of enforcing congressional subpoenas, and expressly granted the Senate a limited cause of action and granted the House *no* cause of action, Congress thereby allowed the House to invoke a broader cause of action in equity. *See Hernandez v. Mesa*, 140 S. Ct. 735, 747 (2020) ("It would be 'anomalous to impute … a judicially implied cause of action beyond the bounds [Congress has] delineated for [a] comparable express caus[e] of action.'" (citation omitted)). That is particularly so given that the Senate's statutory cause of action is subject to numerous limitations, as discussed. *See supra* pp. 5-6, 20.

3. Finally, the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*, does not aid the Committee. That Act simply "enlarge[s] the range of remedies available in the federal courts" for cases that already can be litigated there. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667-671 (1950); *see* Wright & Miller, *Federal Practice & Procedure* § 2751 (4th ed. Oct. 2020)("The remedy made available by the Declaratory Judgment Act … afford[s] one threatened with liability an early adjudication without waiting until an adversary should see fit to begin an action after the damage has accrued"). The Supreme Court has "long considered 'the operation of the Declaratory Judgment Act' to be only 'procedural,' leaving 'substantive rights unchanged.'" *Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 571 U.S. 191, 199 (2014) (quoting *Aetna Life Ins. Co. v.*

Haworth, 300 U.S. 227, 240 (1937); *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500, 509 (1959)).

Thus, as this Court has squarely held, the Declaratory Judgment Act does not alone "provide a cause of action." *Ali v. Rumsfeld*, 649 F.3d 762, 778 (D.C. Cir. 2011). In *Ali*, for example, the Court held that the plaintiffs there did not have a "cognizable cause of action" for their *Bivens* and Alien Tort Statute claims, *see id.* at 769-79, and the Court, on that basis, concluded that the Declaratory Judgment Act could not supply a freestanding cause of action. *See id.* at 778. That holding accords with well-settled law. *See, e.g.*, *Buck v. American Airlines, Inc.*, 476 F.3d 29, 33 n.3 (1st Cir. 2007) ("Although the plaintiffs style 'declaratory judgment' as a cause of action," the Declaratory Judgment Act "creates a remedy, not a cause of action"); *Davis v. United States*, 499 F.3d 590, 594 (6th Cir. 2007) ("The Declaratory Judgment Act … does not create an independent cause of action."); *Hanson v. Wyatt*, 552 F.3d 1148, 1154, 1156-57 (10th Cir. 2008) (explaining the plaintiff had not "invoked a recognized cause of action" to support his claim, and the Declaratory Judgment Act did not independently "create" one). Because there is otherwise no cause of action to bring this dispute into court, *see supra* pp. 27-34, the Committee cannot rely on the Declaratory Judgment Act to provide it with one.

Indeed, the Committee itself—despite its arguments on appeal regarding the Declaratory Judgment Act as its cause of action—did not assert an independent cause of action under the Act. The Committee's complaint purported to assert an implied

cause of action under Article I of the Constitution, *see* JA63-64, and, in accord with the well-established precedent discussed above, requested only further *remedies* based on the Declaratory Judgment Act, *see* JA64 (citing Declaratory Judgment Act in prayer for relief).

4. In all events, relief under equity jurisdiction or the Declaratory Judgment Act is not available in these circumstances. Such relief is not available as a matter of right, because it rests in courts' discretion. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008); *Wilton v. Seven Falls Co.*, 515 U.S. 277, 281-82 (1995). As this Court explained in *Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999), even decisions finding legislative standing under Article III denied relief on "equitable discretion" grounds "because of the separation of powers problems" the suits created. *Id.* at 114-15 (discussing cases); *see Mazars*, 140 S. Ct. at 2022 (emphasizing separation-of-powers concerns). That disposition would be especially warranted here, given Congress's failure to clearly grant the Committee statutory subject-matter jurisdiction and a cause of action to sue.

III. THE COMMITTEE'S IMPLIED SUBPOENA AUTHORITY DOES NOT EXTEND TO COMPEL TESTIMONY FROM CLOSE PRESIDENTIAL ADVISORS ON MATTERS RELATED TO THEIR DUTIES

Were this Court to reach the merits, the Committee's subpoena is constitutionally invalid.

A. The "Department of Justice has repeatedly" stated "for nearly five decades" that "Congress may not constitutionally compel the President's senior advisers to

testify about their official duties." *Testimonial Immunity Before Cong. of the Former Counsel to the President*, 43 Op. O.L.C. ___, 2019 WL 2315338, at *1 (May 20, 2019) (*Testimonial Immunity Op.*); *see, e.g.*, *Immunity of the Assistant to the President & Dir. of the Office of Political Strategy & Outreach from Cong. Subpoena*, 38 Op. O.L.C. ___, 2014 WL 10788678, at *1 (July 15, 2014) (*Assistant Immunity Op.*) (repeating position with respect to Director of the White House's Office of Political Strategy and Outreach during Obama Administration). Though Presidents have on occasion *permitted* close advisors to testify before Congress in the spirit of accommodation and compromise, *see Testimonial Immunity Op.*, *supra*, at *5, at no time in the Nation's history has an immediate presidential advisor testified before Congress pursuant to a subpoena enforced by an Article III court.

Whether a close presidential advisor is constitutionally immune from compelled congressional testimony and whether the House has the implied constitutional power to compel that testimony are, as a matter of the merits, identical inquiries. *Cf. New York v. United States*, 505 U.S. 144, 159 (1992) (finding same for scope of Congress's Commerce Clause power and States' Tenth Amendment rights). Viewed either as a protection for the President's close advisors or a limitation on congressional subpoenas, the result is that such testimony may not be compelled.

As noted, because the Constitution provides Congress with "no enumerated constitutional power … to issue subpoenas," the Supreme Court has held that the implied subpoena power is justified only as "an essential and appropriate auxiliary to

the legislative function." *Mazars*, 140 S. Ct. at 2031 (quoting *McGrain*, 273 U.S. at 174). That holding was based on the longstanding "history" that formed "a practical construction" of Article I. *McGrain*, 273 U.S. at 174. The Supreme Court has thus specifically cautioned, in the congressional-subpoena context, against "a limitless subpoena power [that] would transform the 'established practice' of the political branches." *Mazars*, 140 S. Ct. at 2034 (quoting *NLRB v. Noel Canning*, 573 U.S. 513, 524 (2016)). Given that the power is implied rather than express, it is particularly true that the political branches' "longstanding practice 'is a consideration of great weight'" if the judiciary must assess the validity of "a significant departure from historical practice." *Id.* at 2031 (quoting *Noel Canning*, 573 U.S. at 524-26).

