From: Smirniotopoulos, Amalea (Judiciary-Dem)
Subject: RE: climate rico
To: Gaeta, Joseph (OLA)
Sent: June 18, 2021 12:26 PM (UTC-04:00)
Attached: 2017-06-30 FBI Response re RICO Climate Denial.pdf, 2018-01-29 Ltr to DOJ RICO Follow-Up Climate Denial.pdf, 2018-02-09 Response from DOJ re Investigation Referral.pdf, 170726_rico climate fbi follow-up.pdf, 170501_Letter to FBI About Climate Investigation.pdf, 170630_Letter to FBI re Climate Referral.pdf

I think this is all of it.

From: Gaeta, Joseph (OLA) (b) (6)
Sent: Friday, June 18, 2021 8:51 AM
To: Smirniotopoulos, Amalea (Judiciary-Dem) (b) (6)
Subject: climate rico

Do you have readily available and could you send to me the back and forth with FBI on climate rico?

Joe Gaeta
Deputy Assistant Attorney General
Office of Legislative Affairs (OLA)
U.S. Department of Justice

SHELDON WHITEHOUSE
RHODE ISLAND

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May 1, 2017

The Honorable James B. Comey, Jr.
Director
Federal Bureau of Investigation
935 Pennsylvania Avenue, NW
Washington, DC 20535-0001

Dear Director Comey:

As you may know, on September 22, 1999, the Department of Justice filed a civil racketeering action to stop ongoing fraudulent activity by the tobacco industry, which was misleading the public about the health harms of its product. On August 17, 2006, the Department won this case in the United States District Court for the District of Columbia; that victory for the Department was upheld by the United States Court of Appeals for the District of Columbia Circuit in a unanimous decision on May 22, 2009, and the United States Supreme Court on June 28, 2010 denied certiorari, leaving the Department's victory at trial and on appeal intact. Although this was a civil case, it was supported by the work of the Federal Bureau of Investigation.

Members of Congress, writers, lawyers, and academic researchers have frequently made comparisons between the fraudulent conduct of the tobacco industry and the campaign of "climate denial" by the fossil fuel industry. A formal letter was sent by members of the House of Representatives to the Department of Justice on October 14, 2015 asking that the fossil fuel industry "climate denial" campaign be investigated like the tobacco industry fraud. On January 12, 2016, in a letter signed by the Assistant Attorney General for Legislative Affairs, the Department indicated that the matter had been referred to the Federal Bureau of Investigation. Attorney General Lynch confirmed that in her testimony before the Senate Judiciary Committee on March 9, 2016.

This letter asks for an update on that investigation.

As a former United States Attorney, I well understand the caution of the FBI and the Department of Justice in questions related to ongoing investigations. At the same time, as a Senator on the Judiciary Committee, I have an oversight responsibility to inquire whether investigations are handled thoroughly, responsibly, and on the merits, and not just shelved.

There are several clues to suggest that the investigation referred to the FBI by the Attorney General may not have been pursued with much diligence. First, this investigation would likely be a civil matter, since the tobacco lawsuit was a civil matter, and the FBI's priorities have traditionally been more in national security and criminal law enforcement. Second, it does not appear that the Attorney General assigned any Department attorney to the investigation, from the Civil Division or elsewhere, a failure that may well have been read by the FBI as signaling an

intention that the matter was sent to the FBI more for decent burial than for proper investigation. Third, the relevant statute (see 18 U.S.C. Sec. 1968) provides a means for significant discovery at the request of the Attorney General, yet it does not appear that this power of the Attorney General was ever invoked -- again, potentially a signal to the FBI not to take this matter too seriously. Finally, there has been no public sign or inkling of any investigative effort having been made by the FBI to obtain documents, witness statements, expert review, or any other information.

Moreover, there was well-documented political backlash by the tobacco industry against the Department for pursuing and ultimately winning its lawsuit against that industry. The Department could reasonably expect similar or greater political backlash from the fossil fuel industry if a similar investigation were undertaken against that industry. If the Bureau read the Attorney General's referral as signaling that discretion would be the better part of valor, this may have provided motive for a less-than-diligent investigation: in order to avoid a predictable major controversy with the politically powerful fossil fuel industry.

Under these circumstances (to wit, the absence of any sign of investigative effort and a motive to avoid foreseeable political conflict), I think that it is fair and appropriate within my oversight function to ask the FBI to provide answers to the following questions, and that it would be proper and in order for the FBI to provide answers:

1. Was an investigation ever opened in response to the above referral that the Department of Justice claimed was made to the FBI? If one was opened, has it since been closed?

2. What were the dates on which any such investigation was opened and/or closed?

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5. Under what level of supervision was the investigation conducted? Specifically, was any Department of Justice attorney or prosecutor from outside the FBI ever assigned to the matter?

6. What internal procedures at the Department and/or the FBI govern a civil RICO investigation, and which of those internal procedures were invoked or followed in this matter?

7. If the investigation was closed, what office signed off on closing the matter?

Please feel free to provide any written materials or memos offering evidence that this matter was diligently undertaken by the Bureau.

Again, I understand that facts disclosed by an investigation are treated within the Department of Justice with great caution and respect. I believe that all of these questions relate to investigative effort, not content, and can properly be answered about an investigative referral that was publicly disclosed by the Department and the Attorney General.

Sincerely,

Sheldon Whitehouse
United States Senator

SHELDON WHITEHOUSE
RHODE ISLAND

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June 30, 2017

The Honorable Andrew McCabe
Acting Director
Federal Bureau of Investigation
935 Pennsylvania Avenue, NW
Washington, D.C. 20535-0001

Dear Acting Director McCabe:

As you may know, on September 22, 1999, the Department of Justice filed a civil racketeering action to stop ongoing fraudulent activity by the tobacco industry, which was misleading the public about the health harms of its product. On August 17, 2006, the Department won this case in the United States District Court for the District of Columbia; that victory for the Department was upheld by the United States Court of Appeals for the District of Columbia Circuit in a unanimous decision on May 22, 2009, and the United States Supreme Court on June 28, 2010 denied certiorari, leaving the Department's victory at trial and on appeal intact. Although this was a civil case, it was supported by the work of the Federal Bureau of Investigation.

> Members of Congress, writers, lawyers, and academic researchers have frequently made comparisons between the fraudulent conduct of the tobacco industry and the campaign of "climate denial" by the fossil fuel industry. A formal letter was sent by members of the House of Representatives to the Department of Justice on October 14, 2015 asking that the fossil fuel industry "climate denial" campaign be investigated like the tobacco industry fraud. On January 12, 2016, in a letter signed by the Assistant Attorney General for Legislative Affairs, the Department indicated that the matter had been referred to the Federal Bureau of Investigation. Attorney General Lynch confirmed that in her testimony before the Senate Judiciary Committee on March 9, 2016.

This letter asks for an update on that investigation.

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There are several clues to suggest that the investigation referred to the FBI by the Attorney General may not have been pursued with much diligence. First, this investigation would likely be a civil matter, since the tobacco lawsuit was a civil matter, and the FBI's priorities have traditionally been more in national security and criminal law enforcement. Second, it does not appear that the Attorney General assigned any Department attorney to the investigation, from the Civil Division or elsewhere, a failure that may well have been read by the FBI as signaling an

intention that the matter was sent to the FBI more for decent burial than for proper investigation. Third, the relevant statute (see 18 U.S.C. Sec. 1968) provides a means for significant discovery at the request of the Attorney General, yet it does not appear that this power of the Attorney General was ever invoked – again, potentially a signal to the FBI not to take this matter too seriously. Finally, there has been no public sign or inkling of any investigative effort having been made by the FBI to obtain documents, witness statements, expert review, or any other information.

Moreover, there was well-documented political backlash by the tobacco industry against the Department for pursuing and ultimately winning its lawsuit against that industry. The Department could reasonably expect similar or greater political backlash from the fossil fuel industry if a similar investigation were undertaken against that industry. If the Bureau read the Attorney General's referral as signaling that discretion would be the better part of valor, this may have provided motive for a less-than-diligent investigation: in order to avoid a predictable major controversy with the politically powerful fossil fuel industry.

Under these circumstances (to wit, the absence of any sign of investigative effort and a motive to avoid foreseeable political conflict), I think that it is fair and appropriate within my oversight function to ask the FBI to provide answers to the following questions, and that it would be proper and in order for the FBI to provide answers:

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5. Under what level of supervision was the investigation conducted? Specifically, was any Department of Justice attorney or prosecutor from outside the FBI ever assigned to the matter?

6. What internal procedures at the Department and/or the FBI govern a civil RICO investigation, and which of those internal procedures were invoked or followed in this matter?

7. If the investigation was closed, what office signed off on closing the matter?

8. Please feel free to provide any written materials or memos offering evidence that this matter was diligently undertaken by the Bureau.

Again, I understand that facts disclosed by an investigation are treated within the Department of Justice with great caution and respect. I believe that all of these questions relate to investigative effort, not content, and can properly be answered about an investigative referral that was publicly disclosed by the Department and the Attorney General.

Sincerely,

Sheldon Whitehouse
United States Senator

SHELDON WHITEHOUSE
RHODE ISLAND

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July 26, 2017

Mr. J.C. Hacker
Deputy Assistant Director
Federal Bureau of Investigation
Criminal Investigative Division
935 Pennsylvania Avenue NW
Washington, DC 20535

Dear Mr. Hacker:

Thank you for your reply of June 30 to my letter of May 1, 2017.

I read tolerably well and the only facts I could glean from your letter were that the civil investigation I inquired about was received as a referral on March 15, 2016 by the FBI and subsequently closed by the FBI's CID. I enclose another copy of my original letter and refer you to the specific questions contained therein. I enclose also a copy of an October 23, 2015 letter from the Department of Justice to Chairman Goodlatte and Ranking Member Conyers, and invite your comparison of that letter to the June 30, 2017 letter you sent to me.

With regard to the letter you did send, your assertion that the Department of Justice must meet the burden that it "prove beyond a reasonable doubt" that a requisite illegal enterprise existed does not appear responsive to my letter inquiring about a civil racketeering complaint, along the model I described of the civil RICO tobacco fraud litigation. As Judge Kessler's decision at trial relates, the burden of the government in that proceeding was to prove its case by the preponderance of the evidence. It certainly does not allay my concern as to whether a thorough look was taken if the wrong burden of proof was applied. Moreover, my understanding as a former United States Attorney, and subsequently Attorney General of my state (a state in which all prosecutive authority resides in the Attorney General), is that a trial burden of proof is not the standard of predication to open and conduct a thorough investigation. Many prosecutors would wish to see evidence obtained and evaluated first, before such a standard was ultimately applied to determine whether to take a matter of investigative interest to trial.

Finally, your description of the role of OCGS review of RICO cases does not disclose whether such an OCGS review ever took place, nor does it disclose whether any investigative effort was undertaken to inform that review. There is nothing in your letter that would seem to lend factual support to its assurance that "this referral was taken seriously and was thoroughly assessed." In your business, you would not accept such unsupported assurances, and neither should I.

I would be grateful if you would see to it that I receive an answer to the questions I actually asked, and that it be as thorough an answer as the enclosed Goodlatte/Conyers letter. Once the new Director has been confirmed, I will take the liberty of copying him as well.

Sincerely,

Sheldon Whitehouse
United States Senator

U.S. Department of Justice

Federal Bureau of Investigation

Washington, DC 20535-0001

The Honorable Sheldon Whitehouse
United States Senator
Washington, DC 20510

JUN 3 0 2017

Dear Senator Whitehouse:

This responds to your letter to the Federal Bureau of Investigation, dated May 1, 2017. The FBI is aware of the US Department of Justice (DOJ) referral regarding allegations ExxonMobil may have violated the Racketeer Influenced and Corrupt Organizations Act (RICO); the FBI received this referral on March 15, 2016.

In order to charge a RICO statute, the government must prove beyond a reasonable doubt there is the existence of an illegal enterprise which affects interstate or foreign commerce. The defendants must be employed by or associated with the enterprise, participate in the affairs of the enterprise, and be engaged in a pattern of racketeering activity [section 1962(c)]. Since RICO encompasses a variety of state and federal offenses that can serve as predicate acts of racketeering, RICO can be used in wide-ranging circumstances. While RICO provides an effective and versatile tool for prosecuting criminal activity, injudicious use of RICO may reduce its impact in cases where it is truly warranted. For this reason, it is the policy of the Criminal Investigative Division (CID) that RICO be selectively and uniformly used. In order to ensure uniformity, all RICO criminal and civil actions brought by the United States must receive prior approval from the DOJ Organized Crime and Gang Section (formerly the Organized Crime and Racketeering Section) in Washington, D.C., in accordance with the approval guidelines at Section 9-110.100 *et seq.* of the United States Attorneys' Manual. The guidelines were drafted with a careful consideration of comments received from the Advisory Committee to the United States Attorneys. Therefore, all federal indictments, informations, and complaints alleging violations of the RICO statute must be approved by the Organized Crime and Gang Section.

With the information provided in the referral, CID assessed the allegations in the referral did not indicate a federal violation had occurred. Be assured this referral was taken seriously and was thoroughly assessed. The FBI remains committed to pursuing those individuals and organizations that engage in fraudulent activities. If you would like to provide additional information related to this matter, please send correspondence to:

Federal Bureau of Investigation
Criminal Investigative Division
Attn: Public Corruption Unit
935 Pennsylvania Avenue NW
Washington, DC 20535

We appreciate the opportunity to respond to your inquiry and hope this information is helpful to you.

Sincerely,

J.C. Hacker
Deputy Assistant Director
Criminal Investigative Division

SHELDON WHITEHOUSE
RHODE ISLAND

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January 29, 2018

Mr. J.C. Hacker
Deputy Assistant Director
Federal Bureau of Investigation
Criminal Investigative Division
935 Pennsylvania Avenue NW
Washington, DC 20535

Dear Mr. Hacker:

I write to follow up once again on your letter of June 30, 2017.

As I noted in my initial response on July 26, 2017, that letter fell short of providing the assurances I had previously requested that the 2014 referral by members of the House of Representatives asking the Department of Justice to investigate the fossil fuel industry's "climate denial" campaign was taken seriously and thoroughly assessed. I asked you in July to kindly answer the questions I had posed in my original letter; six months have now elapsed and I have received no response to those questions or my letter.

The seeming unwillingness to answer these questions; the stark contrast between the terse response on this matter versus the fulsome response regarding the IRS 501(c) investigation; and the haphazard confusion in your reply between civil and criminal standards of proof, all give little confidence that this question has been treated seriously, then or now.

I am attaching our correspondence to date for your convenience, including the response in the IRS 501(c) matter. Given that FBI Director Wray has been confirmed in the interim, I am taking the liberty of copying him on this correspondence as well.

