[EN BANC 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,

Appellee,

v.

DONALD F. MCGAHN, II,

Appellant.

On Appeal from the United States District Court for the District of Columbia
(No. 1:19-cv-2379) (Hon. Ketanji Brown Jackson, District Judge)

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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*

Except for the following, all parties, intervenors, and *amici* appearing before this court are listed in the Brief for Appellant:

Doron M. Kalir, Corinna Barrett Lain, Jonathan R. Nash, Michael J. Perry, Edward A. Purcell, Jr., Joan M. Shaughnessy, Andrew M. Siegel, David Sloss, Stephen F. Smith, and Maxwell Stearns appeared as *amici curiae*.

B. Rulings Under Review

References to the rulings at issue appear in the Brief for Appellant.

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 Representatives v. McGahn*, 951 F.3d 510 (D.C. Cir.), *on reh'g*, 968 F.3d 755 (D.C. Cir.) (en banc), *on remand* 973 F.3d 121 (D.C. Cir. 2020). Some of the same or similar legal issues are presented in *U.S. House of Representatives v. Mnuchin*, 976 F.3d 1 (D.C. Cir. 2020), *Committee on Ways and Means, U.S. House of Representatives v. Department of Treasury*, No. 1:19-cv-01974-TNM (D.D.C.), and *Committee on Oversight and Reform, U.S. House of Representatives v. Barr*, No. 1:19-cv-03557-RDM (D.D.C.).

/s/ Douglas N. Letter
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GLOSSARY

Committee	Committee on the Judiciary of the U.S. House of Representatives
Comm. Br.	Brief of the Committee (Dec. 16, 2019)
Comm. Supp. Br.	Supplemental Brief of the Committee (Dec. 23, 2019)
DOJ	U.S. Department of Justice
FBI	Federal Bureau of Investigation
JA__	Joint Appendix
McGahn	Donald F. McGahn, II
OLC	Office of Legal Counsel, U.S. Department of Justice

INTRODUCTION

In the view of the Department of Justice ("DOJ"), the Committee cannot seek relief from the courts for a violation of its Article I authority to obtain information. That contention should sound familiar—it is a repackaged version of the argument that this en banc Court rejected several months ago. In its prior decision, this Court held that the Committee suffers a judicially cognizable injury when its Article I authority to gather information is thwarted. This Court should again refuse DOJ's invitation to lock the courthouse doors to the Committee, and now hold that the Committee may proceed with this suit. It should also reach the merits and affirm the grant of partial summary judgment so that the Committee may—after over a year of litigation—obtain the information to which it is entitled.

Regarding the Court's inquiry in its order granting en banc review, this dispute is not moot. The Committee maintains a right to and need for McGahn's testimony. The Committee, whose Chairman will not change in the next Congress, will reissue the subpoena, consistent with House Rules and precedent. This case will thus continue, and nothing about the end of this Congress will prevent this Court from resolving it.

Turning to the threshold issue of cause of action, the House has a right to pursue equitable relief. This Court has already held that the House has Article I authority to obtain information in service of its legislative function, and that the Trump Administration's attempt to hamstring that power gives rise to a justiciable

controversy. And equitable relief is available to remedy that injury under the precedents of the Supreme Court and this Court.

DOJ responds with a hodge-podge of purported separation-of-powers concerns. But the separation of powers is safeguarded, not undermined, by keeping the courts open to enjoin unlawful action by the Executive—a point the Supreme Court recognized in confirming that a suit in equity is available to remedy a separation-of-powers injury. Nor does the Committee require a bicameral statutory cause of action to obtain equitable relief to vindicate its independent power to investigate; that equitable authority is already available under the Constitution.

As for statutory subject-matter jurisdiction, this case presents a straightforward federal question under 28 U.S.C. § 1331. DOJ must therefore ask this Court to find multiple layers of implied repeals in a different provision that, by its terms, applies only to the Senate, not the House. That disfavored method of statutory interpretation is particularly implausible here, where such implied repeal would prevent House Committees from effecting their constitutional power, and the legislative history shows that Congress had no such intent.

On the merits, the district court correctly found no basis for DOJ's sweeping claim that current and former senior Presidential aides have absolute immunity. DOJ's immunity theory conflicts with precedent of the Supreme Court and this Court and cannot be reconciled with the long history of Congressional testimony by Presidents and their close aides.

STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction under 28 U.S.C. § 1331. The district court entered partial summary judgment in favor of the Committee and enjoined McGahn to comply with the subpoena. JA967-68. McGahn filed a timely notice of appeal. JA969. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

I. Whether this case will survive the end of the 116th Congress because the Committee will continue its investigation and the Chairman will reissue the subpoena in this case at the start of the 117th Congress.

II. Whether the Committee has a cause of action to seek an equitable remedy for the violation of its Article I authority caused by McGahn's failure to comply with its subpoena.

III. Whether the federal-question statute, 28 U.S.C. § 1331, provides the district court with subject-matter jurisdiction to resolve this suit, which arises under the Constitution.

IV. Whether McGahn lacks absolute testimonial immunity from a Congressional subpoena.

STATEMENT OF THE CASE

A. Legal Framework.

Article I of the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, § 1.

The Constitution also assigns each House of Congress authority to "determine the Rules of its Proceedings." U.S. Const. art. I, § 5, cl. 2. House Rule X.1(*l*) provides that the legislative jurisdiction of the Committee includes "[c]riminal law enforcement and criminalization"; "[t]he judiciary and judicial proceedings, civil and criminal"; "presidential succession"; and "[s]ubversive activities affecting the internal security of the United States." The Committee thus exercises jurisdiction over legislation regarding special counsel and criminal statutes, and it serves as the authorizing committee for DOJ and the Federal Bureau of Investigation ("FBI").

The Committee has "general oversight responsibilities" over subjects within its jurisdiction, including the "organization and operation of Federal agencies" it oversees, House Rule X.2(a), (b)(1)(B), https://perma.cc/7XTB-LUAJ, and the Committee is charged with reviewing those subjects "on a continuing basis" to determine whether legislative reforms are warranted, *id.* X.2(b)(1). The Committee "at any time" may conduct related "investigations and studies," *id.* XI.1(b)(1), and issue subpoenas for testimony and documents, *id.* XI.2(m)(1)(B), (m)(3)(A)(i).

B. The Committee's Investigation And Subpoena To McGahn.

The Committee seeks McGahn's testimony for legislative and oversight purposes, including its investigation of matters concerning the President's interference with DOJ and the FBI arising out of the events uncovered by Special Counsel Robert Mueller. *See* Comm. Br. 4-9, 15-17 (describing Committee's legislative and oversight aims). McGahn's testimony remains relevant to consideration of remedial legislation,

including proposals relating to reporting requirements for communications between the White House and DOJ, limitations on the removal of special counsel, and reporting requirements for offers of prohibited campaign assistance from foreign nationals. *See* Comm. Supp. Br. 9 (legislative proposals).

Following a nearly two-year long investigation, the Special Counsel concluded that the "Russian government interfered in the 2016 presidential election in sweeping and systematic fashion." Robert S. Mueller III, *Report on the Investigation into Russian Interference in the 2016 Presidential Election* (2019), https://perma.cc/DN3N-9UW8 ("Mueller Report"), Vol. I at 1. He further concluded that the Trump Campaign welcomed Russia's election interference because the campaign "expected it would benefit electorally from information stolen and released through Russian efforts." *Id.*, Vol. I at 1-2, 5. The Special Counsel explained that President Trump committed "multiple acts … that were capable of exerting undue influence over law enforcement investigations, including" the Special Counsel's investigation. *Id.*, Vol. II at 157; *see generally id.*, Vol. II.

McGahn was a key witness to many of the most serious instances of Presidential misconduct documented in the Mueller Report and voluntarily provided to the Special Counsel considerable information about his interactions with the President. President Trump allowed McGahn, while still serving as White House Counsel, to sit for at least five interviews with the Special Counsel's Office spanning

30 hours.[1] The Mueller Report mentions McGahn's statements more than 160 times, including in connection with President Trump's many efforts to thwart the investigation, interfere with agency processes, and conceal his obstruction.[2]

McGahn resigned from his position as White House Counsel in October 2018, and returned to private practice. *See* JA18.

In March 2019, the Committee opened an investigation into threats to the rule of law and Presidential misconduct. Pursuant to its investigation, the Committee issued voluntary document requests to McGahn, including a letter in which Chairman Jerrold Nadler explained the Committee's "obligation to investigate evidence of abuses of executive power, public corruption, and acts of obstruction" by the President and its role as the "the main oversight authority for the Department of Justice." JA542. McGahn did not provide the requested materials.

Following the public release of the Mueller Report, President Trump publicly "appeared to call into question the veracity" of McGahn's statements to the Special Counsel. JA857.

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[1] *See* Shannon von Sant, *President Trump Attacks Report On White House Counsel's Cooperation With Mueller*, NPR (Aug. 19, 2018), https://perma.cc/M6MN-YQV3; Mueller Report Vol. II at 31, 35, 52, 63, and 84 (citing FBI "302" reports of interviews on five different dates).

[2] *See, e.g.*, Mueller Report, Vol. II at 24-48 (President Trump's firing of National Security Advisor Michael Flynn); *id.*, Vol. II at 52-55, 57-77 (President Trump's efforts to end the FBI's Russia investigation and his termination of FBI Director James Comey); *id.*, Vol. II at 77-78, 80-90, 113-20 (President Trump's directions to McGahn to fire Special Counsel Mueller and subsequent efforts to create a false record).