Here, rather than the enforcement of subpoenas in federal court, a "tradition of negotiation and compromise" has continued through modern times when committees sought information that, for instance, "implicated [President Reagan's] confidential relationship with subordinates" or pertained to "notes taken by a White House attorney" under President Clinton. *Mazars*, 140 S. Ct. at 2030-31. Based on that historical practice, the Supreme Court warned against a judicial result that would permit the Committee—"[i]nstead of negotiating over information requests"—to "simply walk away from the bargaining table and compel compliance in court." *Id.* at 2034. That admonition is especially prudent since a single House Committee is not subject to structural checks such as bicameralism and presentment that "protect the

Executive Branch from Congress" and ensure "full study and debate." *Chadha*, 462 U.S. at 951.

Moreover, extending the exercise of this implied general power to allow a committee of a single House to target the President and his immediate advisors is neither an essential nor an auxiliary function. It has no support in historical or traditional practice. And if the Founders had intended to authorize the House or one of its committees to take the extraordinary step of compelling the President or his immediate advisors to provide testimony, they surely would have spelled that out expressly. *Cf. NFIB v. Sebelius*, 567 U.S. 519, 559 (2012) (Roberts, C.J.) (implied powers under the Necessary and Proper Clause are "incidental" and cannot be "great substantive and independent powers"); *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992) (refusing to construe the Administrative Procedure Act to apply to the President absent an "express statement by Congress").

Furthermore, judicially enforceable congressional subpoenas demanding testimony from the President or his immediate advisors encroach upon the President's ability to carry out his constitutional prerogatives under Article II. "The President occupies a unique position in the constitutional scheme." *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982). The Constitution itself "entrust[s] [the President] with supervisory and policy responsibilities of utmost discretion and sensitivity." *Id.* at 750. "The entire 'executive Power' belongs to the President alone," "who must 'take Care that the Laws be faithfully executed.'" *Seila Law LLC v. CFPB*, 140 S. Ct.

2183, 2197 (2020) (U.S. Const. art. II, §§ 1, 3). Owing to the President's unique constitutional status, the separation of powers protects his office from encroachments on its independence and autonomy. *See Kendall v. United States*, 37 U.S. (12 Pet.) 524, 610 (1838); *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1867). That independence and autonomy depends critically on the confidentiality of his communications with his close advisors. *See United States v. Nixon*, 418 U.S. 683, 705-06, 708 (1974); *In re Sealed Case*, 121 F.3d 729, 742 (D.C. Cir. 1997); *Association of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 909-10 (D.C. Cir. 1993) (*AAPS*).

Congress thus has no ability to compel the President's testimony. "[A]llowing Congress to subpoena the President to appear and testify would 'promote a perception'"—and, eventually, the expectation—"'that the President is subordinate to Congress, contrary to the Constitution's separation of governmental powers into equal and coordinate branches.'" *Testimonial Immunity Op.*, *supra*, at *3. "Congress could 'exert an imperious control' over the Executive Branch and aggrandize itself at the President's expense, just as the Framers feared." *Mazars*, 140 S. Ct. at 2034 (quoting The Federalist No. 71, at 484 (J. Cooke ed. 1961) (A. Hamilton)). Indeed, the Constitution expressly recognizes only a limited presidential obligation to report to Congress "from time to time" regarding "the State of the Union," U.S. Const. art. II, § 3, which is in significant tension with the notion that Congress is implicitly authorized to compel the President's testimony whenever it pleases.

Nor may Congress circumvent that limit on its implied investigative authority and compel the President's close advisors to appear and testify instead. "[T]he President alone and unaided could not execute the laws," *Myers v. United States*, 272 U.S. 52, 117 (1926), and must rely on the advice and assistance of close advisors in the formulation of policy and execution of his constitutional duties, *Assistant Immunity Op.*, *supra*, at *2; *see also Sealed Case*, 121 F.3d at 750. The Constitution thus protects the Presidency against "substantial intrusions on the process by which those in closest operational proximity to the President advise the President." *Cheney*, 542 U.S. at 381.

Unlike Cabinet Secretaries who administer agencies created and regulated by Congress, close presidential advisors are unique because they exclusively assist the President in exercising his Article II functions. *Cf. Kissinger v. Reporters Comm. For Freedom of the Press*, 445 U.S. 136, 156 (1980) ("agency" under the Freedom of Information Act does not encompass "the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President"); *AAPS*, 997 F.2d at 909-10 (construing requirements of the Federal Advisory Committee Act not to apply to a task force chaired by the First Lady to avoid encroaching on the President's right to confidential communications). And insofar as the Committee relies on its legislative functions to support the current subpoena, Congress cannot enact legislation that "impair[s] [the President] in the performance of [his] constitutional duties." *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 493, 500 (2010) (quoting *Loving v. United States*, 517 U.S. 748, 757 (1996)); *see Mazars*,

140 S. Ct. at 2035-26 (cautioning against congressional subpoenas in aid of "legislation concerning the Presidency").

Precluding Congress from compelling testimony from immediate advisors is therefore necessary to preserve the autonomy and confidentiality of presidential decisionmaking that are essential to the effective functioning of the Presidency. Allowing Congress to compel close advisors' testimony would provide congressional committees with the ability to harass advisors in an effort to influence their conduct, retaliate against the President and his advisors for actions a committee disliked, or embarrass and weaken the President for partisan gain. *Testimonial Immunity Op.*, *supra*, at *2. Committees could also attempt to exert undue influence over the President's decisionmaking by using questioning to expose sensitive ongoing matters or to demand justifications for Executive actions and decisions, thus risking significant congressional interference with the President's ability to discharge his duties and promoting a perception of presidential subordination to Congress. *Assistant Immunity Op.*, *supra*, at *2.

In these respects, as Attorney General Reno explained, "[s]ubjecting a senior presidential advisor to the congressional subpoena power would be akin to requiring the President himself to appear before Congress on matters relating to the performance of his constitutionally assigned executive functions." *Assertion of Executive Privilege with Respect to Clemency Decision*, 23 Op. O.L.C. 1, 5 (1999). Congress's

implied subpoena power does not permit it to wield such authority and influence over the President's exercise of his constitutional duties.