Sincerely,

Sheldon Whitehouse
United States Senator

cc: The Honorable Christopher Wray

SHELDON WHITEHOUSE
RHODE ISLAND

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May 1, 2017

The Honorable James B. Comey, Jr.
Director
Federal Bureau of Investigation
935 Pennsylvania Avenue, NW
Washington, DC 20535-0001

Dear Director Comey:

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Please feel free to provide any written materials or memos offering evidence that this matter was diligently undertaken by the Bureau.

Again, I understand that facts disclosed by an investigation are treated within the Department of Justice with great caution and respect. I believe that all of these questions relate to investigative effort, not content, and can properly be answered about an investigative referral that was publicly disclosed by the Department and the Attorney General.

Sincerely,

Sheldon Whitehouse
United States Senator

U.S. Department of Justice

Federal Bureau of Investigation

Washington, DC 20535-0001

The Honorable Sheldon Whitehouse
United States Senator
Washington, DC 20510

JUN 30 2017

Dear Senator Whitehouse:

This responds to your letter to the Federal Bureau of Investigation, dated May 1, 2017. The FBI is aware of the US Department of Justice (DOJ) referral regarding allegations ExxonMobil may have violated the Racketeer Influenced and Corrupt Organizations Act (RICO); the FBI received this referral on March 15, 2016.

In order to charge a RICO statute, the government must prove beyond a reasonable doubt there is the existence of an illegal enterprise which affects interstate or foreign commerce. The defendants must be employed by or associated with the enterprise, participate in the affairs of the enterprise, and be engaged in a pattern of racketeering activity [section 1962(c)]. Since RICO encompasses a variety of state and federal offenses that can serve as predicate acts of racketeering, RICO can be used in wide-ranging circumstances. While RICO provides an effective and versatile tool for prosecuting criminal activity, injudicious use of RICO may reduce its impact in cases where it is truly warranted. For this reason, it is the policy of the Criminal Investigative Division (CID) that RICO be selectively and uniformly used. In order to ensure uniformity, all RICO criminal and civil actions brought by the United States must receive prior approval from the DOJ Organized Crime and Gang Section (formerly the Organized Crime and Racketeering Section) in Washington, D.C., in accordance with the approval guidelines at Section 9-110.100 *et seq.* of the United States Attorneys' Manual. The guidelines were drafted with a careful consideration of comments received from the Advisory Committee to the United States Attorneys. Therefore, all federal indictments, informations, and complaints alleging violations of the RICO statute must be approved by the Organized Crime and Gang Section.

With the information provided in the referral, CID assessed the allegations in the referral did not indicate a federal violation had occurred. Be assured this referral was taken seriously and was thoroughly assessed. The FBI remains committed to pursuing those individuals and organizations that engage in fraudulent activities. If you would like to provide additional information related to this matter, please send correspondence to:

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Criminal Investigative Division
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We appreciate the opportunity to respond to your inquiry and hope this information is helpful to you.

Sincerely,

J.C. Hacker
Deputy Assistant Director
Criminal Investigative Division

SHELDON WHITEHOUSE
RHODE ISLAND

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July 26, 2017

Mr. J.C. Hacker
Deputy Assistant Director
Federal Bureau of Investigation
Criminal Investigative Division
935 Pennsylvania Avenue NW
Washington, DC 20535

Dear Mr. Hacker:

Thank you for your reply of June 30 to my letter of May 1, 2017.

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Sincerely,

Sheldon Whitehouse
United States Senator

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

October 23, 2015

The Honorable Bob Goodlatte
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable John Conyers, Jr.
Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman and Congressman Conyers:

We write to inform you about the Department of Justice's criminal investigation into whether any IRS officials committed crimes in connection with the handling of tax-exemption applications filed by Tea Party and ideologically similar organizations. Consistent with statements from the Department of Justice (the Department) throughout the investigation, we are pleased to provide additional information regarding this matter now that we have concluded our investigation. In recognition of not only our commitment to provide such information in this case, but also the Committee's interest in this particular matter, we now provide a short summary of our investigative findings.

In collaboration with the FBI and Treasury Inspector General for Tax Administration (TIGTA), the Department's Criminal and Civil Rights Divisions conducted an exhaustive probe. We conducted more than 100 witness interviews, collected more than one million pages of IRS documents, analyzed almost 500 tax-exemption applications, examined the role and potential culpability of scores of IRS employees, and considered the applicability of civil rights, tax administration, and obstruction statutes. Our investigation uncovered substantial evidence of mismanagement, poor judgment, and institutional inertia, leading to the belief by many tax-exempt applicants that the IRS targeted them based on their political viewpoints. But poor management is not a crime. We found no evidence that any IRS official acted based on political, discriminatory, corrupt, or other inappropriate motives that would support a criminal prosecution. We also found no evidence that any official involved in the handling of tax-exempt applications or IRS leadership attempted to obstruct justice. Based on the evidence developed in this investigation and the recommendation of experienced career prosecutors and supervising attorneys at the Department, we are closing our investigation and will not seek any criminal charges.

The Investigation

The Department's probe began in May 2013, following a TIGTA audit report revealing the IRS's mishandling of tax-exempt applications filed by groups it suspected to be involved in political activity. *See* TIGTA Audit Report, *Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review*, Ref. No. 2013-10-053 (May 14, 2013). TIGTA's audit report revealed that the IRS coordinated the review of applicants for tax-exemption under Internal Revenue Code Sections 501(c)(3) and 501(c)(4), which limit the amount of political activity in which such groups can engage. According to the audit report, one way in which the IRS identified groups for coordinated review was through politically focused keywords, such as "Tea Party," "9/12 Project," and "Patriots," and the inventory of applications identified for coordinated review was internally referred to as the "Tea Party cases." These applications were subjected to heightened scrutiny, including burdensome and unnecessary information requests, which caused significant processing delays. Although TIGTA's audit report detailed no evidence or allegation of discriminatory intent, its findings were unsettling and prompted the Department of Justice to initiate a criminal investigation. Our probe, which was managed by an experienced team of career prosecutors and supervising attorneys from the Criminal Division's Public Integrity Section and Civil Rights Division's Criminal Section, in partnership with seasoned law enforcement agents from the FBI and TIGTA, spanned the better part of two years. As explained below, our investigation confirmed the TIGTA audit report's core factual findings and examined in detail what motivated the decisions leading to the IRS's handling of these tax-exempt applications.

At the investigation's outset, the Department took careful steps to preserve the possibility of criminal prosecution in the face of potential Fifth Amendment issues. Under the Fifth Amendment, statements obtained from federal employees under threat of termination—a common occurrence in administrative investigations like the TIGTA audit—as well as evidence derived from those statements, cannot be used against such employees in a criminal prosecution. *Garrity v. New Jersey*, 385 U.S. 493, 497-98 (1967); *Kastigar v. United States*, 406 U.S. 441, 460 (1972). We therefore formed two teams – a prosecution team principally responsible for the criminal investigation, and a filter team responsible for shielding the prosecution team from statements and information that risked contaminating an otherwise viable criminal prosecution. Before the prosecution team was given access to fruits of the audit report, the filter team reviewed prior statements by IRS employees to TIGTA auditors to assess whether a court might deem them compelled under the Fifth Amendment, and evaluated the statements and evidence derived from these prior statements to determine whether they could be traced to sources independent from any potentially compelled statements. This prophylactic measure was further necessitated by IRS leadership's order to its employees to cooperate in the parallel Congressional investigation, raising concerns that a court could deem statements given to Congressional committees to have been compelled. In early October 2013, we determined that the filter procedure was no longer necessary and that any potential prosecution supported by the evidence would not be frustrated by a Fifth Amendment challenge.

The prosecution and filter teams conducted over 100 interviews. Top-level IRS officials, including former IRS Commissioner Douglas Shulman, former Acting IRS Commissioner

Steven Miller, and former Exempt Organizations Director Lois Lerner, voluntarily participated in extensive interviews with the prosecution team, as did their close advisors and career managers and line-level revenue agents directly involved in processing tax-exempt applications. Some key witnesses were interviewed multiple times. No person interviewed during the investigation was made promises of non-prosecution in order to obtain their statements.

Throughout the investigation, not a single IRS employee reported any allegation, concern, or suspicion that the handling of tax-exempt applications—or any other IRS function—was motivated by political bias, discriminatory intent, or corruption. Among these witnesses were several IRS employees who were critical of Ms. Lerner's and other officials' leadership, as well as others who volunteered to us that they are politically conservative. Moreover, both TIGTA and the IRS's Whistleblower Office confirmed that neither has received internal complaints from IRS employees alleging that officials' handling of tax-exempt applications was motivated by political or other discriminatory bias.

In addition to conducting interviews, we also collected and reviewed voluminous relevant documents. On May 31, 2013, the Department served the IRS with a demand that it preserve all documents potentially material to the investigation, with the same obligations and subject to the same potential sanctions that would apply had the IRS been served a federal grand jury subpoena. The IRS produced more than one million pages of unredacted documents and asserted no privileges against disclosure. The Department shared Congress's frustration with the IRS's revelation in June 2014 that its document collection and preservation process was susceptible to potentially catastrophic loss. Specifically, the IRS revealed that its electronic backup system for emails was vulnerable to the crash of a single employee's hard drive, which could result in the permanent loss of that employee's email archive. Indeed, this is what occurred with respect to Ms. Lerner, whose hard drive crashed in June 2011, causing the destruction of her email archives. Our confidence in the IRS's data collection process was further undermined by the four-month delay in its disclosure of this information, as well as TIGTA's discovery that, in March 2014, IRS information technology employees inadvertently destroyed more than 400 electronic backup tapes that may have contained copies of Ms. Lerner's emails.

Despite these shortcomings, we are confident that we were able to compile a substantially complete set of the pertinent documents. The IRS collected documents from more than 80 employees—many more employees than were regularly and directly involved in the matters under investigation—making exceedingly remote the chance that a hard drive crash or other technical failure experienced by any particular employee could cause the permanent loss of any relevant email or other document. Moreover, we did not rely exclusively on the IRS to collect documents. We also searched Ms. Lerner's entire computer and Blackberry, obtained the complete email boxes of IRS employees central to the investigation (as opposed to obtaining only those emails the IRS deemed responsive), and performed office searches of some officials. We also obtained documents directly from several witnesses. Our extensive witness interviews revealed no indication of any missing material documents, and no IRS witness reported seeing any documents that have since gone missing or are otherwise unaccounted for. Finally, as discussed more below, our investigation revealed no evidence that the IRS's document collection

and retention problems, Ms. Lerner's hard drive crash, or the IRS's delayed disclosure regarding these matters were caused by a deliberate attempt to conceal or destroy information.

The Department also obtained and reviewed the IRS's tax-exempt-application files for nearly 500 groups that applied for status between 2009 and the release of the Audit Report in May 2013, which were subject to the IRS's coordinated review regarding political activity. According to an analysis by the FBI, nearly 70 percent of the applications coordinated for review were submitted by right-leaning groups, including the Tea Party, confirming the TIGTA audit's finding that such groups were disproportionately impacted by the IRS's coordinated review of applications. We identified groups suffering the most significant of the impacts of these procedures and obtained interviews with representatives of eleven of them. Some of these interviews were obtained through lawyers, including a firm representing as many as 50 individual organizations. Although not all of these represented organizations agreed to be interviewed, their lawyers either informed us that the information provided by organizations whose representatives did agree to be interviewed was sufficient to further the Department's criminal investigation, or provided detailed information about their clients' interactions with the IRS. In addition, we had the benefit of reviewing the detailed complaints filed in civil cases lodged in the District of Columbia and Southern District of Ohio, as well as reviewing public testimony from applicants who appeared before Congress to describe their interactions with the IRS.

Investigative Findings

In order to bring criminal charges, we must have evidence of criminal intent. The Department searched exhaustively for evidence that any IRS employee deliberately targeted an applicant or group of applicants for scrutiny, delay, denial, or other adverse treatment because of their viewpoint. Intentional viewpoint discrimination may violate civil rights statutes, which criminalize acting under color of law to willfully deprive a person of rights protected by the Constitution or federal law. *See* 18 U.S.C. §§ 241, 242. Intentional viewpoint discrimination may also violate criminal tax statutes that prohibit IRS employees from committing willful oppression under color of law, for example by deliberately failing to perform official duties with the intent of defeating the due administration of revenue laws, or by corruptly impeding or obstructing the administration of the Tax Code. *See* 26 U.S.C. §§ 7214(a)(1), 7214(a)(3), 7212(a). These statutes require proof beyond a reasonable doubt that an IRS official specifically intended to violate the Constitution, Tax Code, or another federal law.

As applied to this case, a criminal prosecution under any of these statutes would require proof that an IRS official intentionally discriminated against an applicant based upon viewpoint. It would be insufficient to prove only that IRS employees used inappropriate criteria to coordinate the review of applications, acted in ways that resulted in the delay of the processing applications, or disproportionately subjected some applicants to burdensome or unnecessary questions. Instead, we would have to prove that such actions were undertaken for the very purpose of harassing or harming applicants. Proof that an IRS employee acted in good faith would be a complete defense to a criminal charge; and proof that an IRS employee acted because

of mistake, bad judgment, ignorance, inertia, or even negligence would be insufficient to support a criminal charge.

Our investigation found no evidence that any IRS employee acted with criminal intent. We analyzed the culpability of every IRS employee who played a role in coordinating for review applications or handling them afterwards, from line-level revenue agents and managers in the Cincinnati-based Determinations Unit, to tax law specialists and senior executive officials based in Washington, D.C. Apart from the belief by many tax-exempt applicants affiliated with the Tea Party and similar ideologies that they had been targeted, we found no evidence that any IRS employee intentionally discriminated against these groups based upon their viewpoints. To the contrary, the evidence indicates that the decisions made by IRS employees, though misdirected, were motivated by the desire to treat similar applications consistently and avoid making incorrect decisions. Their plans to treat applications consistently were poorly implemented, due to a combination of ignorance about how to apply section 501(c)(4)'s requirements to organizations engaged in political activity, lack of guidance from subject matter experts about how to make decisions in an area most witnesses described as difficult, and repeated communication and management issues. Moreover, many employees failed to engage in critical thought about the effect their actions (or inactions) would have upon those who applied for tax-exempt status. We found that many IRS employees' failure to give adequate attention to the applications at issue was caused by competing demands on their time and an unwillingness to be held accountable for difficult decisions over sensitive matters. We did not, however, uncover any evidence that any of these employees were motivated by intentional viewpoint discrimination.