In April 2019, as relevant here, the full Committee voted to issue a subpoena to McGahn for his testimony at a hearing. JA618-29. The afternoon before McGahn's scheduled appearance, White House Counsel Pat Cipollone informed the Committee that the Office of Legal Counsel ("OLC") had advised that "McGahn is absolutely immune from compelled congressional testimony with respect to matters occurring during his service as a senior advisor to the President." JA303; *see* JA306-20 (enclosing OLC opinion). That evening, McGahn's private counsel informed the Committee that McGahn "f[ound] himself facing contradictory instructions from two co-equal branches of government" and would refuse to testify. JA631-32. The Committee convened for its scheduled hearing without McGahn.

By resolution, the House authorized the Committee to use "all necessary authority under Article I of the Constitution" to enforce the subpoena through litigation. H. Res. 430, 116th Cong. (2019); *see* H. Rep. No. 116-108, at 21 (2019). In a July 11, 2019, memorandum, Chairman Nadler stressed that the Committee has "a constitutional duty to investigate credible allegations of misconduct by executive branch officials, including the President of the United States." JA529. He explained that the Committee must consider "whether the conduct uncovered [by the Special Counsel] may warrant amending or creating new federal authorities," including legislation "relating to election security, campaign finance, misuse of electronic data, and the types of obstructive conduct that the Mueller Report describes." JA530 (quoting H. Rep. No. 116-105, at 13 (2019)).

Although the Committee repeatedly tried to reach an accommodation with the White House regarding McGahn's testimony, the parties reached a total impasse instead. JA845.

C. Procedural History.

In August 2019, the Committee filed this suit, seeking declaratory and injunctive relief. JA12-65. The district court held that the Committee had suffered a cognizable Article III injury and had a cause of action to sue. JA916-37. The court also confirmed its subject-matter jurisdiction and rejected President Trump's claim of "absolute immunity" covering McGahn. JA909-28, 937-64.[3]

A divided panel of this Court reversed, holding that the Committee lacked standing. *Comm. on the Judiciary of the U.S. House of Representatives v. McGahn*, 951 F.3d 510, 531 (D.C. Cir. 2020) ("*McGahn I*"). Nevertheless, two judges cast doubt on the Administration's assertion of absolute immunity. *Id.* at 531-32, 537-42 (Henderson, J., concurring); *id.* at 558 (Rogers, J., dissenting).

This Court granted rehearing en banc and reversed the panel. The en banc Court held that the Committee has standing to sue to enforce its subpoena, explaining

[3] The district court relied on rulings by District Judges Bates and Berman Jackson concluding that House Committees have a cause of action to sue to enforce subpoenas against the former White House Counsel and the Attorney General, respectively, and that such suits are within federal courts' subject-matter jurisdiction. *See Comm. on Oversight & Gov't Reform v. Holder*, 979 F. Supp. 2d 1, 17-20, 22-24 (D.D.C. 2013); *Comm. on the Judiciary of the U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 64-65, 88, 94 (D.D.C. 2008).

that "the ordinary and effective functioning of the Legislative Branch critically depends on the legislative prerogative to obtain information, and constitutional structure and historical practice support judicial enforcement of congressional subpoenas when necessary." *Comm. on the Judiciary of the U.S. House of Representatives v. McGahn*, 968 F.3d 755, 760-61 (D.C. Cir. 2020) ("*McGahn En Banc*").

On remand, the panel, again over Judge Rogers's dissent, reversed the district court, holding that the Committee had no cause of action to sue to enforce its subpoena power. *Comm. on the Judiciary of the U.S. House of Representatives v. McGahn*, 973 F.3d 121, 123 (D.C. Cir. 2020) ("*McGahn II*"). Judge Rogers further explained that McGahn's absolute-immunity theory "must fail." *Id.* at 131 (Rogers, J., dissenting).

D. House Rules Provide For Litigation To Continue From One Congress To The Next.

The 116th Congress will conclude on the morning of January 3, 2021, and the 117th Congress will begin immediately thereafter on that same day. *See* U.S. Const. amend. XX, § 1. As one of its first orders of business, the new House will adopt its own rules.[4] In recent years, those rules have authorized ongoing House litigation to continue, stipulating that "[t]he House, the Speaker, a committee or the chair of a committee" that was "authorized during a prior Congress" to engage in litigation is "authorized to act as the successor in interest … with respect to such litigation matter,

[4] *See, e.g.*, 165 Cong. Rec. H8 (daily ed. Jan. 3, 2019), https://perma.cc/D6FD-RMJK (116th Congress); 163 Cong. Rec. H7 (daily ed. Jan. 3, 2017), https://perma.cc/9QPK-9CKL (115th Congress).

and to take such steps as may be appropriate to ensure continuation of such litigation matter." House Rule II.8(c), (116th Congress).[5] The House expects the same rule to be adopted by the 117th Congress.

Shortly after adopting its rules, the House will appoint committee chairs.[6] *See, e.g.*, 165 Cong. Rec. H32 (daily ed. Jan. 3, 2019); *id.* at H225 (daily ed. Jan. 4, 2019). The incoming chair of the Committee on the Judiciary will be immediately empowered to continue to press any litigation matter—including this suit—that had been authorized by a prior Congress. *See* House Rules II.8(c); H. Res. 430, 116th Cong. (2019) (authorizing the Chairman to initiate this litigation).

In addition, the House will adopt language clarifying that the House rules authorize the incoming Chairman to immediately reissue the Committee's subpoena, thereby ensuring that this litigation can continue uninterrupted. The Chairman of the Committee has made clear that the Committee intends to continue to pursue this litigation in the next Congress, and he will promptly reissue the subpoena to McGahn. *Memorandum of the Chairman re Continuation of Ongoing Committee Litigation in the 117th*

[5] *Accord* H. Doc. No. 114-192 (2017), https://perma.cc/6KX6-Q4KQ (115th Congress; containing identical rule). All citations to House Rules are to the Rules of the 116th Congress, unless otherwise noted.

[6] The Democratic Caucus has approved the Committee's current Chairman, Jerrold Nadler, to continue in his role as Chairman in the 117th Congress. *See* Press Release, Speaker of the House, *Pelosi Announces Committee Chairs Approved by Democratic Caucus for the 117th Congress* (Dec. 3, 2020), https://perma.cc/7AWS-7YXH.

Congress (Dec. 16, 2020), https://perma.cc/KHF7-8VSE ("Chairman Nadler Memorandum").

SUMMARY OF THE ARGUMENT

I. This case will not become moot. Although the Committee's current subpoena to McGahn expires when this Congress ends, the House anticipates that the Members of the 117th Congress will, as part of Congress's opening-day session, authorize committee chairs to continue ongoing litigation, including by reissuing subpoenas. The Committee's Chairman has stated that he will reissue the subpoena to McGahn and continue this litigation. McGahn's testimony will remain relevant to the Committee's oversight and legislative priorities.

II. No other threshold issue prevents this Court from deciding the merits of this suit. This Court has already held en banc that the Committee may, where necessary, "seek judicial enforcement of its duly issued subpoena." *McGahn En Banc*, 968 F.3d at 770. "[E]quitable relief 'has long been recognized as the proper means for preventing entities from acting unconstitutionally,'" including in separation-of-powers challenges. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010) (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001)). And an unbroken line of Supreme Court precedent, from *McGrain* to *Quinn* to *Mazars*, confirms that Congress's Article I power to investigate includes the right to seek judicial process where, as here, doing so is necessary.

In response, citing separation-of-powers concerns, DOJ argues that the Houses of Congress must jointly legislate—and the President sign—an express statutory cause of action to empower the House to sue. But that ignores the House's independent authority under the Constitution. DOJ then wrongly relies on cases barring *damages* against federal officials and advances an incomplete narrative of the history of House suits.

Additionally, the Declaratory Judgment Act permits courts to declare parties' "rights" and "legal relations" where, as here, there is an actual case or controversy, and federal jurisdiction. 28 U.S.C. § 2201(a).

III. This court has subject-matter jurisdiction pursuant to 28 U.S.C. § 1331 because the enforceability of a House subpoena is a question that "arises under the Constitution of the United States," as this Court has held. *United States v. AT&T Co.*, 551 F.2d 384, 389 (D.C. Cir. 1976) ("*AT&T I*"). That a separate provision, 28 U.S.C. § 1365, provides jurisdiction for some Senate subpoena enforcement disputes does not divest federal courts of jurisdiction to adjudicate *House* subpoenas. Any overlap between Section 1365's jurisdictional grant for Senate subpoenas and Section 1331 is no different from numerous other redundancies in jurisdictional provisions and does not suggest that Section 1365 impliedly repeals jurisdiction for House subpoena enforcement actions under Section 1331.

IV. The Executive Branch's sweeping assertion that current and former Presidential aides enjoy absolute immunity from compelled Congressional testimony

has no basis in law. *See, e.g.*, *United States v. Nixon*, 418 U.S. 683 (1974) ("*Nixon*"). Indeed, the Supreme Court has rejected DOJ's separation-of-powers and policy concerns as a basis for absolute Presidential immunity in cases involving the President himself.

STANDARD OF REVIEW

This Court "review[s] the district court's grant of summary judgment de novo." *American Society for Testing & Materials v. Public.Resource.Org., Inc.*, 896 F.3d 437, 445 (D.C. Cir. 2018).