The threat of compelled testimony also would impede the President's access to the sound and candid advice required for effective decisionmaking. "If presidential advisors must assume they will be held to account publicly for all approaches that were advanced, considered but ultimately rejected, they will almost inevitably be inclined to avoid serious consideration of novel or controversial approaches to presidential problems," *Sealed Case*, 121 F.3d at 750, to the detriment of "the effectiveness of the executive decision-making process," *id.* at 742. Subjecting the President's closest advisors to a "wide range of unanticipated and hostile questions about highly sensitive deliberations" would also create a substantial risk of inadvertent or coerced disclosure of confidential information. *Assistant Immunity Op.*, *supra*, at *3.

Indeed, these same considerations led the Supreme Court to extend Speech or Debate Clause immunity, U.S. Const. art. I, § 6, cl. 1, to congressional aides to ensure that Members can effectively perform their legislative duties. *Gravel v. United States*, 408 U.S. 606, 616-17 (1972). Similarly, the Court has suggested that, for presidential aides "entrusted with discretionary authority in such sensitive areas as national security or foreign policy, absolute immunity [from civil damages suits] might well be justified to protect the unhesitating performance of functions vital to the national interest." *Harlow v. Fitzgerald*, 457 U.S. 800, 812 & n.19 (1982).

The Counsel to the President plainly counts as a close presidential advisor. He advises the President "on all aspects of Presidential activity," including national security and foreign policy, and his responsibilities also include coordinating the President's agenda with the rest of the Executive Branch and negotiating with Congress on the President's behalf. JA712-713; *see Committee on the Judiciary of the U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 105 (D.D.C. 2008) (acknowledging that the position is a "senior presidential advisor[]").

It makes no difference that McGahn no longer serves as Counsel to the President. Even after service as an immediate presidential advisor ends, "the risk to the separation of powers and to the President's autonomy posed by" the advisor's compelled testimony continues. *Testimonial Immunity Op.*, *supra*, at *11. Just as with current advisors, a former advisor could be compelled to disclose, or inadvertently disclose, privileged information, and the spectacle of compelling a former advisor to answer questions about his duties could "render [the President] 'complaisan[t] to the humors of the Legislature'" or promote that perception. *Mazars*, 140 S. Ct. at 2034. Likewise, the knowledge of future hostile questioning would surely exert influence over the quality and candor of the counsel the advisor provides while serving the President. *Testimonial Immunity Op.*, *supra*, at *10. "The confidentiality necessary" to a President's receipt of "full and frank submissions of facts and opinions" from his advisors "cannot be measured by the few months or years between the submission of

the information and the end of the President's tenure," *Nixon v. GSA*, 433 U.S. 425, 449 (1977), much less his advisors' tenure.

Nor would the possibility of a close advisor's invoking executive privilege on a question-by-question basis fully protect the presidential prerogatives at stake. *See Mazars*, 140 S. Ct. at 2033 (separation-of-powers protections apply even where "cases involve nonprivileged, private information"). Even apart from privilege concerns, compelled testimony would still threaten presidential autonomy and independence by allowing congressional committees to harass the President and his immediate advisors through demands to testify, would still promote the appearance of Executive subservience to the Legislature, and would still act as a deterrent to advisors providing the full and frank advice the President needs. *Testimonial Immunity Op.*, *supra*, at *3, 10. Moreover, even privilege concerns would not be eliminated, due to the risk of inadvertent disclosure from "a wide range of unanticipated and hostile questions," with Congress asserting for itself the authority to decide whether a witness properly invoked privilege. *Id.* at *3. At a minimum, the likely privilege disputes that would result when a close advisor testifies and Congress seeks judicial resolution would be in serious tension with the basic principle that such confrontations "should be avoided whenever possible." *Cheney*, 542 U.S. at 389-90.

Given these structural separation-of-powers concerns and the lack of historical support, the Committee's subpoena cannot be characterized as "an essential and appropriate auxiliary to the legislative function." *Mazars*, 140 S. Ct. at 2031 (quoting

McGrain, 273 U.S. at 174). Accordingly, McGahn cannot be compelled to testify pursuant to this unconstitutional subpoena.

B. The district court's order that McGahn must comply with the Committee's subpoena is flawed in several respects.

First, the district court observed that there was a lack of judicial precedent supporting the Executive Branch's longstanding position that Congress may not compel testimony from close presidential advisors. JA941-47. But that gets things backwards. There could hardly be precedent on that point because, "[f]or more than two centuries, the political branches have resolved information disputes using the wide variety of means that the Constitution puts at their disposal." *Mazars*, 140 S. Ct. at 2035. And it was precisely that "longstanding practice" that the court should have provided "'great weight'" in assessing the validity of the Committee's novel approach. *Id.* at 2031 (quoting *Noel Canning*, 573 U.S. at 524-26).

The district court also relied on cases raising fundamentally different issues—namely, judicial subpoenas seeking production of records, not congressional subpoenas seeking testimony. JA940-41. But a congressional subpoena compelling public testimony from a close presidential advisor raises graver separation-of-powers concerns than a subpoena that is issued under the authority of a neutral federal judge that imposes the lesser burdens of production of records. *See Chadha*, 462 U.S. at 947 (noting "profound conviction of the Framers that the powers conferred on Congress were the powers to be most carefully circumscribed"). In any case, the court

identified no instance where even a federal court had demanded testimony from a close presidential advisor about his official duties.

The district court also relied (JA938-39) on *Harlow*'s holding that presidential advisors generally are entitled only to qualified immunity in damages suits. 457 U.S. at 808-09. But this is not an individual-capacity suit for damages for clearly established violations of constitutional and statutory rights; rather, it is a suit that would authorize a legislative committee to regulate the conduct of presidential advisors by forcing them to testify, thereby undermining the President's interests in autonomy and confidentiality. Indeed, *Harlow* itself recognized that certain "aides entrusted with discretionary authority" in particularly "sensitive areas"—surely a description of the Counsel to the President—may be entitled to absolute immunity even in damages actions "to protect the unhesitating performance of functions vital to the national interest." *Id.* at 812.