As noted above, no IRS employee we interviewed, from those directly involved in decision making to those who were primarily witnesses to the conduct of others, reported having any information suggesting that any action taken by any person in the IRS was done for the purpose of harming or harassing applicants affiliated with the Tea Party or similar groups. These witness accounts are fully supported by contemporaneous internal IRS documents, which do not suggest that there was a partisan political motive for any of the decisions made during the handling of the applications. Moreover, any inference of specific intent that might be drawn from the length of the delay in processing applications, the burdensomeness of the information requests, or the fact that Tea Party and ideologically similar organizations were disproportionately affected by the IRS's coordination efforts, is contradicted by witnesses' explanations of why IRS employees made the decisions that they did, all of which—even if misguided—are inconsistent with criminal intent.

Importantly, our investigation revealed that this was not the first time that the IRS had used inept labels in organizing their review of applications. Prior to the IRS procedures that were the subject of our investigation, the IRS had historically coordinated review of applications based on the applicant's name and affiliations, including using keywords such as "progressive" and "ACORN." This historical practice creates a substantial barrier to establishing criminal intent, and bolsters the conclusion that IRS employees did not believe that coordinating for review applications using words like "Tea Party" could potentially violate the Constitution or the Tax Code, or that this method of coordinating applications for review was discriminatory or

otherwise inappropriate. Moreover, the decision to coordinate the review of applications and the discussions about how to handle them were conducted openly across multiple IRS components and among many different employees with a range of political views, including some who voluntarily identified themselves in interviews as conservative or Republican. Such open discussion of planned actions is inconsistent with criminal intent.

The evidence that we developed demonstrated a disconnect between employees in Cincinnati, who were principally responsible for identifying the applications for review and crafting the burdensome information requests, and employees in Washington, D.C., who were principally responsible for the delay and failure to provide guidance on how to handle the application backlog despite repeated requests that they do so from revenue agents and their supervisors in Cincinnati. As a result, no one person (or group of people) was responsible for the chain of events that resulted in the manner in which applications were ultimately coordinated for review and then delayed. Instead, we found overwhelming evidence that the ill-advised selection criteria, burdensome information requests, and application delays were the product of discrete mistakes by line-level revenue agents, technical specialists, and their immediate supervisors, and that those mistakes were exacerbated by oversight and leadership lapses by senior managers and senior executive officials in Washington, D.C. We developed no evidence that the decisions IRS employees made about how to handle applications, either in Cincinnati or Washington, were motivated by discriminatory intent or other corrupt motive.

The one official who, by virtue of her role as Director of the IRS's Exempt Organizations Division, arguably had the most oversight responsibility for all tax-exempt applications, was Ms. Lerner. Due to her position, and because the U.S. House of Representatives Ways and Means Committee referred civil rights allegations against her to the Department on April 9, 2014, we took special care to evaluate whether Ms. Lerner had criminal culpability. The need for scrutiny of Ms. Lerner in particular was heightened by the discovery and publication of emails from her official IRS account that expressed her personal political views and, in one case, hostility towards conservative radio personalities. We therefore specifically considered whether Ms. Lerner's personal political views influenced her decisions, leadership, action, or failure to take action with respect to tax-exempt applications or any other matter. We found no such evidence.

Our conclusion regarding Ms. Lerner is supported by several factors. First, not a single IRS employee that we interviewed, some of whom were critical of Ms. Lerner's leadership and general management style, and some of whom volunteered that they consider themselves politically conservative, witnessed, alleged, or suspected that Ms. Lerner acted with a political, discriminatory, corrupt, or other inappropriate purpose.

Second, our investigation revealed that when Ms. Lerner became fully aware of and focused on the Cincinnati-based Determinations Unit's use of inappropriate criteria, she recognized that it was wrong, ordered that it stop immediately, and instructed subordinates to take corrective action. In fact, Ms. Lerner was the first IRS official to recognize the magnitude of the problem and to take concerted steps to fix it. To the extent that Ms. Lerner mishandled the oversight of how these tax-exempt applications were processed, it resulted from her failure to digest materials available to her from which she could have identified the problem sooner, and

her delegation of corrective action to subordinates whom she did not adequately supervise to assure that her directions were implemented sufficiently.

Third, although Ms. Lerner exercised poor judgment in using her IRS email account to exchange personal messages that reflected her political views, we cannot show that these messages related to her official duties and actions with respect to the handling of these tax-exempt applications. In fact, we uncovered no email or other communication showing that Ms. Lerner exercised her decision-making authority in a partisan manner generally, or in the handling of tax-exempt applications specifically, and no witness we interviewed interpreted any email or other communication they exchanged with Ms. Lerner in such a manner.

Finally, our investigation uncovered no evidence that Ms. Lerner intentionally caused her hard drive to crash or that she otherwise endeavored to conceal documents or information from IRS colleagues or this investigation. Moreover, it bears noting that Ms. Lerner cooperated fully with our investigation, voluntarily sitting for approximately 12 hours of interviews with no promise of immunity, producing emails and documents upon request, and disclosing passwords to her IRS Blackberry to assist in searching its contents.

We also carefully considered whether any IRS official attempted to obstruct justice with respect to their reporting function to Congress, the collection and production of documents demanded by the Department and Congress, the delayed disclosure of the consequences of Ms. Lerner's hard drive crash, or the March 2014 erasure of electronic backup tapes. *See, e.g.*, 18 U.S.C. §§ 1503, 1512, 1515, 1519. At a minimum, these statutes would require us to prove a deliberate attempt to conceal or destroy information in order to improperly influence a criminal or Congressional investigation. We uncovered no evidence of such an intent by any official involved in the handling of tax-exempt applications or the IRS's response to investigations of its conduct.[1] Although the IRS's decision to delay the disclosure of the consequences of Ms. Lerner's hard drive crash for more than four months undermined confidence in its judgment, it was not criminal. The evidence shows that IRS attorneys and officials spent that time exercising due diligence to determine what had occurred, mitigating heavily against criminal intent. Similarly, the evidence shows that IRS officials in Washington were unaware of the March 2014 erasure of electronic backup tapes until it was brought to their attention by TIGTA in June 2015. Although those backup tapes should have been protected from erasure due to the Department's preservation demand, there is no evidence that any IRS employee intended to conceal the backup tapes from our investigation or realized that erasing them might violate the preservation demand.

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[1] TIGTA has developed evidence that, in June 2015, GS Grade 4 employees and their supervisor working at the IRS's Enterprise Computing Center may have made misleading statements to TIGTA about the manner in which electronic server hard drives were inventoried. There is no evidence suggesting that the employees were involved in the handling of tax-exempt applications, intended to conceal information about the IRS's handling of tax-exempt applications, or that they acted at the behest of any of the IRS employees involved in the handling of tax-exempt applications. Rather, the evidence suggests that the employees failed to inventory the server hard drives properly and later sought to avoid being held accountable for that failure. The Criminal Division's Public Integrity Section and the Civil Rights Division's Criminal Section determined that the possibly misleading statements had no adverse impact on the Department's criminal investigation of the handling of tax-exempt applications. TIGTA has informed the Department that it intends to refer this matter to a U.S. Attorney's Office.

There is no basis for any obstruction of justice charge arising from the IRS's data collection and preservation protocol.

Conclusion

The IRS mishandled the processing of tax-exempt applications in a manner that disproportionately impacted applicants affiliated with the Tea Party and similar groups, leaving the appearance that the IRS's conduct was motivated by political, discriminatory, corrupt, or other inappropriate motive. However, ineffective management is not a crime. The Department of Justice's exhaustive probe revealed no evidence that would support a criminal prosecution. What occurred is disquieting and may necessitate corrective action – but it does not warrant criminal prosecution.

We hope this information is helpful. We have made a substantial effort to provide detailed information regarding our findings in this letter, and would be pleased to offer a briefing to address any questions you may have on this matter. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter.

Sincerely,

Peter J. Kadzik
Assistant Attorney General

U.S. Department of Justice

Federal Bureau of Investigation

Washington, D. C. 20535-0001

FEB 0 9 2018

The Honorable Sheldon Whitehouse
United States Senate
Washington, DC 20510

Dear Senator Whitehouse:

This responds to your letters to the FBI, dated July 26, 2017 and October 5, 2017, which elaborated on your May 1, 2017 letter.

In regard to the specific questions asked in your May letter, no FBI investigation was ever opened in response to your referral to the Department of Justice (the Department). The Criminal Investigative Division of FBI Headquarters, in consultation with the Department (Civil and Criminal divisions) and our affected field offices, assessed the allegations and determined the information included in the referral did not indicate a federal criminal or civil violation had occurred. The FBI is aware, however, of a related regulatory inquiry into the matter and should the inquiry identify additional information indicating a possible violation of federal criminal law, then additional assessment and actions as appropriate will be taken. Regarding investigations of civil Racketeer Influenced and Corrupt Organizations Act (RICO) violations, any action would be brought forward first by the Department. The Department could then request FBI assistance in investigating a civil matter undertaken by the department at which point the FBI would support their request.

We appreciate the opportunity to respond to your inquiry and hope this information is helpful to you.

Sincerely,

J.C. Hacker
Deputy Assistant Director
Criminal Investigative Division

From: Gaeta, Joseph (OLA)
Subject: ERPO
To: David Stoopler
Sent: June 2, 2021 9:26 PM (UTC-04:00)
Attached: 2020-06-02 ERPO_DISCUSSION DRAFT.pdf

Please do not share. Not necessarily final but close.

Sent from my iPhone

MODEL LEGISLATION FOR EXTREME RISK PROTECTION ORDERS

SEC. 1. EXTREME RISK PROTECTION ORDERS

(a) DEFINITIONS. –

(1) "Petitioner" means:

(A) A law enforcement officer or agency, including an attorney for the state;

(B) A member of the family of the respondent, which shall be understood to mean a parent, spouse, child, or sibling of the respondent;

(C) A member of the household of the respondent;

(D) A dating or intimate partner of the respondent;

(E) A health care provider [as defined by state law] who has provided health services to the respondent;

(F) An official of a school or school system in which the respondent is enrolled or has been enrolled within the preceding six months/one year/two years/other appropriate time period specified by state law]; or

(G) [Any other appropriate persons as specified by state law.]

(2) "Respondent" means the person against whom an order under Section 2 or 3 has been sought or granted.

(b) TYPES OF ORDERS. – The petitioner may apply for an emergency ex parte order as provided in Section 2 or an order following a hearing as provided in Section 3.

SEC. 2. EMERGENCY EX PARTE ORDER

(a) BASIS FOR ORDER. – The court shall issue an emergency ex parte extreme risk protection order upon submission of an application by a petitioner, supported by an affidavit or sworn oral statement of the petitioner or other witness, that provides specific facts establishing probable cause that the respondent's possession or receipt of a firearm will pose a [significant danger/extreme risk/other appropriate standard established by state law] of personal injury or death to the respondent or another person. The court shall take up and decide such an application on the day it is submitted, or if review and decision of the application on the same day is not feasible, then as quickly as possible but in no case later than [appropriate time period specified by state law].

(b) CONTENT OF ORDER. – An order issued under this section shall –

(1) prohibit the respondent from possessing, using, purchasing, manufacturing, or otherwise receiving a firearm;

(2) order the respondent to temporarily surrender any firearms in his or her possession or control, and any license or permit allowing the respondent to possess or acquire a firearm, to any law enforcement officer presenting the order or to a law enforcement agency as directed by the officer or the order; and

(3) inform the respondent of the time and place of the hearing under Section 3 to determine whether he or she will be subject to a continuing prohibition of possessing and acquiring firearms.

(c) SEARCH AND SEIZURE. –

(1) If the application and its supporting affidavit or statement establish probable cause that the respondent has access to a firearm, on his or her person or in an identified place, the court shall concurrently issue a warrant authorizing a law enforcement agency to search the person of the respondent and any such place for firearms and to seize any firearm therein to which the respondent would have access.

(2) The court may subsequently issue additional search warrants of this nature based on probable cause that the respondent has retained, acquired, or gained access to a firearm while an order under this section remains in effect.

(3) If the owner of a firearm seized pursuant to this subsection is a person other than the respondent, the owner may secure the return of the firearm as provided in section 3(c)(3).

(d) TIME FOR SERVICE AND SEARCHES. – The responsible law enforcement agency shall serve the order on the respondent, and carry out any search authorized under subsection (c)(1), [promptly/immediately/within other appropriate time period specified by state law] following issuance of the order. If a search is authorized under subsection (c)(1), the agency may serve the order on the respondent concurrently with or after the execution of the search.

SEC. 3. ORDER AFTER HEARING

(a) ORDER AFTER HEARING. – Upon application for an extreme risk protection order, supported an affidavit or sworn oral statement of the petitioner or other witness that provides specific facts giving rise to the concern about the [significant danger/extreme risk/other appropriate standard established by state law] described in Section 2(a), the court may issue an order under this section, which shall be effective for a period of up to [one year/other appropriate time period specified by state law], after a hearing. An order issued under this section shall –

(1) prohibit the respondent from possessing, using, purchasing, or otherwise receiving a firearm; and

(2) order the respondent to surrender any firearm in his or her possession or control, and any license or permit allowing the respondent to possess or acquire a firearm, to any law enforcement officer presenting the order or to a law enforcement agency as directed by the officer or the order.

(b) BASIS FOR ORDER. – The court shall issue such an order based on [a preponderance of the evidence/other appropriate standard as specified by state law] that the respondent's possession or receipt of a firearm will pose a [significant danger/extreme risk/other appropriate standard as specified by state law] of personal injury or death to the respondent or another person. In determining the satisfaction of this requirement, the court shall consider all relevant facts and circumstances after reviewing the petitioner's application and conducting the hearing described in Section 2(d). The court may order a psychological evaluation of the respondent, including voluntary or involuntary commitment of the respondent for purposes of such an evaluation, to the extent authorized by other law.

(c) SEARCH AND SEIZURE. –

(1) If the evidence presented at the hearing establishes probable cause that the respondent has access to a firearm, on his or her person or in an identified place, the court shall concurrently issue a warrant authorizing a law enforcement agency to search the person of the respondent and any such place for firearms and to seize any firearm therein to which the respondent would have access.

(2) The court may subsequently issue additional search warrants of this nature based on probable cause that the respondent has retained, acquired, or gained access to a firearm while an order under this section remains in effect.

(3) If the owner of a firearm seized pursuant to this subsection is a person other than the respondent, the owner may secure the prompt return of the firearm by providing an affidavit to the law enforcement agency affirming his or her ownership of the firearm and providing assurance that he or she will safeguard the firearm against access by the respondent. The law enforcement agency shall return the firearm to the owner upon its confirmation, including by a check of the National Instant Criminal Background Check System and the applicable state firearm background check system, that the owner is not legally disqualified from possessing or receiving the firearm.

(4) [Any provisions under state law permitting the transfer of seized firearms to a person not prohibited from possessing them.]