ARGUMENT

I. This Case Will Not Become Moot: The Committee Will Continue The Relevant Investigation And Reissue The Subpoena To McGahn.

The Committee's subpoena to McGahn will expire when the current Congress ends on January 3, 2021. But DOJ draws the wrong conclusions from that fact. DOJ appears unaware that House rules contain a built-in mechanism for just this event, to ensure litigation continues from one Congress to another. The Committee's Chairman has already stated that he will "promptly reissue the Committee subpoena to Mr. McGahn to ensure th[e] Committee's litigation and corresponding legislative and oversight efforts continue uninterrupted." Chairman Nadler Memorandum. This case therefore will not become moot.

1. As described above, the House will empower Committee Chairman Nadler to act when the new House convenes. Recent Houses have begun new sessions by

approving rules that expressly authorize committee chairs to continue ongoing litigation. *See, e.g.*, 165 Cong. Rec. H8 (Jan. 3, 2019); House Rule II.8(c). When the 117th Congress convenes, the House anticipates that its Members will adopt a comparable set of rules and that, in short order, the Committee Chairman will be appointed. The Chairman will be authorized to take all "appropriate steps" to continue pending litigation, House Rule II.8(c), including immediately reissuing the subpoena to McGahn.[7]

Consistent with its role as the authorizing committee for DOJ and the FBI, *see* House Rules X.1(*l*), X.2(a), (b)(1)(B), the Committee's oversight of both agencies will continue in the 117th Congress. The Committee will continue to seek McGahn's testimony concerning political interference with these agencies and their law enforcement matters. *See* Comm. Supp. Br. 8 (collecting sources). In addition, McGahn's testimony will remain relevant to potential legislative initiatives under consideration during the 116th Congress. *See id.* at 9-10. The Committee has made clear that it will continue to consider these and other legislative responses and

[7] OLC has recognized—in an opinion DOJ cites (Br. 15 n.1)—that "the successor committee in the new House could request the same documents again." *Continuing Effect of a Congressional Subpoena Following the Adjournment of Congress*, 6 Op. O.L.C. 744, 748 (1982).

proposals in the 117th Congress. *See* Chairman Nadler Memorandum. This Court should therefore reject DOJ's speculation that the case will become moot.[8]

2. This Court's decisions in *Miers* and *AT&T I* provide no support to DOJ. Br. 1, 11, 14. Those decisions underscore that this case is *not* moot and reinforce the importance of allowing the new House to continue this litigation and engage in accommodation with the new Administration.

In *Miers*, the Committee issued subpoenas seeking documents and testimony, including from former White House Counsel Harriet Miers. *Comm. on the Judiciary of the U.S. House of Representatives v. Miers*, 542 F.3d 909, 910 (D.C. Cir. 2008). The district court ordered Miers to appear and testify. In October 2008—less than three months before the start of the new Congress—this Court granted DOJ's motion for a stay and denied the Committee's request for expedited proceedings. The Court recognized that the subpoenas would expire at the end of the 110th Congress, but it did not hold that the case would therefore become moot. *Id.* at 911 (noting the Court "need not resolve" mootness).

As Judge Tatel explained in his concurrence, "the case will survive this Congress" because "the successor Congress can assert the prior Committee's investigatory interest." *Id.* at 912 (Tatel, J., concurring). Moreover, the Court

[8] *See In re Sealed Case*, 223 F.3d 775, 778 (D.C. Cir. 2000) ("Appellant has identified no prejudice arising from enforcement of a subpoena where the originally issuing grand jury has expired and another has indisputably carried the investigation forward.").

recognized that allowing the case to proceed on a non-expedited schedule would have the "benefit of permitting the new President and the new House an opportunity to express their views on the merits of the lawsuit." *Id.* at 911.

So, too, in *AT&T I*, this Court held—only days before the new Congress—that the case was not "technically moot" and that negotiations between the parties would determine "[w]hether a controversy will survive" in the next Congress. 551 F.2d at 390. This Court stressed the importance of having those negotiations "conducted not only by a new House but by a new President." *Id.* The case accordingly continued into the new Congress and was reheard by this Court almost a year later, without mention of mootness. *See United States v. AT&T Co.*, 567 F.2d 121, 123 (D.C. Cir. 1977) ("*AT&T II*").

3. Because this case will not become moot, this Court need not reach the question whether this case "would otherwise be capable of repetition yet evading review." *Miers*, 542 F.3d at 912 (Tatel, J., concurring); *see also Del Monte Fresh Produce Co. v. United States*, 570 F.3d 316, 322 (D.C. Cir. 2009). But if the Court disagrees, notwithstanding the Committee's reissuance of the subpoena, the capable-of-repetition-yet-evading review exception would apply. *See S. Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911).

As DOJ recognizes, "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). DOJ argues (Br. 16) that this case is different because it involves important

separation-of-powers issues and received expedited treatment—but DOJ has it backwards. The fact that this type of case raises important questions does not mean it will be resolved quickly; rather, as the procedural history shows, such cases are often subject to protracted litigation and iterative appeals. If the Committee were forced to file a new suit in January to enforce the reissued subpoena to McGahn, the Committee could end up in exactly this same position in another 18 months. And when a House Committee is next forced to issue a subpoena to a Presidential aide, this Court is almost sure to confront DOJ's same threshold arguments, as well as its theory that Presidential advisors are absolutely immune from compelled Congressional testimony.

II. The Committee Has A Cause Of Action To Enforce Its Subpoena.

The Committee's authority to pursue equitable relief is grounded in precedent, including this Court's en banc decision in this very case, which recognized that "McGahn's defiance of [the Committee's] subpoena" gives rise to a "cognizable injury" that can be cured only by "judicial enforcement." *McGahn En Banc*, 968 F.3d at 763, 778. That injury is remediable in equity, "long … recognized as the proper means for preventing entities from acting unconstitutionally," *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 74 (2001)—including in matters involving the separation of powers, *see, e.g., Free Enterprise Fund*, 561 U.S. at 491 n.2. Without an equitable right to

vindicate its constitutional "prerogative to obtain information," *McGahn En Banc*, 968 F.3d at 761, the House's Article I power to investigate would be severely hobbled.

A. The Committee Can Sue In Equity To Remedy McGahn's Failure To Comply With Its Subpoena.

This en banc Court's earlier decision established the relevant predicates confirming the Committee's cause of action to sue in equity. This is a "proper case" where "relief may be given in a court of equity … to prevent an injurious action by a public officer." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015) (quoting *Carroll v. Safford*, 44 U.S. (3 How.) 463 (1845)).

This en banc Court held that "McGahn's disregard of the [Committee's] subpoena, the validity of which he has never challenged, deprived the Committee of specific information sought in the exercise of its constitutional responsibilities." *McGahn En Banc*, 968 F.3d at 763. It also found that the "power of a House of Congress to ensure compliance with its subpoena" is individual to "each House," and includes the power to compel "testimony of a witness and production of requested documents in response to a lawful subpoena." *Id.* at 764, 765, 778. Thus, this Court concluded that the Executive's refusal to comply with a valid subpoena interferes with the House's Article I powers and gives rise to a justiciable controversy that warrants "judicial enforcement" "when necessary." *Id.* at 760-61.

A cause of action in equity has "long been recognized as the proper means for preventing entities from acting unconstitutionally" when necessary. *Malesko*, 534 U.S.

at 74. And it is necessary here. The House "cannot conduct effective oversight of the federal government" or "undertake impeachment proceedings without *knowing* how the official in question has discharged his or her constitutional responsibilities." *McGahn En Banc*, 968 F.3d at 760 (emphasis added). Because this is a "rare case" in which "the political branches have reached an impasse despite repeated attempts to resolve an informational dispute themselves," the Committee has no other practicable means to obtain the information it requires. *Id.* at 778. This is therefore a "proper case" for judicial resolution—and the courts, acting in equity, may give "relief … to prevent an injurious action" by the failure of McGahn to appear before the Committee. *Armstrong*, 575 U.S. at 327 (quoting *Carroll*, 44 U.S. at 463).

That the Committee has an equitable cause of action to cease an ongoing violation of its constitutional function is supported by separation-of-powers principles and precedent. While "congressional subpoenas for the President's information unavoidably pit the political branches against one another," courts must adopt approaches that "take adequate account of the[] significant congressional interests" at stake. *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2033, 2034 (2020). That counsels *for*, not against, judicial enforcement of Congressional subpoenas of the Executive Branch. In *Free Enterprise Fund*, the Supreme Court found no barrier to an "implied private right of action directly under the Constitution to challenge governmental action under … separation-of-powers principles." 561 U.S. at 491 n.2. As the Court explained, there was no reason that a separation-of-powers challenge "should be

treated differently than every other constitutional claim." *Id.* What was true in *Free Enterprise Fund* is true here.

Indeed, in other cases involving Congressional subpoenas, both this Circuit and the Supreme Court have permitted the Executive Branch and the President in his personal capacity to seek equitable relief to vindicate their constitutional prerogatives. *See AT&T II*, 567 F.2d at 130-31; *Mazars*, 140 S. Ct. 2019. It cannot be correct, as DOJ suggests, that the existence of a cause of action depends on which side of the "*v.*" a House Committee finds itself on. DOJ's theory would make the vindication of Congress's constitutional power turn on whether a subpoena recipient planned to comply: If so, the Executive would have a cause of action in equity to prevent compliance, but if not, the Committee would lack a cause of action in equity to enforce compliance. DOJ has not even attempted to justify this asymmetrical rule, which would make Congress's power *un*enforceable in precisely the "rare case[s]" involving disputes between the political branches where this Court already deemed it necessary to "ensure" that "a congressional Committee can seek judicial enforcement of its duly issued subpoena." *McGahn En Banc*, 968 F.3d at 770.