The district court also ignored or minimized the serious separation-of-powers issues that arise when a single House seeks to invoke the Judiciary to compel close presidential advisors to testify, even suggesting that the President himself might be compelled to testify before Congress. JA948 & n.29. For example, the court discounted concerns about the threat to frank communications as "contradict[ing] the lived experience" of close advisors "who have testified before Congress." JA957. But such testimony has historically only been voluntary rather than compelled, and in some instances there was no risk of inadvertent disclosure because the President had

already "determined that he would not claim executive privilege over the subject matters of the testimony." *Testimonial Immunity Op.*, *supra*, at *6 n.2. The court viewed compelled testimony as a "public duty of giving authorized legislators the means of performing their own constitutional functions," JA957-58, without recognizing that the court itself had "a duty of care to ensure that [it] not needlessly disturb" "the allocation of power between [the] two elected branches of Government." *Mazars*, 140 S. Ct. at 2031 (quotation omitted).

Nor did the district court give any credence to the possibility that each chamber of Congress would use this newfound power "to harass the President." *Mazars*, 140 S. Ct. at 2034. It merely stated that "no such parade of horribles has happened" since *Miers*. JA959. But in *Miers*, this Court issued a published order staying the district court's ruling and the dispute was then settled before this Court could definitively resolve the question. *Miers* thus provided scant reason for the House to have confidence that it could vigorously press an otherwise-unprecedented view of its subpoena powers. And the Executive Branch after *Miers* adhered to its position that Congress cannot compel testimony of close advisors. *Assistant Immunity Op.*, *supra*.

Although the district court here noted that, as a former advisor, McGahn's testimony would not distract him from his duties, JA956, it did not grapple with whether he should be treated the same as current advisors because of the other threats to presidential autonomy and confidentiality described above. Those concerns must be central to any analysis of whether the House's attempt to compel testimony from

close presidential advisors exceeds its implied powers. In sum, the court erred in giving dispositive weight to the interests of the Legislative Branch and disregarding those of the Executive Branch, contrary to the separation of powers and our Nation's history and tradition.

CONCLUSION

This Court should vacate the judgment of the district court and remand with instructions that the case be dismissed. In the alternative, it should reverse the judgment of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,356 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

/s/ Courtney L. Dixon
COURTNEY L. DIXON

CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Courtney L. Dixon
COURTNEY L. DIXON

ADDENDUM

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Decided August 31, 2020

No. 19-5331

COMMITTEE ON THE JUDICIARY OF THE UNITED STATES HOUSE OF REPRESENTATIVES,
APPELLEE

v.

DONALD F. MCGAHN, II,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:19-cv-02379)

Hashim M. Mooppan, Deputy Assistant Attorney General, U.S. Department of Justice, and *Mark R. Freeman*, *Michael S. Raab*, and *Martin Totaro*, Attorneys, were on the briefs for appellant.

Douglas N. Letter, General Counsel, U.S. House of Representatives, *Todd B. Tatelman*, Deputy General Counsel, *Megan Barbero* and *Josephine Morse*, Associate General Counsel, *Adam A. Grogg* and *William E. Havemann*, Assistant General Counsel, *Jonathan B. Schwartz*, Attorney, and *Annie L. Owens* were on the brief for appellee.

Steven A. Hirsch, *Justin Florence*, *Jamila G. Benkato*, and *Cameron O. Kistler* were on the brief for *amici curiae* Republican Legal Experts, et al. in support of plaintiff-appellee.

Before: HENDERSON, ROGERS, and GRIFFITH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* GRIFFITH.

Dissenting opinion filed by *Circuit Judge* ROGERS.

GRIFFITH, *Circuit Judge*: In *Committee on the Judiciary v. McGahn*, 2020 WL 4556761 (Aug. 7, 2020), the en banc court held that the Committee on the Judiciary of the House of Representatives has Article III standing to seek judicial enforcement of a subpoena issued to former White House Counsel Donald F. McGahn, II. *Id.* at *15. It remanded the case to this three-judge panel to consider the remaining issues, including whether the Committee has a cause of action to enforce its subpoena and, if so, whether McGahn must testify despite the Executive Branch's assertion of absolute testimonial immunity. *Id.* We have no occasion to address the immunity argument because we conclude that the Committee lacks a cause of action. Accordingly, the case must be dismissed.

I

The en banc court held that the Committee has Article III standing, but the Committee "also need[s] a cause of action to prosecute" its case in federal court. *Make the Road N.Y. v. Wolf*, 962 F.3d 612, 631 (D.C. Cir. 2020). Here, the Committee argues that it has an implied cause of action under Article I, that it can invoke the traditional power of courts of equity to

enjoin unlawful executive action, and that the Declaratory Judgment Act provides a separate basis for this suit. We disagree.

A

Start with Article I. The Committee argues that it is "entitled under Article I to seek equitable relief to enforce a subpoena . . . issued in furtherance of its constitutional power of inquiry." Committee Panel Br. 34 (internal quotation marks omitted). But time and again, the Supreme Court has warned federal courts to hesitate before finding implied causes of action—whether in a congressional statute or in the Constitution. *See, e.g.*, *Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, 140 S. Ct. 1009, 1015 (2020); *Hernandez v. Mesa*, 140 S. Ct. 735, 741-43 (2020); *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1402 (2018); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017); *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001). "When a party seeks to assert an implied cause of action under the Constitution itself, . . . separation-of-powers principles are or should be central to the analysis," and usually Congress "should decide" whether to authorize a lawsuit. *Ziglar*, 137 S. Ct. at 1857 (internal quotation marks omitted).

In this case, Congress has *declined* to authorize lawsuits like the Committee's twice over. First, Congress has granted an express cause of action to the Senate—but not to the House. *See* 2 U.S.C. § 288d; 28 U.S.C. § 1365(b). Second, the Senate statute expressly *excludes* suits that involve executive-branch assertions of "governmental privilege." 28 U.S.C. § 1365(a). The expression of one thing implies the exclusion of the other, and authorizing the Committee to bring its lawsuit would conflict with *two* separate statutory limitations on civil suits to enforce congressional subpoenas. When determining whether to "recognize any causes of action not expressly created by

Congress," "our watchword is caution," *Hernandez*, 140 S. Ct. at 742, and we should not ignore Congress's carefully drafted limitations on its authority to sue to enforce a subpoena.