(d) TIME FOR HEARINGS AND SERVICE. –

(1) A hearing under this section shall be held within [appropriate time period specified by state law] days of the filing of the application, or within [appropriate time

period specified by state law] days of the issuance of an emergency ex parte order under Section 2, if such an order is issued. The responsible law enforcement agency shall serve notice of the hearing on the respondent [promptly/immediately/within 72 hours/within an appropriate time period specified by state law] after the filing of the application or issuance of an emergency ex parte order, but notice may be provided by publication or mailing if the respondent cannot be personally served within the specified period. The respondent shall be entitled to one continuance of up to [appropriate time period specified by state law] days on request, and the court may thereafter grant an additional continuance or continuances for good cause. Any emergency ex parte order under Section 2 shall remain in effect until the hearing is held. The court may temporarily extend the emergency order at the hearing, pending a decision on a final order.

(2) The responsible law enforcement agency shall serve an order issued under this section on the respondent, and carry out any search authorized under subsection (c)(1), [promptly/immediately/within an appropriate time period specified by state law] following issuance of the order. If a search is authorized under subsection (c)(1), the agency may serve the order on the respondent concurrently with or after the execution of the search.

(e) TERMINATION AND RENEWAL OF ORDERS. –

(1) A respondent may file a motion to terminate an order under Section 3 one time during the effective period of that order. The respondent shall have the burden of proving, by the same standard of proof required for issuance of such an order, that he or she does not pose a [significant danger/extreme risk/other appropriate standard specified by state law] of personal injury or death to himself or herself or another.

(2) The petitioner may seek renewals of an order under this section for an additional [six months/one year/other appropriate time period specified by state law] at any time preceding its expiration. Renewals after the initial order shall be granted subject to the same standards and requirements as an initial order. The preceding order shall remain in effect until the renewal hearing is held and the court grants or denies a renewed order.

(3) If the respondent fails to appear at, or cannot be personally served in relation to, any hearing or renewal hearing under this section, the default does not affect the court's authority to issue an order or entitle the respondent to challenge the order prior to its expiration. The order will lapse after [the period established in Section 3(a)] if no eligible petitioner seeks its renewal.

SEC. 4. ENTRY INTO BACKGROUND CHECK SYSTEMS

The court shall forward any order issued under Section 2 or 3 to an appropriate law enforcement agency on the day it is issued. Upon receipt of an order under Section 3, the law enforcement agency shall make the order available to the National Instant Criminal Background

Check System and any state system used to identify persons who are prohibited from possessing firearms.

SEC. 5. PENALTIES FOR VIOLATIONS

The following persons shall be subject to [appropriate criminal penalties specified by state law]:

(1) FILER OF FALSE OR HARASSING APPLICATION. – Any person filing an application under Section 2 or 3 containing information that he or she knows to be materially false, or for the purpose of harassing the respondent.

(2) RESPONDENT NOT COMPLYING WITH ORDER. – Any person who knowingly violates an order under Section 2 or 3, including by possessing or acquiring a firearm in violation of the order or failing to surrender a firearm as required by the order.

(3) PROVIDER OF PROHIBITED ACCESS TO RESPONDENT. – Any person who knowingly provides the subject of an order under Section 2 or 3 access to a firearm, in violation of an assurance the person has provided in an affidavit under Section 2(c)(3) or 3(c)(3) that he or she will safeguard the firearm against access by the respondent.

From: Gaeta, Joseph (OLA)
Subject: CREW filing
To: Aronson, Alex (Judiciary-Dem); Smirniotopoulos, Amalea (Judiciary-Dem)
Sent: May 25, 2021 6:49 AM (UTC-04:00)
Attached: CREW - Stay Motion.pdf, CREW - Exhibit A.pdf

I'm sure this is of interest.

Joe Gaeta
Deputy Assistant Attorney General
Office of Legislative Affairs (OLA)
U.S. Department of Justice

EXHIBIT A

U.S. Department of Justice

Washington D.C. 20530

March 24, 2019

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

FROM: Steven A. Engel
Assistant Attorney General, Office of Legal Counsel

Edward C. O'Callaghan
Principal Associate Deputy Attorney General

SUBJECT: Review of the Special Counsel's Report

At your request, we have evaluated Volume II of the Special Counsel's Report on the Investigation into Russian Interference in the 2016 Presidential Election to determine whether the facts recited therein would support initiating or declining the prosecution of the President for obstruction of justice under the Principles of Federal Prosecution, without regard to any constitutional barrier to such a prosecution under Article II of the U.S. Constitution. Over the course of the Special Counsel's investigation, we have previously discussed these issues within the Department among ourselves, with the Deputy Attorney General, and with you since your appointment, as well as with the Special Counsel and his staff. Our conclusions are the product of those discussions, as well as our review of the Report.

For the reasons stated below, we conclude that the evidence described in Volume II of the Report is not, in our judgment, sufficient to support a conclusion beyond a reasonable doubt that the President violated the obstruction-of-justice statutes.[1] In addition, we believe that certain of the conduct examined by the Special Counsel could not, as a matter of law, support an obstruction charge under the circumstances. Accordingly, were there no constitutional barrier, we would recommend, under the Principles of Federal Prosecution, that you decline to commence such a prosecution.

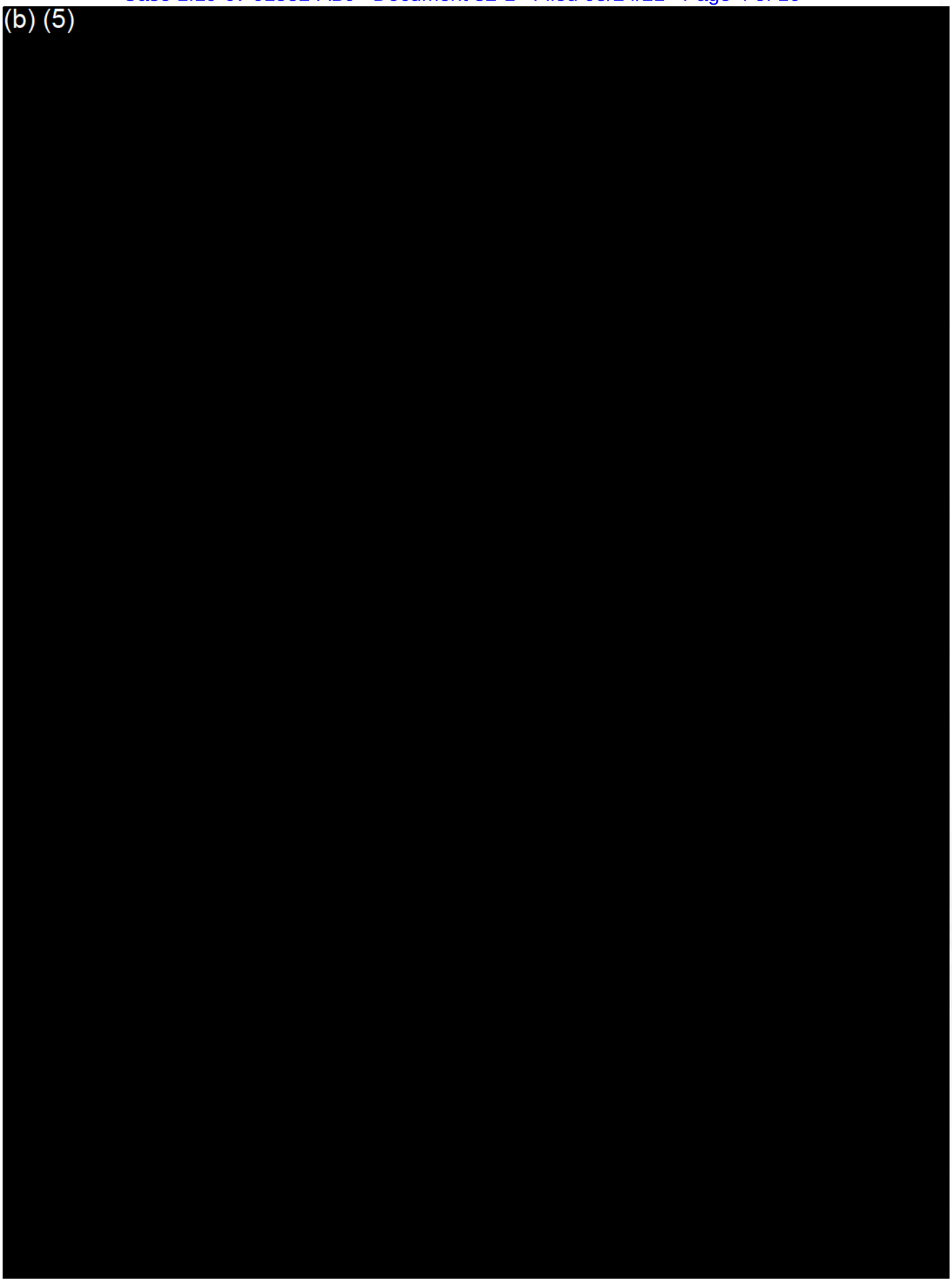
I. The Department Should Reach a Conclusion on Whether Prosecution Is Warranted Based on the Findings in Volume II of the Special Counsel's Report

The Special Counsel has investigated certain facts relating to the President's response to the FBI's Russia investigation and to the subsequent Special Counsel investigation. In so doing,

1 Given the length and detail of the Special Counsel's Report, we do not recount the relevant facts here. Our discussion and analysis assumes familiarity with the Report as well as much of the background surrounding the Special Counsel's investigation.

the Special Counsel reached no conclusion as to whether the President had violated any criminal law or whether, if so, such conduct warranted prosecution. The Special Counsel considered evaluating such conduct under the Justice Manual standards governing prosecutions and declinations, but determined not to apply that approach for several reasons. The Special Counsel recognized that the Office of Legal Counsel ("OLC") had determined that "a sitting President is constitutionally immune from indictment and criminal prosecution." *A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 Op O.L.C. 222, 260 (2000). Although the OLC opinion permitted the investigation of a sitting President, the Special Counsel concluded that it would be unfair to reach any charging decision, because the President would not then be afforded any opportunity to clear his name before an impartial adjudicator. Accordingly, the Report identifies evidence on both sides of the obstruction question and leaves unresolved what it viewed as "difficult issues" concerning whether the President's actions and intent could be viewed as obstruction of justice.

Although the Special Counsel has declined to reach a conclusion, we think that the Department should reach a judgment on this matter. Under traditional principles of prosecution, the Department either brings charges or it does not. Because the Department brings charges against an individual only where the admissible evidence would support the proof of such charges beyond a reasonable doubt, any uncertainty concerning the facts or the law underlying a proposed prosecution ultimately must be resolved in favor of that individual. That principle does not change simply because the subject of the investigation is the President. Although the Special Counsel recognized the unfairness of levying an accusation against the President without bringing criminal charges, the Report's failure to take a position on the matters described therein might be read to imply such an accusation if the confidential report were released to the public. Therefore, we recommend that you examine the Report to determine whether prosecution would be appropriate given the evidence recounted in the Special Counsel's Report, the underlying law, and traditional principles of federal prosecution.



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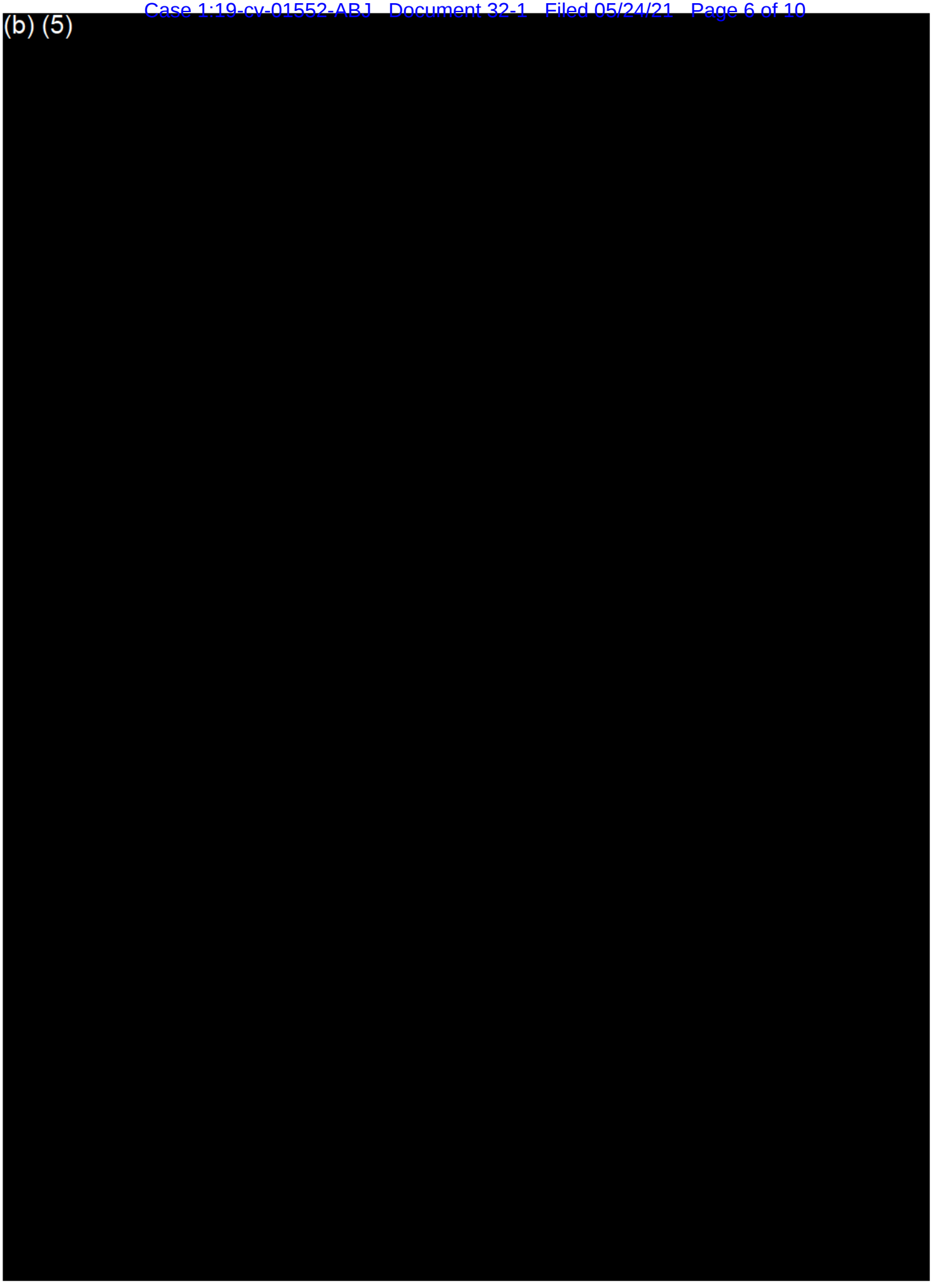