A long line of Supreme Court precedent supports equitable relief here. The Supreme Court in *Mazars* held that Congress's right to "obtain information" is both "'broad' and 'indispensable.'" 140 S. Ct. at 2031 (quoting *Watkins v. United States*, 354 U.S. 178, 187, 215 (1957)). Without the "essential" inquiry power and corollary "process to enforce it," Congress would be "unable to legislate 'wisely or effectively.'"

Id. (quoting *McGrain v. Daugherty*, 273 U.S. 135, 174, 175 (1927)). *Mazars*'s logic thus endorsed the corollary principle that judicial process must be available to the Committee to enforce its subpoenas.

Likewise in *McGrain*, the Supreme Court considered whether Congress had the power to "compel a private individual to appear … and give testimony." 273 U.S. at 154. Although *McGrain* arose in the context of a habeas proceeding, the Supreme Court spoke broadly of Congress's constitutional power to secure information: "A legislative body cannot legislate wisely or effectively in the absence of information." *Id.* at 175. Because "mere requests for such information often are unavailing, … some means of compulsion are essential to obtain what is needed." *Id.* Accordingly, the Court held, "[t]he power of inquiry—*with process to enforce it*—is an essential and appropriate auxiliary to the legislative function." *Id.* at 174 (emphasis added).

Three decades later, the Supreme Court revisited the question in *Quinn v. United States*, 349 U.S. 155 (1955), a direct criminal appeal involving a private individual. The Court reaffirmed that "[w]ithout the power to investigate … including of course the authority to compel testimony[,] … Congress could be seriously handicapped in its efforts to exercise its constitutional function wisely and effectively." *Id.* at 160-61. Congress could seek that enforcement, and vindicate its constitutional prerogative, the Court explained, "either through its own processes or through judicial trial." *Id.* at 161.

This Court's and the Supreme Court's precedent align: The courts must be available to the House in the "rare" case where judicial resolution is "necessary." *McGahn En Banc*, 968 F.3d at 761, 778. Here, where McGahn's conduct has hamstrung core Article I powers, and the Committee lacks other adequate redress, judicial process is necessary and proper.

B. DOJ's Contrary Arguments Are Incorrect.

DOJ's attempt to avoid these precedents is unavailing.

1. Separation-of-powers principles do not compel treating McGahn's "handicapp[ing]" of the House's constitutional prerogatives, *id.* at 768, "differently than every other constitutional claim" for equitable relief. *See Free Enter. Fund*, 561 U.S. at 491 n.2. Without the possibility of judicial enforcement, Presidential administrations will have no incentive to cooperate and every incentive to "direct widescale non-compliance with lawful inquiries by a House of Congress, secure in the knowledge that little can be done to enforce its subpoena—as President Trump did here." *McGahn En Banc*, 968 F.3d at 771. Dispatching the Sergeant-at-Arms to arrest an Executive-Branch official would create significant separation-of-powers and practical problems, which judicial resolution avoids. *See id.* at 776. DOJ's suggestion that equity should be uniquely unavailable to Congress to enforce its subpoenas—when the Executive Branch and the President may sue over the same, *see Mazars*, 140 S. Ct. 2019; *AT&T II*, 567 F.2d at 122-23, 130-31; *cf. Trump v. Vance*, 140 S. Ct. 2412

(2020)—would further upset rather than maintain the constitutional balance between the branches.

2. DOJ's argument that equity is unavailable because "Congress has not authorized House committees to enforce any subpoenas," is likewise untenable. Br. 27. Legislation is unnecessary to secure the availability of traditional equitable relief. DOJ's proposal for bicameral legislation ignores that both Houses of Congress stand "on the same plane" in their power to investigate and enforce compliance; each House has independent "power, through its own process, to compel" testimony. *McGrain*, 273 U.S. at 154.

Demanding that the Senate agree to enact and the President agree to sign legislation vindicating the prerogatives of the House disrespects the constitutional order. The issue here is enforcement of a Legislative-Branch subpoena with which the Trump Administration has directed total noncompliance; it makes no sense to say the House must secure the *President's* signature on legislation bestowing a cause of action to enable judicial enforcement of the same. Just as "the House can wield its appropriations veto fully and effectively all by itself, without any coordination with or cooperation from the Senate," *United States House of Representatives v. Mnuchin*, 976 F.3d 1, 14 (D.C. Cir. 2020) (citing *McGahn En Banc*, 968 F.3d at 768), so, too, can House Committees issue and enforce their subpoenas without seeking "Senate involvement" or the President's acquiescence. For this reason as well, DOJ's appeal to *Armstrong*'s language about Congressional enactments of causes of action (Br. 32-33) is

inapplicable to this case. Otherwise, the House's enforcement of its own Article I powers would be dependent on obtaining the agreement of the Senate and could be vetoed by the President.

Reed v. County Commissioners of Delaware County, 277 U.S. 376 (1928), supports both the existence of a Congressional cause of action and each House of Congress's independent right to sue. That case did not address—or even question—whether each House of Congress had a cause of action. The question presented was not whether the Senate committee had a cause of action in equity to enforce its subpoena, but whether the federal courts had subject-matter jurisdiction to hear the case under 28 U.S.C. § 41(1). Under that statute, subject-matter jurisdiction turned on whether "the committee or its members were authorized to sue by" Senate resolution. 277 U.S. at 388. The Court held that subject-matter jurisdiction was lacking because the relevant Senate resolutions did not authorize the Committee "to sue" on behalf of "the United States" within the meaning of Section 41(1). *Id.* at 388-89.

The Court did not doubt that the Committee would have had a cause of action in equity in a case where subject-matter jurisdiction existed—or that the Senate's right existed without bicameral legislation. In fact, one day after *Reed* was decided, the Senate, acting alone, passed a resolution authorizing the committee to file suit. S. Res. 262, 70th Cong. (1928). Given that the Senate authorized its own committee to sue by confirming subject-matter jurisdiction pursuant to Section 41(1), it understood it already had a cause of action and possessed the power unilaterally to sue.

3. DOJ also argues that Congress's inherent contempt power impliedly deprives it of the ability to seek civil enforcement for its subpoenas. Br. 30. No precedent supports that suggestion, and DOJ fails to grapple with its perverse consequences: that the Committee would be able to enforce its constitutional prerogatives only by arresting and imprisoning offenders. This Court has already rejected DOJ's logic, noting that this alternative was "impractical" and no reason to deny a "peaceable judicial alternative." *McGahn En Banc*, 968 F.3d at 776. DOJ's point is particularly puzzling because, while the body of DOJ's brief points to the contempt authority as an alternative means of subpoena enforcement, a footnote disclaims the House's power to arrest Executive-Branch officials. Br. 25 n.3. DOJ asks this Court to deny the House *any* means of enforcing its constitutional power as to Executive-Branch officials.

4. In another familiar refrain, DOJ argues that history does not support the existence of an equitable cause of action here. Br. 31. But DOJ invokes the wrong history. The relevant precedent is the "long history of judicial review of illegal executive action … tracing back to England," which establishes that equitable relief is available "to prevent an injurious act by a public officer." *Armstrong*, 575 U.S. at 327 (quotation marks omitted); *see Free Enter. Fund*, 561 U.S. at 491 & n.2.

In focusing on the relative scarcity of pre-1970 suits by Congress (Br. 31-32), DOJ repeats the panel's error from *McGahn I*, finding that the Committee lacked standing because of a historical dearth of such suits. The en banc Court reversed,

explaining that judicial enforcement of subpoenas does not rely on a particular judicial pedigree; rather, it "preserves the power of subpoena that the House of Representatives is already understood to possess" under Article I. *McGahn En Banc*, 968 F.3d at 771, 776-78.

DOJ ignores this Court's teaching. The fact that prior Presidents have not issued President Trump's "unprecedented categorical direction" to refuse accommodation and disregard the House's Article I authority does not undermine the existence of a cause of action; it underscores why equitable relief must be available. *See id.* at 777.

The Committee's suit to enforce a subpoena in equity is nothing like *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, where the requested relief had been "specifically disclaimed by longstanding judicial precedent" despite an equally long history of the wrongdoing that formed the heart of the allegations. 527 U.S. 308, 322 (1999). The Supreme Court there refused to infer an equitable remedy because it found "absolutely nothing new about" about the alleged conduct, and relevant bodies of law had "developed to prevent such conduct," whereas an equitable power had not. *Id.* But this case neither comes on the heels of precedent denying an equitable cause of action (to the contrary, case law supports it), nor involves run-of-the-mill wrongs for which courts have crafted other remedies. That is why the Committee sued seeking enforcement of its subpoena.

5. Finally, DOJ's resort to decisions involving implied causes of action for damages are plainly off-point. Br. 31-34 (citing *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017); *Hernandez v. Mesa*, 140 S. Ct. 735, 741-43 (2020)). It is no surprise that courts hesitate to imply causes of action for damages. Those cases "often create substantial costs, in the form of defense and indemnification," and it is not the courts but Congress that is responsible for deciding whether "monetary and other liabilities should be imposed." *Ziglar*, 137 S. Ct. at 1856; *see also Hernandez*, 140 S. Ct. at 742. As *Ziglar* itself recognized, that reasoning does not disturb courts' well-established equitable powers to enforce the Constitution. 137 S. Ct. at 1856.