The Committee next suggests that—even if Article I alone doesn't provide a cause of action—the court may exercise its "traditional equitable powers" to grant relief. *Ziglar*, 137 S. Ct. at 1856. But even those equitable powers remain "subject to express and implied statutory limitations," *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015), and are further limited to relief that was "traditionally accorded by courts of equity," *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 319 (1999). Again, "implied statutory limitations" foreclose suits by the House and suits that implicate a governmental privilege; this one checks both boxes, so Congress itself has precluded us from granting the requested relief to the Committee.

In any event, there is also nothing "traditional" about the Committee's claim. The Committee cannot point to a single example in which a chamber of Congress brought suit for injunctive relief against the Executive Branch prior to the 1970s. True enough, the en banc court rejected McGahn's argument that "federal courts have not historically entertained congressional subpoena enforcement lawsuits," but the full court also recognized the "relative recency" of lawsuits to enforce subpoenas. *McGahn*, 2020 WL 4556761, at *14. When determining the scope of our equitable authority, however, "relatively recent" history isn't enough. In *Grupo Mexicano*, the Supreme Court explained that we "must ask whether the relief" that the Committee requests "was traditionally accorded *by courts of equity*." 527 U.S. at 319 (emphasis added). The relief requested here—an injunction issued against a former Executive Branch official in an interbranch information dispute—cannot possibly have been traditionally available in

courts of equity, because the "separate systems of law and equity" in our federal system ceased to exist in 1938. *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 960 (2017). The Committee's smattering of examples from the 1970s comes (at least) thirty years too late.

Confining ourselves "within the broad boundaries of traditional equitable relief" constrains federal courts to their proper role in a democratic system. *Grupo Mexicano*, 527 U.S. at 322. We cannot simply gesture towards the "flexibility" of equity and offer whatever relief (in our view) seems necessary to redress an alleged harm; that would transform equity's "flexibility" into "omnipotence." *Id.* Congress may someday determine that the federal courts should stand ready to enforce legislative subpoenas against executive-branch officials, but authorizing that remedy ourselves would be "incompatible with the democratic and self-deprecating judgment" that we lack the "power to create remedies previously unknown to equity jurisprudence." *Id.* at 332. "The debate concerning [the] formidable power" to compel executive-branch officials to respond to congressional subpoenas "should be conducted and resolved where such issues belong in our democracy: in the Congress." *Id.* at 333.

Finally, the Committee claims that the Declaratory Judgment Act allows it to bring suit. *See* 28 U.S.C. § 2201(a). This argument is even less persuasive. The Declaratory Judgment Act does not itself "provide a cause of action," as the "availability of declaratory relief presupposes the existence of a judicially remediable right." *Ali v. Rumsfeld*, 649 F.3d 762, 778 (D.C. Cir. 2011) (cleaned up); *see also C&E Servs., Inc. of Wash. v. D.C. Water & Sewer Auth.*, 310 F.3d 197, 201 (D.C. Cir. 2002). That statute is "procedural only" and simply "enlarge[s] the range of remedies available in the federal courts." *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667,

671 (1950) (internal quotation marks omitted). Because Article I does not create a "judicially remediable right" to enforce a congressional subpoena, the Committee cannot use the Declaratory Judgment Act to bootstrap its way into federal court. Thus, even though the Committee has the Article III standing necessary to "get[] [it] through the courthouse door, [that] does not keep [it] there." *Make the Road*, 962 F.3d at 631.

B

The dissent's contrary arguments fail. First, the dissent suggests that the court may infer a cause of action from the Committee's Article I power to issue subpoenas. Dissent at 1-2. The dissent quotes *McGrain v. Daugherty*, which held that the "power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." 273 U.S. 135, 174 (1927); *see also Quinn v. United States*, 349 U.S. 155, 160-61 (1955) (similar). But the Supreme Court has also explained that "[a]uthority to exert the powers of the [House] to compel production of evidence *differs widely* from authority to invoke judicial power to that purpose." *Reed v. Cty. Comm'rs of Del. Cty.*, 277 U.S. 376, 389 (1928) (emphasis added). And neither of the cases that the dissent cites says that Article I gives the Committee power to file a civil suit to enforce its subpoenas. *McGrain* arose out of a habeas corpus suit filed after the Senate exercised its *inherent* contempt power to arrest the Attorney General's brother. *See McGrain*, 273 U.S. at 153-54. And although *Quinn* stated that Congress has "the authority to compel testimony" through "its own processes" or a "judicial trial," that case arose out of a criminal conviction for contempt of Congress—a violation of a criminal statute. 349 U.S. at 160-61. These cases do not demonstrate that Article I creates a cause of action for the Committee. To the contrary, they show that Congress has long relied on its own devices—either its inherent contempt power, *see, e.g.*,

Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1821), or the criminal contempt statute enacted in 1857, *see McGrain*, 273 U.S. at 167.

Our circuit has already recognized these limits on Congress's power to enforce subpoenas. As we explained, "Prior to 1978 Congress had *only two* means of enforcing compliance with its subpoenas: [1] a statutory criminal contempt mechanism and [2] the inherent congressional contempt power." *In re U.S. Senate Permanent Subcomm. on Investigations*, 655 F.2d 1232, 1238 (D.C. Cir. 1981) (emphasis added) (footnote omitted). Although Congress "[r]espond[ed] to this deficiency" by enacting a "mechanism for civil enforcement of *Senate* subpoenas" in 1978, that statute "does not . . . include civil enforcement of subpoenas by the House of Representatives." *Id.* at 1238 & n.28 (emphasis added). Our precedent thus plainly presupposes that the Constitution alone does not provide a cause of action.

The dissent's reliance on the Declaratory Judgment Act also fails. The dissent concedes that the Act "'presupposes the existence of a judicially remediable right.'" Dissent at 3 (quoting *C&E Servs.*, 310 F.3d at 201). The dissent locates this "judicially remediable right" in Article I, but as explained above, Congress has no implied constitutional power to seek civil enforcement of its subpoenas. The Committee thus cannot identify an underlying judicial remedy that could authorize it to invoke the Declaratory Judgment Act.

II

Because the Committee lacks a cause of action to enforce its subpoena, this lawsuit must be dismissed. We note that this decision does not preclude Congress (or one of its chambers) from *ever* enforcing a subpoena in federal court; it simply

precludes it from doing so without first enacting a statute authorizing such a suit. The Constitution's Necessary and Proper Clause vests Congress with power to "make all Laws which shall be necessary and proper for carrying into Execution" its constitutional powers, and that Clause gives Congress—and certainly not the federal courts—the broad discretion to structure the national government through the legislative process. U.S. CONST. art. I, § 8, cl. 18.