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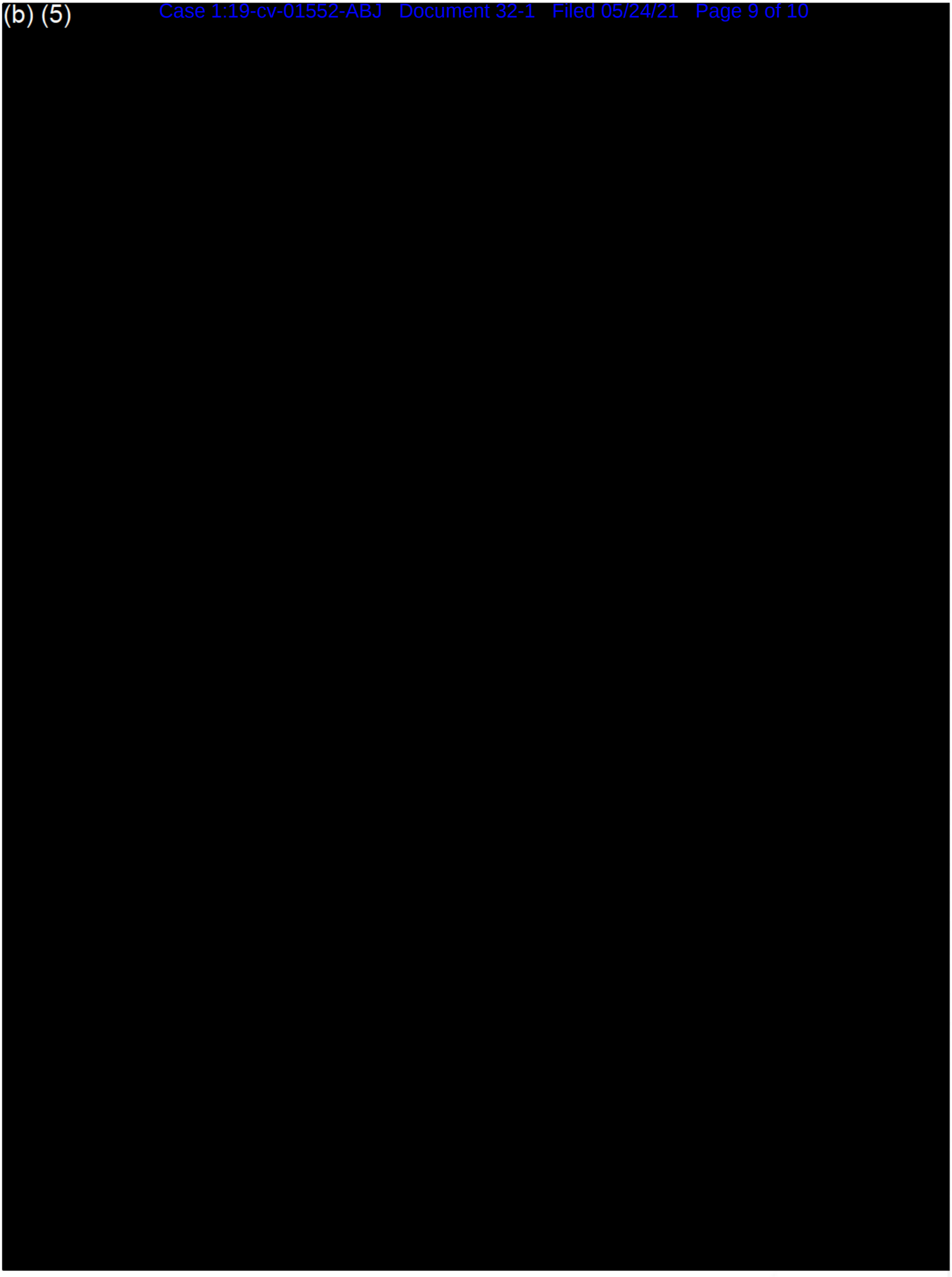

RECOMMENDATION: We recommend that you conclude that, under the Principles of Federal Prosecution, the evidence developed during the Special Counsel's investigation is not sufficient to establish that the President committed an obstruction-of-justice offense.

APPROVE: WPBarr DATE: 3/24/2019

DISAPPROVE: _____ DATE: _____

OTHER: _____

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, Plaintiff, v. U.S. DEPARTMENT OF JUSTICE, Defendant.	Case No. 1:19-cv-1552 (ABJ)

DEFENDANT'S MOTION FOR A PARTIAL STAY PENDING APPEAL AND MEMORANDUM IN SUPPORT

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INTRODUCTION

We respectfully seek a stay pending appeal of this Court's order, but only insofar as it requires the release of Section II of Document no. 15—also referred to as the March 2019 Memorandum. The government has determined not to appeal this Court's decision insofar as it ordered the release of the entirety of the first page of Document no. 15 and Section I of the document. Accordingly, this Court's memorandum opinion, which discusses those previously redacted portions of the document, may be unsealed in its entirety.

As discussed below, the standards for a stay pending appeal are satisfied here. The irreparable harm that would be caused by the release of the redacted portions of the document is manifest, as it would render moot the government's appeal and require the release of the deliberative material in Section II of the memorandum. On the merits, the Court's decision was substantially premised on the view that the government's briefs and declarations incorrectly described the nature of the decisional process in which the Attorney General was engaged. In retrospect, the government acknowledges that its briefs could have been clearer, and it deeply regrets the confusion that caused. But the government's counsel and declarants did not intend to mislead the Court, and the government respectfully submits that imprecision in its characterization of the decisional process did not warrant the conclusion that Document no. 15 was unprotected by the deliberative process privilege. Nor does it warrant the conclusion here that the distinct deliberative material in Section II of that document is unprotected.

Simultaneously with this motion, the government is filing a notice of appeal, as authorized by the Office of the Solicitor General. In the event that this Court is inclined to deny this motion, the government respectfully requests that this Court make clear that disclosure of Section II is not required before the court of appeals acts on the stay motion that the government intends to prepare

and file in that court in the event that this Court denies relief.

STATEMENT

This Freedom of Information Act (FOIA) case arises out of a FOIA request that plaintiff, Citizens for Responsibility and Ethics in Washington (CREW), submitted to the Office of Legal Counsel (OLC), seeking "all documents pertaining to the views OLC provided Attorney General William Barr on whether the evidence developed by Special Counsel Robert Mueller is sufficient to establish that the President committed an obstruction-of-justice offense." Colborn Decl. (ECF No. 15-3), Ex. B at 1. With its response to plaintiff's request, the Department of Justice (DOJ) released in redacted form the March 2019 Memorandum, a memorandum to the Attorney General from OLC Assistant Attorney General (AAG) Steven Engel and Principal Associate Deputy Attorney General (PADAG) Edward O'Callaghan. Colborn Decl. ¶ 17; Brinkmann Decl. (ECF No. 15-4) ¶¶ 7, 11. DOJ's declarants attested that Document no. 15 memorialized Engel's and O'Callaghan's "candid analysis and legal advice" provided to the Attorney General "prior to his final decision," Brinkmann Decl. ¶ 11, on the central issue addressed in the memorandum: whether the evidence described in the Special Counsel's Report "would support initiating or declining the prosecution of the President for obstruction of justice under the Principles of Federal Prosecution," Colborn Decl. ¶ 17 (quoting Document no. 15 at 1); *see also* 2d Colborn Decl. (ECF No. 19-1) ¶ 9; Brinkmann Decl. ¶¶ 7, 11.

On May 3, 2021, the Court determined that Document no. 15 "is not predecisional, and it may not be withheld under Exemption 5 on the basis of the deliberative process privilege." Mem. Op. (ECF No. 27) (Op.) 28. Accordingly, that same day, the Court ordered DOJ to "produce Document 15 to plaintiff," Order (ECF No. 26) 1, and further directed that DOJ "must file any motion to stay this order by May 17, 2021, and it must inform the Court at that time of its position

on whether the Memorandum Opinion may be unsealed in its entirety."[1]

As noted above, the government has determined not to appeal the Court's decision insofar as it orders the release of the entirety of the first page of Document no. 15 and Section I of the document. A copy of Document no. 15 reflecting that release is attached as Exhibit A. With the release of page 1 and Section I, the sealed portions of the Court's Memorandum Opinion may now be unsealed.

STANDARD OF REVIEW

A party seeking a stay pending appeal must show that four factors weigh in favor of a stay: "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985) (per curiam). *See also Nken v. Holder*, 556 U.S. 418, 434-435 (2009); *Winter v. Natural Res. Def. Council, Inc*., 555 U.S. 7, 22 (2008).

"A party does not necessarily have to make a strong showing with respect to the first factor (likelihood of success on the merits) if a strong showing is made as to the second factor (likelihood of irreparable harm)." *Dunlap v. Presidential Advisory Comm'n on Election Integrity*, 319 F. Supp. 3d 70, 83 (D.D.C. 2018) (citing *Cuomo*, 772 F.2d at 974). Furthermore, "courts often recast the likelihood of success factor as requiring only that the movant demonstrate a serious legal question on appeal where the balance of harms strongly favors a stay." *Al-Anazi v. Bush*, 370 F. Supp. 2d 188, 193 n.5 (D.D.C. 2005) (citations omitted); *see also Cigar Ass'n of Am. v. U.S. Food & Drug Admin.*, 317 F. Supp. 3d 555, 560–61 (D.D.C. 2018) ("[T]he 'sliding scale' framework

[1] This Court subsequently extended the deadline to May 24, 2021. May 14, 2021 Minute Order.

allows a movant to remedy a lesser showing of likelihood of success on the merits with a strong showing as to the other three factors, provided that the issue on appeal presents a 'serious legal question' on the merits." (quoting *Wash. Area. Metropolitan Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (1977)).

ARGUMENT

I. THE GOVERNMENT WILL SUFFER IRREPARABLE INJURY IF A STAY IS NOT GRANTED.

In the absence of a stay, DOJ will immediately be required to disclose Section II of Document no. 15 prior to having an opportunity to appeal the Court's May 3 Order. The irreparable harm that would result is manifest. Where, as here, an order directs an agency to produce material that the agency argues is legally exempt from disclosure, compliance with the order "mak[es] the issue . . . effectively moot." *In re Sealed Case (Medical Records)*, 381 F.3d 1205, 1210 (D.C. Cir. 2004) (quoting *United States v. Philip Morris Inc.*, 314 F.3d 612, 619 (D.C. Cir. 2003)). That is because compliance "let[s] the cat out of the bag, without any effective way of recapturing it if the district court's directive [is] ultimately found to be erroneous." *Judicial Watch, Inc. v. DOJ*, 432 F.3d 366, 369 (D.C. Cir. 2005) (quoting *Irons v. FBI*, 811 F.2d 681, 683 (1st Cir. 1987)). The government's appeal from the Order thus "will become moot" if DOJ "surrender[s]" Document no. 15 in its entirety, because the ordered release would cause "confidentiality [to] be lost for all time[,]" thereby "utterly destroy[ing] the status quo[.]" *Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979). The resulting harm to DOJ would thus be "irreparabl[e]." *Id*.

For that reason, "[p]articularly in the FOIA context, courts have routinely issued stays where the release of documents would moot a defendant's right to appeal." *People for the Am. Way Found. v. U.S. Dep't of Educ.*, 518 F. Supp. 2d 174, 177 (D.D.C. 2007) (citation omitted);

see also John Doe Agency v. John Doe Corp., 488 U.S. 1306, 1308-09 (1989) (Marshall, J., in chambers) (staying FOIA disclosure order of lower court pending disposition of certiorari petition where, *inter alia*, "fact that disclosure would moot that part of the [challenged] decision requiring disclosure of the *Vaughn* index would also create an irreparable injury"); *Ctr. for Int'l Envt'l Law v. Office of U.S. Trade Rep.*, 240 F. Supp. 2d 21, 23 (D.D.C. 2003); *Ctr. for Nat'l Sec. Studies v. DOJ*, 217 F. Supp. 2d 58, 58 (D.D.C. 2002). If the government is required to disclose Section II of Document no. 15, its right to a meaningful appeal will be lost, and the status quo cannot be restored. The harm from compliance with the Order to produce Section II thus would be both significant and irreparable.

II. AN APPEAL WOULD PRESENT A SERIOUS LEGAL QUESTION ON WHICH DOJ IS LIKELY TO SUCCEED.

The government is also likely to succeed on appeal because Section II of Document no. 15 memorializes deliberative and predecisional advice to the Attorney General regarding the substantive question of whether the evidence contained in the Special Counsel's Report would support initiating or declining a prosecution under the Principles of Federal Prosecution. The Court based its contrary conclusion on the view that the government's briefs and declarations misdescribed the nature of the decisional process in which the Attorney General was engaged, and that a memorandum prepared contemporaneously with a "decision" cannot be "predecisional." But the latter conclusion is contrary to governing law, and the government respectfully submits that the former reflects a misunderstanding of the arguments the government was intending to make. Those arguments accurately described how the redacted portions of the March 2019 Memorandum were predecisional and deliberative. And read as a whole, the evidence in the record—which includes the memorandum—demonstrates that Section II of Document no. 15 is covered by the deliberative process privilege because it is both deliberative and predecisional.

A. Section II provided advice in the context of a decisional process.

The Court first held that Document no. 15 could not be accurately described as pre-"decisional" because the Court's "review of the document reveals that the Attorney General was not . . . engaged in making a decision about whether the President should be charged with obstruction of justice" at the relevant time. Op. 19.[2] In other words, the Court understood the government's briefs and declarations to be characterizing the decision that the Attorney General was making as a decision whether to actually commence an indictment or prosecution of the President, and further understood that characterization as inconsistent with the memorandum itself. To be clear, the government agrees that the Attorney General was not making a decision about whether to indict or prosecute, and we regret language that was imprecise in the government's brief and the confusion it has caused. Rather, the declarations and briefs on the whole made clear that the decision in question was whether the facts articulated by Volume II of the Special Counsel's Report were sufficient to establish that the President had committed obstruction of justice, *i.e.,* whether the facts constituted prosecutable conduct under the Principles of Federal Prosecution. *Compare* Colborn Decl. ¶ 17 *with* Op. 24.