C. The Committee Is Entitled To Relief Under The Declaratory Judgment Act.

The Committee is also entitled to sue under the Declaratory Judgment Act, which empowers courts to declare parties' "rights" and "legal relations" where there is (1) an actual case or controversy, and (2) federal jurisdiction. 28 U.S.C. § 2201(a). Here, both conditions are met: Because the Committee has Article III standing to seek "judicial enforcement of its subpoena," *McGahn En Banc*, 968 F.3d at 772, "[i]t follows that the present dispute is a genuine case or controversy," *McGahn II*, 973 F.3d at 127 (Rogers, J., dissenting). And as this Court held in *AT&T I*, there is federal jurisdiction under 28 U.S.C. § 1331 because the enforceability of a Committee subpoena "arises under the Constitution of the United States." 551 F.2d at 389; *see*

infra at 29-30. The Declaratory Judgment Act thus authorizes the Committee to seek a judicial declaration of its right to compliance with its lawful subpoena.

DOJ gets nowhere arguing that the Declaratory Judgment Act does not itself create substantive legal rights or "provide a cause of action" where one is otherwise lacking. Br. 35. Here, the Committee invokes the Act to obtain a declaration vindicating its "right, based in the Constitution, to have McGahn appear to testify." *McGahn En Banc*, 968 F.3d at 765. As Judge Rogers explained, equity entitles the Committee to an injunction to protect its constitutional right to secure McGahn's testimony, and the Declaratory Judgment Act entitles the Committee to a declaration of that right. *McGahn II*, 973 F.3d at 127-29 (Rogers, J., dissenting).

III. The District Court Has Subject-Matter Jurisdiction Under 28 U.S.C. § 1331.

The Committee seeks in this litigation to vindicate its rights and powers under Article I. *See* JA59-64. Thus, under Section 1331's text, this "civil action[] arise[s] under the Constitution." 28 U.S.C. § 1331; *see also McGahn II,* 973 F.3d at 130 (Rogers, J., dissenting). DOJ does not dispute that the Committee's suit satisfies the plain language of Section 1331. Instead, DOJ argues that a different jurisdictional provision, 28 U.S.C. § 1365, which addresses only Senate subpoenas, impliedly divests the district court of federal-question jurisdiction and deprives the Committee of a

cause of action. This argument misconstrues Sections 1331 and 1365 and the relevant case law.

A. This Suit Presents A Straightforward Federal Question.

Section 1331, by its plain terms, provides jurisdiction over a suit concerning the enforcement of a House committee's subpoena. More than forty years ago, this Court in *AT&T I* found "subject matter jurisdiction under 28 U.S.C. § 1331" in just such a suit because the action "ar[ose] under the Constitution of the United States." 551 F.2d at 388-89; *see also* JA897-99. That conclusion applies here. Although the parties' roles are reversed—a former Executive-Branch official is the defendant, and a House committee is the plaintiff—this makes no difference to this Court's ability to hear the case, for a controversy between two parties "arises under" federal law regardless of which party is plaintiff or defendant. *See Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 844 (9th Cir. 2011); *Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act*, 10 Op. O.L.C. 68, 88 (1986) (*AT&T I*'s reasoning on subject-matter jurisdiction "would appear to apply equally to suits filed by a House of Congress seeking enforcement of its subpoena").

"*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 II*, 973 F.3d at 130 (Rogers, J., dissenting). And district courts in this Circuit have uniformly construed *AT&T I* to find subject-matter jurisdiction under Section 1331 over enforceability of House

subpoenas to Executive-Branch officials. JA893; *Comm. on Oversight & Gov't Reform v. Holder*, 979 F. Supp. 2d 1, 17 (D.D.C. 2013); *Miers*, 558 F. Supp. 2d at 64-65. Moreover, both this Court and the Supreme Court addressed the merits of a challenge to a House committee's subpoena in *Mazars* without questioning President Trump's assertion of jurisdiction under Section 1331. *See Mazars*, 140 S. Ct. at 2026; *Trump v. Mazars USA, LLP*, 940 F.3d 710, 714 (D.C. Cir. 2019), *rev'd*, 140 S. Ct. 2019 (2020).

B. DOJ's Implied Repeal Argument Is Incorrect.

To avoid this straightforward result, DOJ argues (Br. 19-27) that Section 1365, a provision titled "*Senate* actions"—which provides jurisdiction over "any civil action brought by *the Senate* or any authorized committee or subcommittee of *the Senate*" to enforce a subpoena, 28 U.S.C. § 1365(a) (emphases added)—impliedly repeals this Court's jurisdiction under Section 1331 on another subject, suits to enforce House subpoenas. DOJ's argument is wrong.

1. By its terms, Section 1365 does not apply to House subpoenas. DOJ must therefore ask this Court to climb a steep hill: to read that provision to silently repeal Section 1331's grant of jurisdiction as to suits involving House subpoena enforcement.

Implied repeals of this kind are strongly disfavored, and nothing about Section 1365 justifies such an extraordinary step. The Supreme Court has cautioned that "[j]urisdiction conferred by 28 U.S.C. § 1331 should hold firm against mere

implication flowing from subsequent legislation." *Mims v. Arrow Fin. Servs., LLC,* 565 U.S. 368, 383 (2012) (quotation marks omitted); *see also id.* at 379. And "[i]n the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Morton v. Mancari*, 417 U.S. 535, 550 (1974); *see Me. Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1323 (2020). But Sections 1365 and 1331 contain no conflict as to House enforcement suits. Section 1331 encompasses House subpoena enforcement actions, and Section 1365 does not address those actions. There is thus no textual basis for "a repeal by implication." *Morton*, 417 U.S. at 550.

Even if the Court had reason to look behind Section 1365's text, its history confirms that the provision—*intentionally*—has nothing to say about House subpoenas. An earlier version of the legislation would have created an Office of Congressional Legal Counsel and authorized that Office to enforce Congressional subpoenas of both the House and Senate. *See* S. Rep. No. 95-170 at 177, 180 (1977). But because the appropriate House committees "ha[d] not considered" these proposals for joint action, the Senate proceeded with establishing "its own Office of Senate Legal Counsel," S. Rep. No. 95-127, at 80 (1978) (Conf. Rep.), and created a process for that office to pursue subpoena enforcement actions "under any statute conferring jurisdiction on any court of the United States (including [the new] section 136[5])," Ethics in Government Act of 1978, Pub. L. No. 95-521, § 705, 92 Stat. 1824, 1878 (codified at 2 U.S.C. § 288d).

Contrary to DOJ's contentions, Congress did not make a studied choice "not to create subject-matter jurisdiction for subpoena-enforcement suits by the House." Br. 20. Quite the opposite. Congress omitted the House from Section 1365 because the House had not had an adequate opportunity to consider the proposal.

This history cannot reasonably be interpreted to have *sub silentio* deprived the House of the ability to seek enforcement of its subpoenas in court, particularly because Section 1365 was enacted against the backdrop of this Court's holding in *AT&T I* that Section 1331 *granted* jurisdiction over enforcement of those subpoenas. Section 1365 was not a repudiation of *AT&T I*'s holding regarding House subpoenas; it said nothing at all about them. *See* S. Rep. No. 95-127 at 80. "Given the jealousy with which each House of Congress guards its constitutional prerogatives … it would … be inappropriate, in the absence of a clear statutory directive, to conclude § 1365 … restricted the power of the House to file a federal subpoena-enforcement action." *McGahn II*, 973 F.3d at 131 (Rogers, J., dissenting).

Verizon Maryland, Inc. v. Public Service Commission of Maryland, 535 U.S. 635 (2002), reinforces this conclusion. There, plaintiffs claimed that the determination of a state public service commission violated federal law and thus presented a federal question under Section 1331. *See id.* at 640. The court of appeals held that a separate statute "strip[ped] this jurisdiction" by "mak[ing] *some other* actions by state commissions reviewable in federal court." *Id.* at 642-43. But the Supreme Court reversed,

explaining that "[t]he mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others." *Id.* at 643.

The same principle controls here. The Committee's claim presents a federal question, and nothing in Section 1365—which "merely makes *some other* [subpoena enforcement] actions … reviewable in federal court," *id.*—"displays any intent to withdraw federal jurisdiction under § 1331," *id.* at 644.

Other provisions of the jurisdictional scheme "reinforce the conclusion that [Section 1365's] silence on the subject leaves the jurisdictional grant of § 1331 untouched." *Id.*; *see* 28 U.S.C. § 1366 (expressly excluding challenges to certain laws from Section 1331). This Court should "not presume that [Section 1365] means what it neither says nor fairly implies." *Verizon Maryland*, 535 U.S. at 644.

DOJ wrongly suggests that Section 1365 is a "specific" statute that should control over the more "general" Section 1331. *See* Br. 22-23. But, as discussed, Section 1365 does not apply to the House. Thus, as the *Holder* court found, for House subpoena enforcement actions, there *is* no specific provision that could control over Section 1331. *See* 979 F. Supp. 2d at 19. The specific-governs-the-general canon "is impotent … unless the compared statutes are 'irreconcilably conflicting.'" *Adirondack Med. Ctr. v. Sebelius*, 740 F.3d 692, 698-99 (D.C. Cir. 2014). Here, no such conflict exists, so "it is [the courts'] duty to harmonize the provisions and render each effective." *Id.* What effect the provision might have regarding Senate subpoena enforcement is a different question, not before this Court.