If Congress (rather than a single committee in a single chamber thereof) determines that its current mechanisms leave it unable to adequately enforce its subpoenas, it remains free to enact a statute that makes the House's requests for information judicially enforceable. Indeed, Congress has passed similar statutes before, authorizing criminal enforcement in 1857 and civil enforcement for the Senate in 1978. *See Senate Permanent Subcomm.*, 655 F.3d at 1238 & n.26. Because no "legislation pursues its purposes at all costs," *CTS Corp. v. Waldburger*, 573 U.S. 1, 12 (2014) (internal quotation marks omitted), any such statute might, for example, carve out certain categories of subpoenas, or create unique procedural protections for defendants. That's exactly what Congress has done in the past. The 1857 statute, for instance, stated that "no person examined and testifying" before Congress "shall be held to answer criminally . . . for any fact or act [about] which he shall be required to testify." *In re Chapman*, 166 U.S. 661, 665 n.1 (1897). And the Senate's civil enforcement statute exempts from suit any defendant asserting a "governmental privilege." 28 U.S.C. § 1365(a).

Balancing the various policy considerations in crafting an enforcement statute is a legislative judgment. For that reason, the Constitution leaves to Congress—and not to the federal courts—the authority to craft rights and remedies in our constitutional democracy. Perhaps "new conditions" "might

call for a wrenching departure from past practice" and for a new statute allowing the House to leverage the power of federal courts to compel testimony or the production of documents. *Grupo Mexicano*, 527 U.S. at 322. But if any institution is well-positioned to "perceive" those new conditions, to assess Congress's needs, to balance those needs against the countervailing policy considerations, and then "to design the appropriate remedy," that institution is Congress. *Id.*

The judgment of the district court is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

ROGERS, *Circuit Judge*, dissenting: In *Committee on the Judiciary v. McGahn*, 2020 WL 4556761 (Aug. 7, 2020), the *en banc* court held that a Committee of the House of Representatives has Article III standing to seek judicial enforcement of a subpoena duly issued to former White House Counsel Donald F. McGahn, II. *Id.* at *15. It remanded to the panel initially assigned to hear the case the remaining issues, including the jurisdictional issues the court considers today. *Id.* For the following reasons, the Committee has a cause of action to litigate its subpoena enforcement lawsuit in federal court and the court has statutory subject matter jurisdiction to resolve it. Further, on the merits, McGahn's contention that he is entitled to absolute immunity from the Committee's subpoena lacks merit.

I.

McGahn contends that, notwithstanding the Committee's Article III standing, *see generally McGahn*, 2020 WL 4556761, there is no statutory or constitutional authorization for the Committee to bring the present subpoena enforcement lawsuit. But there is both an implied cause of action under Article I of the Constitution and a cause of action pursuant to the Declaratory Judgment Act authorizing the Committee to bring this lawsuit.

A.

In *McGrain v. Daugherty,* 273 U.S. 135 (1927), the Supreme Court indicated that the Constitution implies a right of action to enforce a subpoena. In that case, the Supreme Court stated that "the power of inquiry — with process to enforce it — is an essential and appropriate auxiliary to the legislative function." *Id.* at 174; *see McGahn*, 2020 WL 4556761, at *4–5. The Court inferred from Article I not only the power of a House of Congress to demand testimony and

information but also "process to enforce" such a demand, namely a subpoena enforcement lawsuit. Similarly, the Supreme Court stated in *Quinn v. United States*, 349 U.S. 155 (1955), that a subpoena gives Congress "the authority to compel testimony, either through its own processes or through judicial trial," *id.* at 160–61, indicating that the subpoena power encompasses the authority to enforce a subpoena in federal court. In sum, the Supreme Court has explained that the powers of Congress enumerated in Article I of the Constitution imply not only a right to information but also a right to seek judicial enforcement of its subpoena.

B.

Even if an implied cause of action under the Constitution were inadequate, the Declaratory Judgment Act provides a cause of action for Congress to enforce its subpoena. The Act authorizes the court to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought," so long as there is "a case of actual controversy" over which a federal court may exercise jurisdiction. 28 U.S.C. § 2201(a). Those two requirements — (1) an actual case or controversy, and (2) federal court jurisdiction — are met here. First, the *en banc* court has held that the Committee has Article III standing. *See generally McGahn*, 2020 WL 4556761. It follows that the present dispute is a genuine case or controversy. Second, 28 U.S.C. § 1331 supplies federal jurisdiction over this lawsuit, as explained in Part II *infra*. The statutory requirements for proceeding under the Declaratory Judgment Act are thus met. Under the plain text of the Act, nothing else is required. In particular, "the wording of the statute does not indicate that any independent cause of action is required to invoke" the Declaratory Judgment Act, *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 80 (D.D.C. 2008), and the Supreme Court,

although emphasizing that the Act is not a source of federal court jurisdiction or any substantive rights, has never stated that it does not create a right of action.

The various limits that the Supreme Court and this court have placed upon lawsuits brought under the Declaratory Judgment Act do not preclude the House of Representatives from proceeding under the Act. First, the Supreme Court has emphasized that the Declaratory Judgment Act does not provide an independent source of federal jurisdiction. In *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950), the Court stated that the Declaratory Judgment Act "enlarged the range of remedies available in the federal courts but did not extend their jurisdiction." *Id.* In that case, plaintiffs filed suit pursuant to the Declaratory Judgment Act seeking an interpretation by the federal court of a contract provision, a question solely of state law. *Id.* at 672. The Court decided that the mere fact that the plaintiffs had proceeded under the Act did not suffice to render the case's state contract law issue a federal question for purposes of § 1331. *See id.* at 671–72. The proscription of *Skelly Oil* is no obstacle to the Committee here because the court has jurisdiction under 28 U.S.C. § 1331, *see* Part II *infra*. Thus, the Committee does not impermissibly seek to rely on the Act as a source of federal court jurisdiction.