While a decision whether to actually commence a prosecution, and a decision as to whether the evidence would be sufficient to establish a basis to prosecute, may be closely related, and while both involve assessments that are "prosecutorial" in nature, they are not one and the same. The Attorney General could seek advice on and decide whether the conduct in question met the legal standard for an offense and DOJ standards for bringing a prosecution under the Principles of Federal Prosecution, notwithstanding that an actual criminal prosecution was foreclosed by the

[2] The Court already found that DOJ satisfactorily demonstrated that Document no. 15 is deliberative. *See* Op. 17.

prior OLC opinion. And because the existence of the OLC opinion foreclosing prosecution was widely known and acknowledged in both the Mueller Report and Attorney General Barr's contemporaneous letter to Congress, the government had no reason to suggest (and certainly did not mean to suggest) that a decision whether to bring an actual criminal prosecution was in play. Accordingly, given the decision the Attorney General was making—whether the facts constituted an offense that would warrant prosecution—the decisional process was privileged, just as it would have been if the Attorney General had been deciding whether to actually commence a prosecution.

Plaintiff contended in its briefing that the Attorney General did not have a genuine decision to make. Pl.'s Mem. in Supp. of Cross-Mot. For Summ. J. (ECF No. 17-1) (Pl.'s Mem.) at 15-16. That is incorrect. The Attorney General was electing to make a decision that was explicitly left open by the Special Counsel: whether, in "a prosecutor's judgment[,] . . . crimes were committed" based on "the conduct [the Special Counsel] investigated under the Justice Manual standards governing prosecution and declination decisions." Special Counsel Robert S. Mueller III, Report on the Investigation into Russian Interference in the 2016 Election, Vol. II, 2 (2019) (Mueller Report, Vol. II), available at https://www.justice.gov/storage/report_volume2.pdf; *see also id.* at 1 (citing *A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 Op. O.L.C. 222, 222, 260 (2000)). The Attorney General's determination on that point—and on what, if anything, to say to the public about that question—undoubtedly qualifies as a decision, even if it could not have resulted in an actual prosecution of the sitting President. *See* Colborn Decl. ¶ 23. There was no legal bar to determining that the evidence did or did not establish commission of a crime, a determination the Attorney General made and announced.

In refuting the point that the Attorney General had nothing to decide, we did not mean to suggest that the Attorney General was deciding whether to commence an indictment or prosecution

of the sitting President. As plaintiff correctly pointed out, that option was foreclosed for reasons having nothing to do with the allocation of responsibility between the Special Counsel and the Attorney General, based on DOJ's longstanding view that the sitting President was constitutionally immune from prosecution. We regret that we did not make this distinction clearer in our briefing. And we trust that the government's release of page 1 and Section I of Document no. 15, which include three references to the constitutional barrier, will dispel any remaining confusion on this point. Regardless of the constitutional barrier, however, the advice in Section II of the memorandum regarding whether the evidence was sufficient to warrant a prosecution for obstruction of justice contributed to a real decisional process that the deliberative process privilege protects.

B. Document no. 15 was *pre*-decisional because it was memorializing advice provided during the course of a decisionmaking process.

The Court additionally held that Document no. 15 was not "pre"-decisional because it was drafted contemporaneously with the preparation of the Attorney General's letter to Congress and was not finalized until after that letter was finalized. Op. 27. The government respectfully submits that that holding, based on the Court's review of redacted emails released by DOJ to plaintiff, misapplies the governing law and disregards the government's October 7, 2020 declaration addressing the timing of the decision.

As the Supreme Court recently explained, "[t]o decide whether a document communicates the agency's settled position," as opposed to predecisional deliberations, "courts must consider whether the agency treats the document as its final view on the matter" or whether, instead, the document "leaves agency decisionmakers 'free to change their minds.'" *Fish & Wildlife Service v. Sierra Club, Inc.*, 141 S. Ct. 777, 786 (2021). One relevant factor in determining whether a document is predecisional is whether the author possesses the legal authority to decide the matter

at issue. *See, e.g.*, *Electronic Frontier Found. v. DOJ*, 739 F.3d 1, 9 (D.C. Cir. 2014) ("OLC is not authorized to make decisions about the FBI's investigative policy, so the OLC Opinion cannot be an authoritative statement of the agency's policy."). Another is whether the document is directed from a subordinate to a superior official or the opposite. *See, e.g.*, *Brinton v. Department of State*, 636 F.2d 600, 605 (D.C. Cir. 1980) ("'[F]inal opinions[]' . . . typically flow from a superior with policy-making authority to a subordinate who carries out the policy.").

Here, the relevant factors point uniformly to the conclusion that this memorandum contained advice to the Attorney General on a decision; it did not state or memorialize a final decision already reached. Nothing on the face of Document no. 15 suggests that it was memorializing a decision already rendered. To the contrary, the memorandum presented the Attorney General with options to approve or disapprove the recommendation that it offered, and in two places—in the now unredacted portion of the first paragraph on page 1, and on page 5, which DOJ continues to withhold in full—the document makes clear that it reflects advice previously offered to the Attorney General. And the predecisional nature of the advice memorialized in Document no. 15 is confirmed by the two declarations of Paul P. Colborn. The first states that the memorandum "was provided prior to the Attorney General's decision in the matter" and contained "advice and analysis supporting a recommendation regarding the decision he was considering." Colborn Decl. ¶ 21. The second declaration clarifies that Document no. 15 itself was not presented to or signed by the Attorney General until after the March 24 letter was sent to Members of Congress. But the second declaration also explains "that prior to making his decision and sending the letter, the Attorney General had received the substance of the advice contained in [the memorandum] and reviewed multiple drafts of that memorandum," and that "[t]he substance of the advice contained in [the memorandum] did not change in any material way

between the time when the Attorney General last received a draft of the memorandum and the time the Attorney General initialed the approval box on the signed final form of the memorandum." 2d Colborn Decl. ¶ 9.

The Court's holding that Document no. 15 was not predecisional relies exclusively on the timing of that memorandum's preparation relative to the preparation of the letter to Congress. Op. 26-28. But it is not unusual, particularly in a matter being handled in expedited fashion, for a recommendation memorandum to be prepared contemporaneously with the document that carries out the decision. And such memoranda can retain their predecisional character even when they are finalized after the decision in question. The purpose of the deliberative process privilege is to protect "the ingredients of the decisionmaking process," as distinct from "communications made after the decision and designed to explain it." *Sears*, 421 U.S. at 151-152. And a document memorializing "the ingredients of the decisionmaking process" does not become post-decisional simply because it is finalized once the process has concluded. *See, e.g.*, *Mead Data Central, Inc. v. Dep't of the Air Force*, 566 F.2d 242, 257 (D.C. Cir. 1977) ("It would exalt form over substance to exempt documents in which staff recommend certain action or offer their opinions on given issues but require disclosure of documents which only 'report' what those recommendations and opinions are."); *New York Times Co. v. Off. of Mgmt. & Budget*, No. CV 19-3562 (ABJ), 2021 WL 1329025, at *6 (D.D.C. Mar. 29, 2021) ("Chronology is not the beginning and end of the inquiry . . . ; the Court of Appeals [has] recognized that 'documents dated after [the decision at issue] may still be predecisional and deliberative with respect to other, nonfinal agency policies.'" (quoting *Judicial Watch, Inc. v. FDA*, 449 F.3d 141 (D.C. Cir. 2006), and citing *Mead Data Ctr.,* 566 F.2d at 256)); *CREW v. DOJ*, 658 F. Supp. 2d 217, 234 (D.D.C. 2009) ("[T]he information withheld by DOJ recounts the 'ingredients of the decisionmaking process,' and for that reason the information

withheld qualifies as predecisional—despite the fact that the interview in which the information was disclosed took place after the decisions were made."); *EPIC v. DHS*, 2006 WL 6870435, at *7-8 (D.D.C. Dec. 22, 2006) (similar).

Here, as discussed above, the Colborn declarations establish that Document no. 15 reflected and summarized advice given to the Attorney General before he decided what to write to Congress. The Second Colborn Declaration explains the chronology:

> I stated in my prior declaration that "[f]ollowing receipt of the memorandum, the Attorney General announced his decision publicly in a letter to the House and Senate Judiciary Committees." [citation omitted] I have recently been informed that prior to making his decision and sending the letter, the Attorney General had received the substance of the advice contained in Document No. 15 [that is, the Memorandum] and reviewed multiple drafts of that memorandum, but the memorandum in fact was put into the signed final form of Document No. 15, and its approval box initialed by the Attorney General, about two hours after the Attorney General sent the letter to the House and Senate Judiciary Committees. The substance of the advice contained in Document No. 15 did not change in any material way between the time when the Attorney General last received a draft of the memorandum and the time the Attorney General initialed the approval box on the signed final form of the memorandum.

2d Colborn Declaration ¶ 9.

Nor would the predecisional character of a recommendation memorandum change even if drafted to support an anticipated outcome. Often, for example, a decisionmaker may give a preliminary indication of a planned course of action and ask for a memorandum supporting that course of action. But the memorandum retains its predecisional character as long as the decision could be informed by the memorandum. In such a circumstance, the memorandum imposes additional discipline on the process, requiring a full written analysis of the reasons for and against the action, and the decisionmaker retains the discretion to change the decision based on considerations discovered during the process of writing or reviewing the memorandum. The process is not dissimilar to that of a judge who reaches a preliminary conclusion about how to rule

in a given case and tasks a law clerk to write an opinion supporting that conclusion. The law clerk's draft remains predecisional because the judge, after reading the analysis, can still be persuaded or dissuaded by the analysis and reach a different conclusion.

If anything, the fact that this memorandum was being drafted in parallel with the letter to Congress—as opposed to after the fact—bolsters the view that it reflects "the ingredients of the decisionmaking process," as opposed to documenting a consummated decision. Regardless of exactly when the memorandum was finalized, it was generated while the deliberative process was ongoing, its substance was provided to the Attorney General prior to his making a decision, and the memorandum was presented to the Attorney General (in near-final though not final form) at the time that he was still making a final decision. For all of these reasons, the Court was incorrect to conclude that Document no. 15 was not "pre"-decisional.

C. The government's declarations and briefs were accurate and submitted in good faith.

As described above, Document no. 15 is privileged on its face. The Court nevertheless concluded that inaccuracies in the descriptions of the document in the government's declarations and briefs vitiated application of the privilege. But the government's declarations and briefs accurately characterized the deliberative and predecisional nature of the document.

The declarations and briefs first accurately described the decisional process underlying the final conclusion. As the first part of the first sentence of the memorandum, which was unredacted when the memorandum was originally released, and the now unredacted remaining material on page 1 of Document no. 15 show, the decision on which the memorandum was advising the Attorney General was whether the evidence in Volume II of the Special Counsel's Report was sufficient to establish that the President had committed obstruction of justice. *See* Ex. A at 1. None of the three submitted declarations stated that the Attorney General was deciding whether to

actually commence an indictment or prosecution of the President. The Declaration of Vanessa R. Brinkmann explained that Document no. 15 "was provided to aid in the Attorney General's decision-making process as it relate[d] to the findings of the [Special Counsel's Office (SCO)] investigation, and specifically as it relate[d] to whether the evidence developed by SCO's investigation [was] sufficient to establish that the President *committed* an obstruction-of-justice offense," Brinkmann Decl. ¶ 11 (emphasis added)—not whether he should be *indicted for* such an offense. The Brinkmann declaration went on to explain that that "legal question" was one that the Mueller Report "did not resolve." *Id.* at ¶ 11. The Mueller Report was not silent on the question of whether the President should actually be *prosecuted*; the Special Counsel took that question to be settled by longstanding DOJ precedent that "a sitting President may not be prosecuted." Mueller Report, Vol. II, at 1 (citing 24 Op. O.L.C. at 222, 257, 260). Rather, the question the report pointedly "did not resolve" was the one Attorney General Barr answered: whether the facts found by the Special Counsel were sufficient to establish that the President *committed* obstruction of justice.

The first Colborn Declaration likewise explained that Document no. 15 "was submitted to the Attorney General to assist him in determining whether the facts set forth in Volume II of Special Counsel Mueller's report 'would support initiating or declining the prosecution of the President for obstruction of justice under the Principles of Federal Prosecution.'" Colborn Decl. ¶ 17. That description quotes from the unredacted portion of the opening sentence of the memorandum and is accurate; it neither states nor necessarily implies that the authors were advising the Attorney General on whether the President should actually be *prosecuted*. *See also* Def.'s Mem. in Supp. of Mot. for Summ. J. (Def.'s Mem.) (ECF No. 15-2) 14 (quoting Colborn Decl.).

The declarations and briefing did not state that Document no. 15 took as a given the longstanding DOJ view that the Constitution bars the prosecution of a sitting President. *See, e.g.*, Op. 19. But that view was widely known, and documented in the Special Counsel's Report itself, long before the declarations and briefs were filed.[3] *See* Mueller Report, Vol. II, at 1 (citing 24 Op. O.L.C. at 222, 260). And the Attorney General's letter to Congress—which was prepared and issued on the same day that Document no. 15 was finalized, Op. 28—explicitly stated that the determination whether the President had committed obstruction "was made without regard to, and [was] not based on, the constitutional considerations that surround the indictment and criminal prosecution of a sitting president." *See* Letter from William P. Barr, Attorney General, to Hon. Lindsey Graham, Chairman, Committee on the Judiciary, U.S. Senate, *et al.* (Mar. 24, 2019) at 3 (citing 24 Op. O.L.C. 222), available at https://www.justice.gov/archives/ag/page/file/1147981/download.

The government now recognizes, however, that several statements in its briefing, read without the foregoing context—and in light of the redactions from page 1 of the memorandum of the references to the constitutional bar—were susceptible to an interpretation that the Attorney General was considering whether a prosecution or indictment of the sitting President should actually be commenced. *See* Def.'s Mem. 16 ("Finally, the March 2019 Memorandum contains analysis about whether evidence supports initiating or declining a prosecution. Documents containing deliberations about whether to pursue prosecution are generally protected by the deliberative process privilege." (citing cases)); Def.'s Opp'n to Pl.'s Cross-Mot. for Summ. J. & Reply Mem. in Supp. of Def.'s Mot. for Summ. J. & Renewed Mot. to Dismiss (Def.'s Reply)

[3] Indeed, CREW's request specifically sought documents "pertaining to the views OLC provided Attorney General William Barr on whether the evidence developed by Special Counsel Robert Mueller is sufficient to establish that the President committed an obstruction-of-justice offense," Colborn Decl., Ex. B (ECF No. 15-3 at PDF page 19)—a description precisely mirroring the government's description of Document no. 15.

(ECF No. 19) 14 ("Plaintiff's supposition that Document no. 15 'was not part of a deliberation about whether or not to prosecute the President,' Pl.'s Br. 16, cannot overcome the deference to the agency's affidavits."); *id.* at 17 ("Plaintiff has only its misinterpretation of the DOJ special counsel regulations and its own irrelevant speculation, unsupported by admissible evidence, that 'the Attorney General was not seeking legal advice from OLC in order to make a prosecution decision.'").