2. Beyond ignoring that Section 1365 is a non-sequitur for House subpoena suits, DOJ erroneously claims that Congress intended to preclude suits against Executive-Branch officials by enacting Section 1365. Br. 21-23. This argument for any implied repeal (let alone one that is House-specific) rests on the false premise that "it was well understood" when Section 1365 was enacted "that Congress otherwise lacked the authority to sue to enforce its subpoenas." Br. 23. To the contrary, *AT&T I* had established that subpoena enforcement suits fell within Section 1331, and Section 1365 did nothing to disturb that holding. Congress instead meant to ensure that judicial enforcement would be readily available for Senate subpoenas against private parties and officials acting in their individual capacities by removing an erstwhile barrier to such actions, the then-applicable amount-in-controversy requirement.

The history confirms this conclusion. Section 1365 had its origins in a Watergate-era district court decision. The Senate Select Committee had brought a civil action to enforce its subpoena against then-President Nixon and argued that Section 1331—which at that time contained a $10,000 amount-in-controversy requirement—provided the district court with jurisdiction. *See Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 366 F. Supp. 51, 59 (D.D.C. 1973).

Then-President Nixon acknowledged the obvious: that the suit involved a "federal question" because it "raise[d] an issue of the respective rights of the President and Congress and of the power of the courts to mediate between them." Presidential

Campaign Activities of 1972, Senate Resolution 60: Appendix to the Hearings of the Select Committee on Presidential Campaign Activities of the United States Senate, 93d Cong., 1st & 2d Sess. 1, at 826 (1974). However, Nixon protested that the amount-in-controversy requirement was not met. *Id.* The district court agreed, and on that limited basis dismissed the Committee's enforcement action for lack of jurisdiction. *See Senate Select Committee*, 366 F. Supp. at 59-61.

In 1976, seeking to correct the "deficiency" in Section 1331 that required litigants seeking "nonstatutory review … against Federal officers" to satisfy the amount-in-controversy requirement, S. Rep. No. 94-966, at 14-15 (1976), Congress amended Section 1331 to remove the amount-in-controversy requirement for actions "brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity," Act of Oct. 21, 1976, Pub. L. No. 94-574, § 2, 90 Stat. 2721. Shortly thereafter, this court in *AT&T I* affirmed that suits regarding the enforcement of a House subpoena raise a "federal question" and fall within the scope of Section 1331 so long as any applicable amount in controversy is satisfied. 551 F.2d at 389 & n.7.[9] But a jurisdictional gap remained: The amount-in-controversy requirement continued to apply to actions against private parties and officials acting in their individual capacity. Accordingly, Congress still needed to satisfy the amount-in-controversy requirement in those subpoena-enforcement suits. The Senate was

[9] The Court decided *AT&T I* after the amendment to Section 1331 but did not rely on the new amount-in-controversy exception. 551 F.2d at 389 n.7.

particularly concerned about this issue because of its "[then-]recent experience" in *Senate Select Committee*. S. Rep. No. 95-170, at 20-21, 91; JA892.

Section 1365, passed by Congress in 1978, resolved this concern. Pub. L. No. 95-521, Title VII, § 705(f)(1), 92 Stat. at 1879 (originally codified at 28 U.S.C. § 1364). The provision eliminated the amount-in-controversy requirement for the enforcement of Senate subpoenas against private parties.

The Senate Committee on Governmental Affairs stated explicitly in its report that the statute was "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. This statement is unsurprising, given that this Court in *AT&T I* and even President Nixon's counsel in *Senate Select Committee* had concluded that Congressional subpoena enforcement cases implicate federal questions within the meaning of Section 1331. *See AT&T I*, 551 F.2d at 389; *supra* at 34-35. The Senate report stated that Section 1365 was enacted in response to the *Senate Select Committee* decision "to *leave no question* that Congress intends for the District Court for the District of Columbia to have jurisdiction to hear civil actions to enforce Congressional subp[o]enas." S. Rep. No. 95-170, at 91 (emphasis added). In 1980, two years after Section 1365's enactment, Congress removed Section 1331's amount-in-controversy requirement entirely. Act of Dec. 1, 1980, Pub. L. No. 96-486, § 2(a), 94 Stat. 2369, 2369.

The legislative history of Section 1365 shows that the law meant to move beyond the Watergate-era disagreement over jurisdictional amounts in controversy, not to reflect Congressional agreement that Section 1331 did not already confer jurisdiction over subpoena enforcement suits. *See Mims*, 565 U.S. at 382 (Congress may clarify that jurisdiction is available "to avoid any argument" to the contrary, even if a court would have had jurisdiction "[h]ad Congress said nothing at all").

In light of this history, even the Executive Branch has previously rejected DOJ's current argument that Section 1365 ousted Section 1331 jurisdiction over Congressional subpoena enforcement actions. In 1986, OLC concluded that the legislative history counseled against any argument that Section 1365 "provides the exclusive route for either House to bring a civil action to enforce its subpoenas, and thus, that no route exists for civil enforcement against an executive branch officer." *Response to Congressional Requests for Information*, 10 Op. O.L.C. at 87 n.31. OLC correctly concluded that the "civil enforcement route … would appear to be a viable option" for the House. *Id.* at 88; *accord Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 137 & n.36 (1984).

Section 1365 also is not atypical in its anachronistic overlap with Section 1331. "Redundancies across statutes are not unusual events in drafting." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992). As to Section 1331, in particular, when Congress removed the amount-in-controversy requirement from that provision, Congress

rendered several other provisions at least partially redundant, including 28 U.S.C. §§ 1337, 1338, 1339, and 1343. Congress was not required to repeal those provisions and apparently felt no need to do so. *See Winstead v. J.C. Penney Co.*, 933 F.2d 576, 580 (7th Cir. 1991) (eliminating Section 1331's amount in controversy requirement "made of … numerous special federal jurisdictional statutes … so many beached whales, yet no one thought to repeal those now-redundant statutes").

"Sometimes"—here—"the better overall reading of the statute contains some redundancy." *Rimini St., Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873, 881 (2019); *see also Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335, 1350 n.5 (2020) (explaining it was "much more likely" that Congress created a redundancy with Section 1331 to ensure federal jurisdiction than that Congress implicitly intended to affect state-court jurisdiction).

3. DOJ cannot change this result by pointing to a later amendment to Section 1365. Br. 24-26. Congress's 1996 amendment merely clarified that Section 1365 applies in a suit against a federal official "if the refusal to comply is based on the assertion of a personal privilege or objection." False Statements Accountability Act of 1996, Pub. L. No. 104-292, § 4, 110 Stat. 3459, 3460. DOJ gives the change more weight than it warrants, positing that, if Section 1331 had already conferred jurisdiction for all Congressional suits seeking to enforce subpoenas, then the 1996 amendment to Section 1365 would be superfluous. From there, DOJ argues, the drastic conclusion of implied repeal must follow. But DOJ points to nothing to indicate that Congress even considered Section 1331 in enacting this amendment,

much less that Congress intended to restrict jurisdiction for the *House* under Section 1331 by amending a statute addressing only "*Senate* actions."[10]

In any event, DOJ fails to explain when exactly, under its theory, Section 1365 silently repealed Section 1331's jurisdiction for House subpoenas. If the Congress that enacted Section 1365 in 1978 did not intend to divest courts of jurisdiction to hear House enforcement suits under Section 1331 (and it did not), DOJ cannot explain why Congress's choice in 1996 to *expand* Section 1365's jurisdictional grant over Senate subpoena enforcement suits would have silently and belatedly wrested from courts jurisdiction over House enforcement suits.

If the 1996 amendment had that effect, then Congress's hands would be forever tied; under DOJ's theory, it could *never* expand the specific jurisdictional grant for Senate subpoenas without implicitly repealing jurisdiction over House subpoena-enforcement actions under Section 1331. Of course, Congress is not put to the choice of abandoning the detailed procedural and remedial requirements for Senate enforcement actions in Section 1365, *see* 28 U.S.C. § 1365(b), (d), or unintentionally repealing jurisdiction over House subpoenas.

4. DOJ's constitutional-avoidance argument (Br. 26-27) also fails. This Court resolved the question of subject-matter jurisdiction over House subpoenas more than

[10] DOJ cites to isolated comments from individual legislators, *see* Br. 24-25, but these comments do not address Section 1331 and in any case cannot "control [the Court's] judgment on 28 U.S.C. § 1331's compass." *Mims*, 565 U.S. at 385.

forty years ago in *AT&T I*, *see* 551 F.2d at 389, and more recently confirmed that "constitutional structure and historical practice support judicial enforcement of congressional subpoenas when necessary." *McGahn En Banc*, 968 F.3d at 761. Notably, DOJ did not object to putting courts "in the middle of disputes between [Congressional committees] and the Executive," Br. at 27, when the President sought that intervention in *Mazars*. *See* Brief for the United States as *Amicus Curiae* Supporting Petitioners, *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020) (No. 19-715), 2020 WL 563912.