Second, the Declaratory Judgment Act "presupposes the existence of a judicially remediable right." *C&E Servs., Inc. v. D.C. Water & Sewer Auth.*, 310 F.3d 197, 201 (D.C. Cir. 2002) (quoting *Schilling v. Rogers*, 363 U.S. 666, 677 (1960)). In *C&E Services*, the issue was whether the appellant could obtain a declaratory judgment that, in structuring its bidding process, the D.C. Water & Sewer Authority had violated the federal Service Contract Act. The court held that it could not, because the Service Contract Act required any dispute arising under it to be resolved by the U.S. Secretary of Labor; the Declaratory

Judgment Act was not an avenue to circumvent that statutory requirement. *See id.* at 202. Citing *Schilling v. Rogers*, 363 U.S. 666 (1960), the court stated that "federal courts may not declare a plaintiff's rights under a federal statute that Congress intended to be enforced exclusively through a judicially unreviewable administrative hearing." *Id.* at 201. That makes *C&E Services* quite different because the Committee is suing in the context of its constitutional duty of impeachment to enforce a right to compulsory process that follows from the Constitution, not a statute. Furthermore, because the Committee does not assert a statutory right, there is no statutorily mandated exclusive remedial scheme for vindication of that right, as there was in *C&E Services*.

More broadly, *C&E Services* and *Schilling* stand for the proposition that the Declaratory Judgment Act provides no substantive right that a plaintiff may seek to adjudicate in federal court. Rather, the Act is a vehicle for vindicating a separate and independent substantive right. The Constitution itself is the source of the right of compulsory process that the Committee seeks to vindicate here; the Supreme Court has long recognized Congress's broad power of inquiry and the concomitant right to compel witnesses to appear before it. *See, e.g.*, *McGrain*, 273 U.S. at 174; *see McGahn*, 2020 WL 4556761, at *4–5. Thus, because the Committee asserts a right to have McGahn appear before it to testify, and because this court has held that a dispute over that right is susceptible of judicial resolution, *see McGahn*, 2020 WL 4556761, at *15, the requirement that a Declaratory Judgment Act plaintiff rely on an independent judicially remediable substantive right is satisfied.

McGahn points out that this court has stated: "Nor does the Declaratory Judgment Act . . . provide a cause of action." *Ali v. Rumsfeld*, 649 F.3d 762, 778 (D.C. Cir. 2011) (citation

omitted). That statement was made in the context of unique factual circumstances very different from the present case. In *Ali*, the appellants were Afghan and Iraqi citizens detained in their home countries in the course of U.S. military operations there. *See id.* at 764–65. Their lawsuit sought, among other things, a declaratory judgment that their treatment in detention violated the law of nations, treaties to which the United States was a party, and the Fifth and Eighth Amendments of the U.S. Constitution. *Id*. The court held that the Declaratory Judgment Act did not provide the plaintiffs with a cause of action, *see id.* at 778, casting doubt that the Fifth and Eighth Amendments protected them because they were detained overseas in a country over which the United States did not exercise "*de facto* sovereignty," *id.* at 772 (citing *Boumediene v. Bush*, 553 U.S. 723, 755 (2008)). The court stated: "[W]e have . . . held that the Suspension Clause does not apply to Bagram detainees. [Appellants] offer no reason — and we see none ourselves — why their Fifth and Eighth Amendment claims would be any stronger than the Suspension Clause claims of the Bagram detainees." *Id.* The clear implication of that reasoning is that the Fifth and Eighth Amendments did not apply to the *Ali* plaintiffs, and thus that no constitutional right was at stake.

No party disputes the existence of the constitutional power — namely, the power of inquiry — that the House seeks to vindicate. *See McGrain*, 273 U.S. at 174. The defect in *Ali*, then, was akin to the problem of *C&E Services*, namely that there was no substantive right that plaintiffs could assert. So understood, *Ali* does not prevent the House from proceeding under the Declaratory Judgment Act here to vindicate an established constitutional right.

II.

It is not enough that the Committee have Article III standing and a cause of action to bring the present lawsuit; the court must also assure itself that it has statutory subject matter jurisdiction to resolve the dispute. Contrary to McGahn's position, the court has subject matter jurisdiction over the Committee's lawsuit pursuant to 28 U.S.C. § 1331, which grants statutory jurisdiction over "all civil actions arising under the Constitution . . . of the United States." The present lawsuit "aris[es] under the Constitution" and is therefore within the court's jurisdiction.

The power that the Committee seeks to exercise in the present lawsuit flows from the Constitution. "Because Congress must have access to information to perform its constitutional responsibilities, when Congress 'does not itself possess the requisite information — which not infrequently is true — recourse must be had to others who do possess it." *McGahn*, 2020 WL 4556761, at *4 (quoting *McGrain*, 273 U.S. at 175). Consequently, "the Supreme Court has acknowledged the essentiality of information to the effective functioning of Congress and long 'held that each House has power to secure needed information' through the subpoena power." *Id.* (quoting *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031 (2020)) (internal quotation marks omitted). "That constitutional power entitles each House to the testimony of a witness and production of requested documents in response to a lawful subpoena." *Id.* Because the House seeks through the present lawsuit to exercise its subpoena power, and because that power flows from Article I of the Constitution, *see, e.g.*, *McGrain*, 273 U.S. at 174, the Committee's lawsuit arises under the Constitution. The court therefore has subject matter jurisdiction pursuant to § 1331.

This conclusion is bolstered by *United States v. AT&T*, 551 F.2d 384 (D.C. Cir. 1976). In that case, the Executive Branch sued AT&T to enjoin its compliance with a congressional subpoena. The President had directed AT&T "as an agent of the United States, to respectfully decline to comply with the Committee subpoena." *Id.* at 387 (citation omitted). The House of Representatives intervened as a defendant to represent its interest in AT&T's compliance with the Committee subpoena. After observing that the subpoena dispute presented "a clash of the powers of the legislative and executive branches," this court held that subject matter "[j]urisdiction exists under 28 U.S.C. § 1331," as explained in Part II. *Id.* at 389. The court reasoned that because the question before it was whether the Executive Branch possessed the "constitutional powers" to "prevent transmission of [requested information] to Congress" pursuant to a congressional subpoena, "[t]he action therefore arises under the Constitution of the United States." *Id.* *AT&T* thus establishes that a dispute over whether a party must comply with a congressional subpoena arises under the Constitution and therefore lies within § 1331's grant of subject matter jurisdiction.

McGahn responds that notwithstanding the plain text of § 1331 and this court's precedent interpreting that provision to provide subject matter jurisdiction over a dispute concerning a congressional subpoena, 28 U.S.C. § 1365 has impliedly repealed federal jurisdiction granted by § 1331. That argument, which the majority embraces, is unpersuasive.