These passages could have been clearer, and the government regrets that they were not. But they were not intended to convey that the decision to which Document no. 15 related was whether to actually commence a prosecution of the President. The first statement, like each of the government's declarations—*see, e.g.*, Colborn Decl. ¶ 17; Brinkmann Decl. ¶ 11; 2d Colborn Decl. ¶ 8—describes the relevant decision as "*whether evidence supports* initiating or declining a prosecution." While it is followed by a statement of the law concerning the applicability of the deliberative process privilege to "[d]ocuments containing deliberations about whether to pursue prosecution," the statement did not say that this memorandum contained such deliberations; it was intended to draw on case law concerning documents memorializing deliberations on whether to actually commence a prosecution. Although the March 2019 memorandum was not advising on whether to commence a prosecution, it involved an assessment that one could naturally call "prosecutorial" in nature—namely, whether the conduct outlined in the Mueller Report would satisfy the elements of the crime of obstruction and satisfy criteria in DOJ's Principles of Federal Prosecution. It was not unreasonable, therefore, to cite case law regarding the protection afforded to traditional prosecution memos.

The second and third sentences could have been worded differently to avoid confusion. They were meant to respond to plaintiff's central argument that the Special Counsel regulations

somehow removed from the Attorney General the ability to make *any* relevant decision and to make the point that the government's declarations adequately demonstrated that there was, in fact, a decision on which the Attorney General was receiving advice. The term "prosecution decision" was a quote from plaintiff's brief, and again, it is natural to describe advice about whether a set of facts does or does not establish the elements of a criminal offense as "prosecutorial" in nature. Notably, the Special Counsel's Report characterized a decision "draw[ing] ultimate conclusions about the President's conduct" as "a traditional prosecutorial judgment." Mueller Report, Vol. II, at 182.

We further recognize that the potential for confusion was exacerbated by the fact that it was not publicly known at the time of the government's filing that the March 2019 Memorandum itself had discussed the constitutional bar. The government had released those portions of the memorandum that corresponded to the conclusion to which the Attorney General affixed his signature, which did not mention the constitutional bar, and redacted information not encompassed by the Attorney General's adoption of the recommendation by the OLC AAG and PADAG in the conclusion of the memorandum. Brinkmann Decl. ¶ 12. The redactions were made in good faith, and certainly not in an effort to conceal the publicly known proposition that the Department of Justice would not consider indicting a sitting President. And the presence or absence of the memorandum's references to the constitutional bar does not affect the viability of the government's claim of privilege with regard to Section II of the memorandum, which was accurately described in the government's declarations as discussed above. With the benefit of hindsight, the government regrets that its declarations and briefs did not state expressly what was clear from the Special Counsel's Report and the Attorney General's letter to Congress—namely, that commencing an actual prosecution of the President was not an option the Attorney General

was considering. But the omission of that express statement was not meant to suggest—and the declarations and briefs read in full and in context did not suggest—that the Attorney General *was* considering an actual prosecution of the President.

The government's briefs and declarations also did not specifically state that, in addition to addressing whether the evidence was sufficient to establish that the President committed obstruction of justice, Document no. 15 also briefly addressed the antecedent question of whether the Attorney General should make a determination on that point and communicate it publicly in light of the anticipated public release of the Special Counsel's Report. But the omission of any specific reference to this antecedent question did not serve to mischaracterize the central decisional process that the Attorney General was undertaking concerning the sufficiency of the evidence. It is not unusual for a memorandum about an issue also to address the antecedent question whether the decisionmaker should resolve the issue or the context in which the issue arises. The declarations provided support for the predecisional, deliberative nature of the memorandum as a whole, emphasizing the decision that the Attorney General ultimately made rather than the various predicates for making that determination.

Similarly, the declarations and briefing were accurate with respect to the document's predecisional nature. Indeed, the Second Colborn Declaration explained in detail the sequencing of the deliberations, making clear that the former Attorney General had received the advice in advance of writing the letter to Congress, and signed the written recommendation memorializing the predecisional advice approximately two hours after sending the letter. *See* 2d Colborn Declaration ¶ 9. And Document no. 15 itself makes clear in the introduction on page 1 that the issue of whether the evidence was sufficient to establish obstruction of justice had been under consideration for some time in conversations among those in DOJ, including with the Special

Counsel, his staff, and the Attorney General.

III. THE BALANCE OF HARDSHIPS WEIGHS IN FAVOR OF A STAY.

A stay pending appeal would not substantially harm plaintiff. It only "postpones the moment of disclosure[,] assuming [plaintiff] prevails[,] by whatever period of time may be required [] to hear and decide the appeal[]." *Providence Journal*, 595 F.2d at 890. The government's decision not to appeal this Court's decision insofar as it requires release of page 1 and Section I of Document no. 15, and the resulting release of those portions of the document, will provide plaintiff and the public with an immediate, clear understanding of the nature and context of the memorandum, and no immediate need exists for public access to the specific analysis contained in Section II of the memorandum.

Public policy also weighs in favor of a stay. DOJ fully acknowledges the importance of the public interest served by adherence to FOIA. Nevertheless, Exemption 5 is intended to protect the confidentiality of the government's deliberative process. *See Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001). That interest will be irrevocably compromised if statutorily exempt material is ordered disclosed before the completion of appellate review. *See* Brinkmann Decl. ¶ 13. Issuance of a stay, in contrast, will not harm the public interest. The most the public stands to lose from the Court granting the instant stay request is a delay until the D.C. Circuit resolves the issue of disclosure.

CONCLUSION

For the foregoing reasons, this Court should grant defendant's motion for a stay pending appeal as to Section II of Document no. 15. In addition, with the disclosure of page 1 and Section I of the memorandum, the sealed portions of the Court's opinion may be unsealed. In the event that this Court denies a stay, it should not require that Section II of Document no. 15 be disclosed

until the D.C. Circuit has the opportunity to rule on the stay motion that the government would prepare and file.

Dated: May 24, 2021

Respectfully submitted,

BRIAN D. NETTER
Deputy Assistant Attorney General

/s/ John R. Griffiths
JOHN R. GRIFFITHS (DC Bar # 449234)
Director

/s/ Elizabeth J. Shapiro
ELIZABETH J. SHAPIRO (DC Bar # 418925)
Deputy Director

/s/ Julie Straus Harris
JULIE STRAUS HARRIS (DC Bar # 1021928)
Senior Trial Counsel
United States Department of Justice
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1100 L Street NW, Room 11514
Washington, D.C. 20005
Tel: (202) 353-7633
Fax: (202) 616-8470
E-mail: julie.strausharris@usdoj.gov

Counsel for Defendant

From: Gaeta, Joseph (OLA)
Subject: follow up
To: Carson, Kevin (Manchin)
Sent: May 13, 2021 1:27 PM (UTC-04:00)

Hi Kevin,

Following up on my voicemail after Kristen's meeting with Senator Manchin. Do we need to schedule another meeting before the floor vote, or was the Senator's request to speak again something that could occur after confirmation. Kristen would be happy to do it. I didn't take the end of the call to suggest your boss needs to know more before he can support her, but if that's the case please let me know ASAP.

Joe Gaeta
Deputy Assistant Attorney General
Office of Legislative Affairs (OLA)
U.S. Department of Justice

From: Zdeb, Sara (Judiciary-Dem)
Subject: RE: Following up on your response to Chair Durbin's January 23 letter
To: Gaeta, Joseph (OLA); Antell, Kira M. (OLA)
Cc: Charlet, Joseph (Judiciary-Dem)
Sent: March 26, 2021 12:31 PM (UTC-04:00)

Hi Joe and Kira:

In your note below from last Friday you indicated that you expected to be in a position this week to make an additional tranche of documents available. We take it that timing has slipped. We would like to arrange to see the documents as early next week as possible, assuming you plan to make them available in the reading room as an initial matter – could you confirm when we'll be able to do so?

Also, we'd appreciate it if you could provide a status update on the terms of the first tranche of documents. These do not strike as a close questions, or at least questions that require 2+ weeks to resolve. It's been more than two months since the Chair submitted his request and more than two weeks since we asked some pretty basic questions about DOJ's basis for withholding the first tranche of documents – and while we understand that others within DOJ are weighing in on these issues, the delay is making us increasingly unhappy.

Thanks,
Sara

From: Zdeb, Sara (Judiciary-Dem)
Sent: Tuesday, March 23, 2021 10:33 AM
To: 'Gaeta, Joseph (OLA)'(b) (6) ; Antell, Kira M. (OLA)(b) (6)
Cc: Charlet, Joseph (Judiciary-Dem)(b) (6)
Subject: RE: Following up on your response to Chair Durbin's January 23 letter

Thanks, Joe – appreciate the update. Please keep us posted on your timing for making additional documents available this week.

As you continue working through your analysis of the terms of the first tranche of documents as well the terms of subsequent tranches, I wanted to flag several examples of deliberative documents that DOJ produced to the Committee over the past few years notwithstanding the general practice you reference below. These documents include:

- An annotated copy of a New York Times article with internal comment bubbles that express the then-current findings of the FBI's Crossfire Hurricane investigation (SENATE-FISA2020-001163-67)
- Internal talking points for a briefing that the FBI provided for the Senate Select Committee on Intelligence (SENATE-FISA2020-001313-21)
- Internal talking points for a defensive briefing provided to the Clinton campaign in 2015 and internal emails discussing whether or not, and how, to give that defensive briefing (SENATE-FISA2020-001324-34)
- Internal handwritten notes taken by (b)(6), (b)(7)(C) regarding his conversations with Christopher Steele and (b)(6), (b)(7)(C) per FBI, and internal FBI communications regarding Steele – including, conveniently, one document labeled "DELIBERATIVE PROCESS PRIVILEGED DOCUMENT" (SENATE-FISA2020-001945-2015) (I'm unable to attach all 71 pages of documents from this DOJ production given attachment size limitations, but trust that you have it in your records. I am, however, attaching an excerpt containing the aforementioned deliberative process privilege legend.)
- Several versions of (b)(7)(E) per FBI that reflect the then-current findings of the Crossfire Hurricane investigation (SENATE-FISA2020-001586-1679) (Again, I'm unable to attach all 93 pages of internal documents given attachment size limitations but trust that you have them in your records.)

These are just select examples of the 2000+ pages of internal documents that DOJ produced to the Committee last year, and they don't include additional internal documents that DOJ produced to HSGAC and Senate Finance, including

hundreds of pages of text messages. The Committee was not limited to in camera review; DOJ physically produced these materials to us without any (b)(5) redactions. Irrespective of how these voluminous productions square with DOJ's general practice, we hope you'll agree that DOJ can't have one standard for requests from Chair Durbin and another for requests from then-Chairman Graham.

Thanks,

Sara

From: Gaeta, Joseph (OLA) (b) (6)
Sent: Friday, March 19, 2021 6:00 PM
To: Zdeb, Sara (Judiciary-Dem) (b) (6) ; Antell, Kira M. (OLA) (b) (6)
Cc: Charlet, Joseph (Judiciary-Dem) (b) (6)
Subject: RE: Following up on your response to Chair Durbin's January 23 letter

Hi Sara,

Thanks for following up and apologies for the delay. Your email identifies certain documents in the first production that you believe would be releasable under FOIA and asks that we either produce them or provide a detailed explanation for the basis for withholding them. The Department has not made any FOIA determination at this time although the process is ongoing. Once those determinations have been made, we are happy to follow up.

As for your request regarding other internal deliberative documents and your suggestion that they should be disclosed, the Department has long maintained a general practice of attempting to accommodate Congress's legitimate interests in obtaining information, while preserving executive branch interests in maintaining essential confidentiality. We have made efforts to accommodate the Committee's needs by providing documents you requested for in camera review at this point. Your analysis suggests that the Department may ultimately be in a position to provide certain material and we are evaluating the arguments you raised.

Moreover, while our analysis regarding the terms of the first production continues as we consider how we can meet the Committee's needs through the accommodation process, I can report that our preparation for additional productions continues and we are making good progress. We anticipate being in a position to, at a minimum, make available additional documents next week.

Joe

From: Zdeb, Sara (Judiciary-Dem) (b) (6)
Sent: Wednesday, March 17, 2021 1:31 PM
To: Gaeta, Joseph (OLA) (b) (6) ; Antell, Kira M. (OLA) (b) (6)
Cc: Charlet, Joseph (Judiciary-Dem) (b) (6)
Subject: RE: Following up on your response to Chair Durbin's January 23 letter

Hi again:

Any update on the items below?

Thanks,
Sara

From: Zdeb, Sara (Judiciary-Dem)
Sent: Wednesday, March 10, 2021 8:44 PM
To: Gaeta, Joseph (OLA) (b) (6) ; 'Antell, Kira M. (OLA)' (b) (6)

Cc: Charlet, Joseph (Judiciary-Dem) (b) (6)
Subject: Following up on your response to Chair Durbin's January 23 letter

Hi Kira and Joe:

Many thanks for arranging today's visit to the DOJ reading room. I'm writing to follow up on and memorialize a couple of items that we discussed toward the end of our visit.

First, it remains our position that we're entitled to production of all 201 pages of documents we reviewed today, and would ask that you do one of the following by the end of Friday: (1) produce the documents themselves, or (2) at a minimum, provide us with a detailed explanation of your basis for withholding them. Our hope is to avoid asking you for a privilege log, so if you opt for the "detailed explanation" route we'd ask that you address the following:

- The basis for withholding communications between DOJ personnel and Pennsylvania officials (both state and federal), which are not inter- or intra-agency communications;
- The basis for withholding communications between DOJ personnel and private attorney (b)(6), (b)(7)(C) per FBI, which are not inter- or intra-agency communications and don't implicate any other privilege we're familiar with;
- The basis for withholding internal DOJ communications related to the (b)(6), (b)(7)(C) per FBI-DOJ communications, which were ministerial and not deliberative; and
- The basis for withholding internal DOJ communications about the Clark letter, which show clear government misconduct that the deliberative process privilege doesn't shield (even if Congress recognized the deliberative process privilege, which, as you know, we do not).

Based on our review, we don't see how DOJ would have a basis to withhold these documents in response to a FOIA request – much less in response to a request from the Committee. We were surprised that you weren't able to answer the questions above during our visit today, and ask that you be prepared to do so by Friday (unless you can produce the documents by then, which is certainly our preference).

Second, although we appreciate that other responsive documents implicate additional equities that take longer to resolve, the documents you made available today struck us as representing only a small portion of what the Committee requested. So we would renew the request we made a few weeks ago for a granular update on the other categories of responsive materials you've identified, where they stand in the process, and what the explanation for their delayed production is. For example, our third request seeks "all documents and communications, including emails, text messages, and calendar entries, referring or related to" the Clark letter. You showed us emails today, but we would also like an update on the status of your collection, review, and timeline for production of text messages and calendars. We'd like a similar status update for each of the other requests encompassed by our letter as well. During our last few conversations you've assured us that these outstanding items are…somewhere in the process, and involve various complexities that aren't necessarily evident. I'm sure they do, but these assurances become progressively less satisfying as more time passes.