IV. McGahn Is Not Absolutely Immune From The Committee's Subpoena.

President Trump directed McGahn—a former White House Counsel—to defy the Committee's subpoena in an investigation into the President's own misconduct on the ground that McGahn is absolutely immune from testifying. The district court correctly rejected the claim that current and former senior Presidential aides have absolute immunity from compelled testimony, concluding that it "has no foundation in law" and "conflicts with key tenets of our constitutional order." JA942. Two members of the panel correctly expressed support for this conclusion. *McGahn I*, 951 F.3d at 538 (Henderson, J., concurring) ("McGahn's claimed immunity rests on somewhat shaky legal ground."); *McGahn II*, 973 F.3d at 131 (Rogers, J., dissenting) ("Precedent forecloses" McGahn's absolute-immunity claim.).

In its briefing before this en banc Court, DOJ attempts to rebrand its absolute immunity theory as a limitation on Congress's implied subpoena power (Br. 37), but

that does not help. Even under DOJ's argument, the purported limitation depends on the merits of the absolute immunity theory (*id.*), which itself is found nowhere in the Constitution. And the fact remains that, unlike Congress's well-established subpoena power, the President's assertion of absolute immunity has never been accepted by any court, conflicts with the Supreme Court's and this Court's precedents rejecting comparable claims, and cannot be reconciled with the long history of Congressional testimony by Presidents and their senior aides. The confidentiality interests that DOJ cites as its primary justification for absolute immunity can be protected by a case-specific application of executive privilege, as they have been since the Founding.

A. Absolute Immunity Contravenes Well-Established Precedent.

Absolute immunity is an invention of the Executive Branch that suffers from the same problem the Supreme Court has found in analogous circumstances; it "rests upon an archaic view of the separation of powers as requiring three airtight departments of government." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977) ("*Nixon v. GSA*") (quotation marks omitted). In separation-of-powers cases, the Supreme Court has long recognized that "our constitutional system imposes upon the Branches a degree of overlapping responsibility." *Mistretta v. United States*, 488 U.S.

361, 381 (1989). Accordingly, when the prerogatives of coequal branches clash, courts have resisted applying absolute rules. *See Nixon v. GSA*, 433 U.S. at 443.

1. Consistent with these principles, courts have repeatedly rejected analogous claims of absolute Presidential immunity, holding instead that qualified privilege, applied on a case-by-case basis, sufficiently protects the Executive Branch's asserted interests.

In 1807, Chief Justice Marshall rejected President Jefferson's claim that the President could not be compelled to respond to a subpoena in a criminal matter. *United States v. Burr*, 25 F. Cas. 187 (C.C.D. Va. 1807) (Marshall, C.J., Circuit Justice). As Chief Justice Marshall explained, it was "not controverted" "[t]hat the president of the United States may be subpoenaed, and examined as a witness, and required to produce any paper in his possession." *Id.* at 191. *Burr* acknowledged that "the occasion for demanding" sensitive information from the President must be "very strong." *Id.* at 192. But even then that justified a case-by-case application of privilege, not absolute immunity. The "clear implication" of *Burr* is that, at least where the President himself is the subject of a subpoena, "the President's special interests may warrant a careful judicial screening of subpoenas after the President interposes an objection, but that some subpoenas will nevertheless be properly sustained by judicial orders of compliance." *Nixon v. Sirica*, 487 F.2d 700, 710 (D.C. Cir. 1973) (en banc).

During the criminal Watergate investigation, the Supreme Court rejected President Nixon's contention that Presidential communications with his aides in the

Oval Office were absolutely privileged. The *Nixon* Court unanimously held 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." 418 U.S. at 706. The Court explained that the President's "broad, undifferentiated claim of public interest in the confidentiality of [Presidential] conversations" conflicts with separation-of-powers principles, and that "the legitimate needs of the judicial process may outweigh Presidential privilege." *Id.* at 706-07. Although Presidential communications are "presumptively privileged," *id.* at 708, that presumption "must yield to the demonstrated, specific need for evidence in a pending criminal trial." *Id.* at 713.

In *Nixon v. GSA*, the Supreme Court reiterated that the Presidential privilege "is a qualified one." 433 U.S. at 446. That case involved a challenge to an act that directed GSA to take custody of President Nixon's papers and recordings. With respect to the absolute privilege claim, the Supreme Court made clear that "there has never been an expectation that the confidences of the Executive Office are absolute and unyielding." *Id.* at 450. The Court explained that Congress sought to "facilitat[e] a full airing" of the Watergate scandal, in part "to gauge the necessity for remedial legislation." *Id.* at 453. Preservation was consistent with Congress's "broad investigative power," *id.* (citing *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491 (1975)), and "claims of Presidential privilege clearly must yield to the important congressional

purposes of preserving [Presidential] materials and maintaining access to them for lawful governmental and historical purposes," *id.* at 454.

Like the Supreme Court, this Court has denied claims to absolute Presidential immunity from process. In *Nixon v. Sirica*, this Court rejected President Nixon's absolute privilege challenge to the district court's order enforcing a grand-jury subpoena. Despite acknowledging that "wholesale public access to Executive deliberations" would impair the functioning of the Executive Branch, this Court emphasized that recognizing an absolute privilege would permit the President to "deny access to all documents in all the Executive departments to all citizens and their representatives, *including Congress*." 487 F.2d at 715 (emphasis added). This Court also declined to apply an absolute privilege in *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 730 (D.C. Cir. 1974), a case involving a Congressional subpoena to the President.

Presidential communications are not absolutely privileged even in civil litigation. In *Dellums v. Powell*, 561 F.2d 242 (D.C. Cir. 1977), a civil damages suit involving a subpoena for certain White House recordings, this Court rejected the assertion that Presidential privilege "works an absolute bar to discovery of presidential conversations in civil litigation." *Id.* at 245-46; *see also Sun Oil Co. v. United States*, 514 F.2d 1020, 1024 (Ct. Cl. 1975) (rejecting President Nixon's absolute privilege claim in response to civil discovery motion); *cf. Clinton v. Jones*, 520 U.S. 681 (1997) (holding

that sitting President was not absolutely immune from civil action arising from private conduct and "assum[ing] that the testimony of the President … may be taken").

The Supreme Court and this Court have thus several times rejected Presidents' claims that their communications are absolutely privileged, even where the communications are of the utmost sensitivity. Courts have rejected absolute privilege claims in the context of Congressional subpoenas, criminal subpoenas, and civil subpoenas. And they have rejected these claims when the subpoena was directed to the President himself. Such claims thus have no force regarding subpoenas directed to Presidential aides, particularly *former* Presidential aides.

2. DOJ's argument (Br. 36-49) that McGahn is absolutely immune from compelled testimony before the Committee cannot be squared with this line of decisions. Assertions of absolute immunity fail under this precedent precisely because they do not take into account Congress's countervailing need for the requested information to carry out its Article I functions.

Contrary to DOJ's suggestion (Br. 38), the Committee is not seeking a "limitless" power to subpoena Executive Branch information. As the case law discussed above recognizes, this power is subject to a proper assertion of qualified executive privilege. *See also Mazars*, 140 S. Ct. at 2032. Indeed, the only one seeking a "limitless" doctrine in this case is DOJ.

B. History Makes Clear That Presidential Aides Do Not Enjoy Absolute Immunity From Congressional Subpoenas.

The long history of Executive Branch compliance with Congressional requests for testimony—including by three sitting Presidents and scores of top White House advisors—supports what judicial precedent makes clear: Presidents and their advisors enjoy no absolute immunity from Congressional process. *See NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014) (history of practice in actual government operations informs consideration of separation-of-powers claim). Past Presidents have understood that Congress has the power to seek information from the Executive Branch and have testified, respecting the constitutional separation of powers.

Presidents Abraham Lincoln, Woodrow Wilson, and Gerald Ford voluntarily testified before Congress while in office.[11] Many close Presidential advisors, including sitting and former White House Counsels, have testified before Congress regarding Presidential misconduct. For example, former White House Counsel Chuck Colson testified multiple times during Watergate.[12] In 1980, then-White House Counsel Lloyd Cutler testified regarding alleged misconduct by President Carter's brother.[13] In

[11] *See Sitting Presidents & Vice Presidents Who Have Testified Before Congressional Committees*, U.S. Senate (2017), https://perma.cc/J2HH-X5WG.

[12] *Inquiry into the Alleged Involvement of the Central Intelligence Agency in the Watergate and Ellsberg Matters: Hearing Before the Special Subcomm. on Intelligence of the H. Comm. on Armed Servs.*, 94th Cong. 581-660 (1973).

[13] *See* Harold C. Relyea & Todd B. Tatelman, Cong. Rsch. Serv., RL31351, *Presidential Advisers' Testimony Before Congressional Committees: An Overview* 8 (2014).

1994, Cutler again testified about Whitewater,[14] as did former White House Counsel Bernard Nussbaum in 1995.[15] In 1997, then-White House Counsel Charles Ruff testified in connection with an investigation into alleged campaign-finance violations.[16] And in 2001, former White House Counsel Jack Quinn testified regarding President Clinton's use of his pardon power.[17]

In addition, numerous Presidential advisors, including White House Counsels and national security officials, have testified specifically pursuant to Congressional subpoenas: former White House Counsel John Dean, former Chief of Staff H.R. Haldeman, and former Chief Advisor to the President for Domestic Affairs John Ehrlichman about Watergate;[18] former National Security Advisor Oliver North and former Assistant to the President for National Security Affairs John Poindexter about

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[14] *White House Contacts with Treasury/RTC Officials About "Whitewater"-Related Matters—Part 1: Hearing Before the H. Comm. on Banking, Fin., and Urban Affairs*, 103d Cong. 12-107 (1994).