Section 1365, entitled "Senate actions," confers on the U.S. District Court for the District of Columbia original jurisdiction "over any civil action brought by the Senate or any authorized committee or subcommittee . . . to enforce, to secure a declaratory judgment concerning the validity of, or to prevent a threatened refusal or failure to comply with, any subpoena or

order issued by the Senate or committee or subcommittee." 28 U.S.C. § 1365. On its face, § 1365 says nothing about subpoena enforcement lawsuits brought by the House of Representatives. Yet by explicitly granting the federal courts jurisdiction over a Senate subpoena enforcement action but not a House subpoena enforcement action, McGahn maintains that Congress intended that the federal courts should not have jurisdiction over the latter. This argument fails on two grounds. First, it overlooks the key context. When Congress enacted § 1365 in 1978, § 1331 contained an amount-in-controversy requirement for lawsuits against private parties and officials acting in their individual capacities. The Senate had good reason to believe that this requirement would be an obstacle to subpoena-enforcement lawsuits because the district court in *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 366 F. Supp. 51 (D.D.C. 1973), had originally dismissed the Senate's lawsuit for failure to meet the requirement, *see id.* at 59–61. Congress addressed this problem in 1978 with the enactment of § 1365, which granted federal courts subject matter jurisdiction over Senate subpoena-enforcement actions without regard to the amount in controversy. The Senate Committee on Governmental Affairs explicitly disclaimed the inference that McGahn now seeks to draw, stating in its report on § 1365 that the provision "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." S. REP. NO. 95-170, at 91–92 (1978).

Congress is free to address problems *seriatim* without thereby implicating questions not before it. As the Supreme Court has explained, "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the

others." *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955) (citation omitted)). With § 1365, Congress was responding to a particular problem: the amount in controversy requirement that, *until it was eliminated in 1980*, prevented federal courts from exercising jurisdiction over Congressional subpoena-enforcement suits under § 1331. Given the specific obstacle Congress overcame in enacting § 1365, there is no basis to conclude the statute bears on federal jurisdiction over House subpoena-enforcement actions. The inference that § 1365 has repealed such jurisdiction is therefore unwarranted.

Second, the Supreme Court has cautioned against the implied repeal argument that McGahn advances. Because "[r]edundancies across statutes are not unusual events in drafting, . . . so long as there is no 'positive repugnancy' between two laws, a court must give effect to both." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992) (quoting *Wood v. United States*, 41 U.S. (16 Pet.) 342, 363 (1842)). Consequently, "jurisdiction conferred by 28 U.S.C. § 1331 should hold firm against 'mere implication flowing from subsequent litigation.'" *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 383 (2012) (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 808 (1976)). That admonition counsels against McGahn's and the majority's theory of the effect that § 1365 has on the court's jurisdiction over the present lawsuit.

To the extent that legislative history may shed light on the meaning of § 1365 as McGahn urges, reliance on two Senators' statements during Floor debate on the bill is misplaced. Two Senators stated that § 1365 indicates there is no federal jurisdiction over a Congressional subpoena-enforcement suit unless specifically authorized and reflects a Congressional judgment courts should refrain from exercising jurisdiction over such disputes. Given the jealousy with which each House

of Congress guards its constitutional prerogatives, these statements are hardly a clear instruction concerning the effect of § 1365 on the institutional powers of the House of Representatives. It would therefore be inappropriate, in the absence of a clear statutory directive, to conclude that § 1365 also restricted the power of the House to file a federal subpoena-enforcement lawsuit.

III.

On the merits, McGahn's contention that he is absolutely immune from the Committee's subpoena must fail. His claim of absolute immunity amounts to the position that the President has the exclusive prerogative to determine what information, if any, will be disclosed in response to a subpoena. Precedent forecloses that position.

In *United States v. Nixon*, 418 U.S. 683 (1974), the Supreme Court rejected this capacious view of Presidential power over Executive Branch information. Stating that "neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances," the Court instead held that the President possesses a qualified executive privilege whereby Presidential communications are presumptively privileged but whose disclosure may be compelled in the case of demonstrated specific need in a criminal proceeding. *Id.* at 706–07. As the *en banc* court recently recognized, this "potentially available privilege is a powerful protection of the President's interest in Executive Branch confidentiality" in the present case. *McGahn*, 2020 WL 4556761, at *11.

The Supreme Court elaborated on the President's qualified power to screen Executive Branch materials from disclosure in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), concerning not a judicial subpoena in a criminal matter but rather a statute regulating the preservation of President Nixon's Presidential papers. The Court reiterated that although the context was different, the executive privilege was "a qualified one" and that "there has never been an expectation that the confidences of the Executive Office are absolute and unyielding." *Id.* at 446, 450. The privilege is similarly qualified when asserted in civil litigation. *See Dellums v. Powell*, 561 F.2d 242, 245–46 (D.C. Cir. 1977).

This court has rejected the claim of absolute presidential privilege in the factual circumstances of the present case, namely in response to a congressional subpoena. In *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974), the court considered a subpoena enforcement lawsuit brought by a Senate Committee. Rather than indulge the President's claim of absolute privilege in response to the subpoena, the court stated that the proper analysis was to determine whether the Committee's demonstrated "public need" was sufficient to overcome the President's general interest in confidentiality; if so, *in camera* review of the requested materials by the district court would follow in order to assess the Executive Branch's particularized claims of privilege. *Id.* at 729–31. The court explained that "[s]o long as the presumption that the public interest favors confidentiality can be defeated only by a strong showing of need by another institution of government . . . the effective functioning of the presidential office will not be impaired." *Id.* at 730.

This precedent demonstrates that although the President's communications with close advisors, including the White

House Counsel, are presumptively privileged, the President does not have absolute, unreviewable discretion to determine what information will be disclosed in response to a subpoena — whether a judicial subpoena in a criminal proceeding or a valid congressional subpoena. Yet that is exactly the nature of McGahn's absolute immunity claim. By asserting that he need not even appear in response to the Committee's duly issued subpoena, he in essence contends that the President may unilaterally determine that no information will be disclosed in response to the subpoena. He thereby seeks to revive a view of Presidential power expressly rejected by the Supreme Court.

Accordingly, the judgment of the district court should be affirmed, *see Comm. on the Judiciary, U.S. House of Representatives v. McGahn*, 415 F. Supp. 3d 148 (D.D.C. 2019), and I respectfully dissent.