[15] *Investigation of Whitewater Development Corporation and Related Matters: Hearing Before the S. Special Comm. to Investigate Whitewater Dev. Corp. and Related Matters*, 104th Cong., Vol. 2, 1201-304, 1326-96 (1995).

[16] *Presidential Advisers' Testimony*, *supra* note 13 at 15.

[17] *Controversial Pardon of International Fugitive Marc Rich: Hearing Before H. Comm. on Gov't Reform*, 107th Cong. 43-87 (2001).

[18] *Inquiry into the Alleged Involvement of the Central Intelligence Agency in the Watergate and Ellsberg Matters: Hearing Before the Special Subcomm. on Intelligence of the H. Comm. on Armed Servs.*, 93d Cong. 875-81 (1973); *Presidential Campaign Activities of 1972: Hearing Before the S. Select Comm. on Presidential Campaign Activities*, 93d Cong. 2509-87 (1973).

Iran-Contra;[19] and former White House Counsel Beth Nolan and former Chief of Staff John Podesta about President Clinton's pardon decisions.[20]

The force of this history is bolstered rather than undermined by the fact that some appearances were voluntary, which shows that past Presidents were reluctant to be seen as obstructing Congressional investigations into their own misconduct—and reluctant even to reach the point of Congress compelling their testimony.[21]

Moreover, contrary to DOJ's contention (Br. 38), the fact that Congress only recently has needed to enforce its subpoenas in federal court says nothing about Congress's *authority* to issue subpoenas to the President and his close advisors. Indeed, the Supreme Court recently made clear that Congress's subpoena power extends to non-privileged Presidential information despite a sparse history of judicial enforcement. *See Mazars*, 140 S. Ct. at 2031.

This history of Presidential advisors testifying before Congress shows that there is no merit to DOJ's claim (Br. 39-40) that absolute immunity is necessary to protect against Congressional encroachment on the President's ability to perform his Article II functions. The purported risks DOJ cites to support its absolute immunity

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[19] *Iran-Contra Investigation: Joint Hearings Before the H. Select Comm. to Investigate Covert Arms Transactions with Iran and the S. Select Comm. on Secret Military Assistance to Iran and the Nicaraguan Opposition*, 100th Cong. 1-404 (1987).

[20] *Controversial Pardon of International Fugitive Marc Rich: Hearing Before the H. Comm. on Gov't Reform*, 107th Cong. 316-437 (2001).

[21] *See* H. Rep. No. 93-1305, at 119 (1974) (Haldeman advised President Nixon that assertion of executive privilege over testimony would look like an "active step you've taken to cover up … Watergate" (alteration omitted)).

theory (Br. 42-45) would be equally present when the testimony is voluntary, but they have not materialized. Executive-Branch officials frequently testify before Congress in oversight matters. Far from an encroachment on the Executive, such transparency displays the "autonomy but reciprocity" among the branches that the Constitution envisions. *Mistretta*, 488 U.S. at 381 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)). Moreover, the notion that McGahn's compliance with a Congressional subpoena would divert President Trump or McGahn from their duties is even less persuasive given that President Trump's term will end in January, and McGahn long ago returned to the private sector.

Nor does the exercise of Congress's constitutional functions foster a perception of Executive subordination to Congress (Br. 40, 42, 45); instead, it reflects the checks and balances the Framers intended in adopting a system of separated powers. *Jones*, 520 U.S. at 703 ("As Madison explained, separation of powers does not mean that the branch 'ought to have no *partial agency* in, or no *controul* over the acts of each other.'" (quoting The Federalist No. 47, at 325 (J. Cooke ed., 1961))).

Indeed, President Trump's order that McGahn ignore the Committee's subpoena creates a more harmful outcome: It threatens to leave the President above the law and to prevent Congress from acquiring facts about Presidential misconduct. Although DOJ suggests (Br. 42, 45, 48) that Congressional subpoenas could be used to harass the Executive Branch, DOJ does not contend that McGahn's subpoena was issued for that purpose or offer any support for its more general speculation. And, as

the Supreme Court has made clear, the Executive Branch confidentiality interests DOJ asserts (Br. 40, 42, 43, 44, 45) can be adequately addressed through a case-by-case assessment of qualified privilege. *See Nixon*, 418 U.S. at 706. DOJ's confidentiality concerns are especially misplaced here because McGahn earlier provided testimony to a federal prosecutor that was cited in a public report.

C. The Authority On Which DOJ Relies Does Not Support Absolute Immunity.

Nor does the authority that DOJ cites support its position. Lacking judicial precedent recognizing absolute immunity, DOJ primarily relies (Br. 36-37, 40-45) on OLC memoranda such as the one issued to justify the defiance of the Committee's subpoena to McGahn, but these opinions do not control here and are unconvincing. JA306-320. They cite no judicial decisions recognizing absolute immunity, because there are none. Rather, they cite other OLC opinions.

In the first memorandum on this topic—the foundation for OLC's subsequent absolute immunity opinions—then-Assistant Attorney General William Rehnquist conceded that his conclusions on absolute testimonial immunity, which at that point applied only to current (as opposed to former) Presidential aides, were "tentative and sketchy." JA962 (quoting *Power of Congressional Committee to Compel Appearance or Testimony of "White House Staff"* (OLC Feb. 5, 1971), https://perma.cc/NB89-BSRD). And "[s]ubsequent OLC opinions are largely derivative and identify no caselaw

recognizing the existence of such immunity from congressional process." *McGahn I*, 951 F.3d at 538 (Henderson, J., concurring).

Moreover, the case law that DOJ cites is inapposite. In *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) ("*Fitzgerald*"), the Supreme Court held that *the President* is immune from civil damages liability arising from his official actions "[b]ecause of the singular importance of the President's duties." 457 U.S. at 751. But both the Supreme Court and this Court have made clear that such immunity does not apply to Presidential aides like McGahn. Indeed, on the same day the Supreme Court decided *Fitzgerald*, it decided *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and rejected the claim that certain senior Presidential aides—one of whom "worked from an office immediately adjacent to the oval office" and "had almost daily contact with the President"—"are entitled to a blanket protection of absolute immunity," *id.* at 805 n.6, 808.

The Court in *Harlow* distinguished *Fitzgerald* because "the recognition of absolute immunity for all of a President's acts in office derives in principal part from factors unique to his constitutional responsibilities and station." *Id.* at 811 n.17. By contrast, "[s]uits against other officials—including Presidential aides—generally do not invoke separation-of-powers considerations to the same extent as suits against the President himself." *Id.*; JA940.

DOJ attempts to distinguish *Harlow* (Br. 47) because this is not a private suit for damages for established constitutional or statutory violations. But DOJ itself is analogizing to these civil-damages cases, including *Harlow*, in an attempt to extend its

absolute immunity theory to Presidential advisors. Br. 39, 43, 47. If courts have rejected DOJ's argument in the civil-damages context, then DOJ's theory certainly does not apply here, where the Committee has weighty interests in exercising its Article I authorities, which are not present in private civil-damages suits.

DOJ also cites (Br. 47) *Harlow*'s equivocal language about whether absolute immunity for civil damages liability "might well be justified" for "aides entrusted with discretionary authority in such sensitive areas as national security or foreign policy." 457 U.S. at 812. But McGahn was not performing sensitive national security or foreign affairs functions when he was witnessing the President's attempted obstruction of the Mueller investigation.

And the Supreme Court clarified after *Harlow* that "performance of national security functions" did not entitle even the Attorney General to absolute immunity from damages suits. *Mitchell v. Forsyth*, 472 U.S. 511, 521-24 (1985). Relying on *Forsyth*, this Court also rejected absolute immunity for the National Security Advisor. *Halperin v. Kissinger*, 807 F.2d 180, 193-94 (D.C. Cir. 1986) (Scalia, Circuit Justice). If the National Security Advisor—whose *entire* function is related to national security—is not entitled to absolute immunity, then the fact that the White House Counsel might perform *some* national security functions surely is insufficient to entitle McGahn to absolute immunity.

DOJ's analogy (Br. 43) to *Gravel v. United States*, 408 U.S. 606 (1972), is similarly misplaced. There, the Supreme Court held that, because Members of Congress are

absolutely immune from certain criminal subpoenas, so too are their staff. But the Constitution's Speech or Debate Clause expressly grants Members of Congress such immunity. U.S. Const. art. I, § 6, cl. 1. The President, by contrast, does not enjoy express constitutional immunity and his aides have never been recognized to possess an absolute immunity for any purpose. *See Harlow*, 457 U.S. at 810-11 (concluding the Executive's analogy to *Gravel* "sweeps too far"). *Gravel*'s grounding in explicit constitutional text speaks to the *absence* of any such constitutional support for DOJ's position here.

CONCLUSION

The Court should affirm the district court's order.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with Federal Rule of App. P. 36(a)(7)(B) because it contains 12,770 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word Professional Plus 2016 in 14-point Garamond type.

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CERTIFICATE OF SERVICE

I certify that on December 16, 2020, I filed the foregoing brief of the Committee on the Judiciary of the U.S. House of Representatives via the CM/ECF system of the United States Court of Appeals for the District of Columbia Circuit, which I understand caused service on all registered parties.

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