Could we schedule time to talk this Friday? We could be free at 4:30 or 4:45pm again if that works for you.

Thanks,
Sara

Sara Zdeb
Chief Counsel for Oversight
U.S. Senate Committee on the Judiciary
Chair Richard J. Durbin
(b) (6) (Direct)
(b) (6) (Mobile)
(b) (6)

[redacted]

Trump Campaign Aides Had Repeated Contacts With Russian Intelligence

February 14, 2017

By MICHAEL S. SCHMIDT, MARK MAZZETTI and MATT APUZZO

WASHINGTON — Phone records and intercepted calls show that members of Donald J. Trump's 2016 presidential campaign and other Trump associates had repeated contacts with senior Russian intelligence officials in the year before the election, according to four current and former American officials.

[redacted] (b)(5) per FBI

American law enforcement and intelligence agencies intercepted the communications around the same time that they were discovering evidence that Russia was trying to disrupt the presidential election by hacking into the Democratic National Committee, three of the officials said. The intelligence agencies then sought to learn whether the Trump campaign was colluding with the Russians on the hacking or other efforts to influence the election.

The officials interviewed in recent weeks said that, so far, they had seen no evidence of such cooperation.

But the intercepts alarmed American intelligence and law enforcement agencies, in part because of the amount of contact that was occurring while Mr. Trump was speaking glowingly about the Russian president, Vladimir V. Putin. At one point last summer, Mr. Trump said at a campaign event that he hoped Russian intelligence services had stolen Hillary Clinton's emails and would make them public.

[redacted] (b)(5) per FBI

The officials said the intercepted communications were not limited to Trump campaign officials, and included other associates of Mr. Trump. On the Russian side, the contacts also included members of the Russian government outside of the intelligence services, the officials said. All of the current and former officials spoke on the condition of anonymity because the continuing investigation is classified.

[redacted]

(b)(5) per FBI

The officials said that one of the advisers picked up on the calls was Paul Manafort, who was Mr. Trump's campaign chairman for several months last year and had worked as a political consultant in Russia and Ukraine. The officials declined to identify the other Trump associates on the calls.

The call logs and intercepted communications are part of a larger trove of information that the F.B.I. is sifting through as it investigates the links between Mr. Trump's associates and the Russian government, as well as the D.N.C. hack, according to federal law enforcement officials. As part of its inquiry, the F.B.I. has obtained banking and travel records and conducted interviews, the officials said.

Mr. Manafort, who has not been charged with any crimes, dismissed the accounts of the American officials in a telephone interview on Tuesday. "This is absurd," he said. "I have no idea what this is referring to. I have never knowingly spoken to Russian intelligence officers, and I have never been involved with anything to do with the Russian government or the Putin administration or any other issues under investigation today."

Mr. Manafort added, "It's not like these people wear badges that say, 'I'm a Russian intelligence officer.'"

Several of Mr. Trump's associates, like Mr. Manafort, have done business in Russia, and it is not unusual for American businessmen to come in contact with foreign intelligence officials, sometimes unwittingly, in countries like Russia and Ukraine, where the spy services are deeply embedded in society. Law enforcement officials did not say to what extent the contacts may have been about business.

(b)(5) per FBI

Officials would not disclose many details, including what was discussed on the calls, which Russian intelligence officials were on the calls, and how many of Mr. Trump's advisers were talking to the Russians. It is also unclear whether the conversations had anything to do with Mr. Trump himself.

A published report from American intelligence agencies that was made public in January concluded that the Russian government had intervened in the election in

[redacted]

[redacted]

part to help Mr. Trump, but did not address whether any members of the Trump campaign had participated in the effort.

The intercepted calls are different from the wiretapped conversations last year between Michael T. Flynn, President Trump's former national security adviser, and Sergey I. Kislyak, the Russian ambassador to the United States. During those calls, which led to Mr. Flynn's resignation on Monday night, the two men discussed sanctions that the Obama administration imposed on Russia in December.

(b)(5) per FBI

But the cases are part of the routine electronic surveillance of communications of foreign officials by American intelligence and law enforcement agencies.

The White House did not immediately respond to a request for comment. The F.B.I. declined to comment.

Two days after the election in November, Sergei A. Ryabkov, the deputy Russian foreign minister, said that "there were contacts" during the campaign between Russian officials and Mr. Trump's team.

"Obviously, we know most of the people from his entourage," Mr. Ryabkov said in an interview with the Russian Interfax news agency.

The Trump transition team denied Mr. Ryabkov's statement. "This is not accurate," Hope Hicks, a spokeswoman for Mr. Trump, said at the time.

(b)(5) per FBI

The National Security Agency, which monitors the communications of foreign intelligence services, initially captured the communications between Mr. Trump's associates and Russians as part of routine foreign surveillance. After that, the F.B.I. asked the N.S.A. to collect as much information as possible about the Russian operatives on the phone calls, and to search through troves of previous intercepted communications that had not been analyzed.

The F.B.I. has closely examined at least four other people close to Mr. Trump, although it is unclear if their calls were intercepted. They are Carter Page, a businessman and former foreign policy adviser to the campaign; Roger Stone, a longtime Republican operative; and Mr. Flynn.

[redacted]

[redacted]

All of the men have strongly denied they had any improper contacts with Russian officials.

As part of the inquiry, the F.B.I. is also trying to assess the credibility of information contained in a dossier that was given to the bureau last year by a former British intelligence operative. The dossier contained a raft of salacious allegations about connections between Mr. Trump, his associates and the Russian government. It also included unsubstantiated claims that the Russians had embarrassing videos that could be used to blackmail Mr. Trump.

The F.B.I. has spent several months investigating the leads in the dossier, but has yet to confirm any of its most explosive allegations.

Senior F.B.I. officials believe that the former British intelligence officer who compiled the dossier, Christopher Steele, has a credible track record, and he briefed F.B.I. investigators last year about how he obtained the information. One American law enforcement official said that F.B.I. agents had made contact with some of Mr. Steele's sources.

(b)(5) per FBI

The F.B.I.'s investigation into Mr. Manafort began last spring as an outgrowth of a criminal investigation into his work for a pro-Russian political party in Ukraine and for the country's former president, Viktor F. Yanukovych. The investigation has focused on why he was in such close contact with Russian and Ukrainian intelligence officials.

(b)(5) per FBI

The bureau did not have enough evidence to obtain a warrant for a wiretap of Mr. Manafort's communications, but it had the N.S.A. closely scrutinize the communications of Ukrainian officials he had met.

(b)(5) per FBI

The F.B.I. investigation is proceeding at the same time that separate investigations into Russian interference in the election are gaining momentum on Capitol Hill. Those investigations, by the House and Senate Intelligence Committees, are examining not only the Russian hacking but also any contacts that Mr. Trump's team had with Russian officials during the campaign.

On Tuesday, top Republican lawmakers said that Mr. Flynn should be one focus of the investigation, and that he should be called to testify before Congress.

[redacted]

[redacted]

Senator Mark Warner of Virginia, the top Democrat on the Intelligence Committee, said that the news surrounding Mr. Flynn in recent days underscored "how many questions still remain unanswered to the American people more than three months after Election Day, including who was aware of what, and when."

Mr. Warner said that Mr. Flynn's resignation would not stop the committee "from continuing to investigate General Flynn, or any other campaign official who may have had ina

[redacted]

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[redacted]

From: [redacted]
Sent: Wednesday, April 15, 2015 10:58 AM
To: [redacted]
Subject: Chronology of Sensitive Information (b)(7)(E) per FBI [redacted]

Follow Up Flag: Follow up
Flag Status: Flagged

Categories: Red Category
SentinelCaseId: TRANSITORY RECORD

[redacted]

[redacted]

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TRANSITORY RECORD

[redacted],

Attached is the Chronology of Sensitive Information

Sensitive Information
[redacted]

Thanks,
[redacted]

From: [redacted]
Sent: Wednesday, April 15, 2015 10:19 AM
To: [redacted]
Subject: FW: Sensitive Information (b)(7)(E) per FBI -- [redacted]
Importance: High

[redacted]

[redacted]

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TRANSITORY RECORD

[redacted],

Please see me on the below.

Thanks,
[redacted]

From: (b)(6), (b)(7)(C) per FBI (CD)(FBI)
Sent: Wednesday, April 15, 2015 9:16 AM
To: [redacted]
Subject: FW: Sensitive Information (b)(7)(E) per FBI -- [redacted]

[redacted]

[redacted]
[redacted]
[redacted]
==========
TRANSITORY RECORD

[redacted],

Please see below. Please coordinate Section's response to the below. Most of this is contained in White paper that [redacted] completed last night. Please make a priority for today. Thank you.

From: (b)(6), (b)(7)(C) per FBI (CD) (FBI)
Sent: Wednesday, April 15, 2015 7:30 AM
To: (b)(6), (b)(7)(C) per FBI (CD)(FBI)
Cc: (b)(6), (b)(7)(C) per FBI (CD)(FBI)
Subject: FW: Sensitive Information - (b)(7)(E) per FBI -- [redacted]

[redacted]

[redacted]
[redacted]
[redacted]
==========
TRANSITORY RECORD

(b)(5), (b)(6), (b)(7)(C) per FBI

[redacted]

(b)(5), (b)(6), (b)(7)(C) per FBI

[redacted]

From: SAC [redacted]
Sent: Tuesday, April 14, 2015 3:31 PM
To: (b)(6), (b)(7)(C) per FBI (CD) (FBI)
Subject: FW: Sensitive Information (b)(7)(E) per FBI [redacted]

[redacted]

[redacted]
[redacted]
[redacted]

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TRANSITORY RECORD

From: COMEY, JAMES B. (DO) (FBI)
Sent: Tuesday, April 14, 2015 1:15 PM
To: SAC [redacted]
Cc: SAC [redacted] (FBI); (b)(6), (b)(7)(C) per FBI (DO) (FBI)
Subject: RE: Sensitive Information (b)(7)(E) per FBI --- [redacted]

[redacted]

[redacted]
[redacted]
[redacted]

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TRANSITORY RECORD

Thanks SAC [redacted]. Don't know anything about this but will get smarter.

SENATE-FISA2020-001332

[redacted] (DO) (FBI)

From: [redacted] (DO) (FB [redacted]@fbi.sgov.gov>
Sent: Wednesday, October 4, 2017 12:05 PM
To: [redacted] (CD) (FBI)
Cc: [redacted] (DO) (FBI)
Subject: My notes re: first day - [redacted]
Attachments: 2017091 STEELE_London_Debriefing_Part_B_Draft.docx

Classification: [redacted]
DELIBERATIVE PROCESS PRIVILEGED DOCUMENT

[redacted]
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[redacted]

See what you think. Add/clarify anything please.

[redacted] – for your review as well.

Out of abundance of caution – though we need to determine one way or another how we're handling classification – I'm classifying this em [redacted]

Best,

[redacted]
Supervisory Intelligence Analyst

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Classification: [redacted]

From: Gaeta, Joseph (OLA)
Subject: RE: Kristen Clarke's SJC questionnaire
To: Brest, Phillip (Judiciary-Dem); Fragoso, Michael (Judiciary-Rep)
Cc: Greenfeld, Helaine A. (OLA); Cress, Brian (OLA)
Sent: March 17, 2021 1:05 PM (UTC-04:00)
Attached: Kristen Clarke Senate Judiciary Questionnaire.pdf

Attached.

From: Brest, Phillip (Judiciary-Dem) (b) (6)
Sent: Wednesday, March 17, 2021 1:01 PM
To: Gaeta, Joseph (OLA) (b) (6); Fragoso, Michael (Judiciary-Rep) (b) (6)
Cc: Greenfeld, Helaine A. (OLA) (b) (6); Cress, Brian (OLA) (b) (6)
Subject: RE: Kristen Clarke's SJC questionnaire

Confirming receipt. Can you send the SJQ itself by email?

Phil

From: Gaeta, Joseph (OLA) (b) (6)
Sent: Wednesday, March 17, 2021 12:55 PM
To: Brest, Phillip (Judiciary-Dem) (b) (6); Fragoso, Michael (Judiciary-Rep) (b) (6)
Cc: Greenfeld, Helaine A. (OLA) (b) (6); Cress, Brian (OLA) (b) (6)
Subject: Kristen Clarke's SJC questionnaire

Phil and Mike,

We have uploaded Kristen Clarke's SJC questionnaire and supporting documents to the JEFS system. Please confirm receipt.

PDFs of documents responsive to the subparts of Q12 and Q14 have been provided in zip files organized in folders (e.g., a folder for 12(a), 12(b) etc.) with the exception of 12(d), which aren't zipped. There are 100+ documents in that folder. I can't see what you see on JEFS, but I am told you have to scroll through several pages to see them all.

Please let me know if you have any questions.

Joe Gaeta
Deputy Assistant Attorney General
Office of Legislative Affairs (OLA)
U.S. Department of Justice

From: Gaeta, Joseph (OLA)
Subject: RE: Kristen Clarke
To: Miller, Derek (Casey)
Sent: March 11, 2021 9:37 PM (UTC-05:00)
Attached: Kristen Clarke Has Long Partnered With Law Enforcement and is Looking For a Productive Respectful Relationship Working With Law Enforcement Leaders as the Assistant.pdf

Hi Derek,

Hope all is well with you. Following up on the Kristen Clarke nomination, I understand (but haven't seen) the FOP has issued a letter saying it cannot support Clarke, though stopping short of opposing her. The letter also expresses appreciation of her willingness to hear out their concerns. While we would have liked FOP's support, Kristen's does have support from other law enforcement orgs, see the attached and this story:

AP News re: Kristen Clarke Support from Law Enforcement

I raise this to you because I'm also told that the FOP in Pennsylvania (maybe the western part of the state) is particularly worked up about Clarke so you may be hearing from them. I'd love for her to have a courtesy meeting with Senator Casey over the next couple of weeks if the Senator is interested. Thanks for considering.

Joe

From: Miller, Derek (Casey) (b) (6)
Sent: Monday, February 8, 2021 5:09 PM
To: Gaeta, Joseph (OLA) (b) (6)
Subject: RE: Kristen Clarke

I think we're good. Have no idea where that came from.

From: Gaeta, Joseph (OLA) (b) (6)
Sent: Monday, February 8, 2021 5:07 PM
To: Miller, Derek (Casey) (b) (6)
Subject: RE: Kristen Clarke

I got it second hand along the lines of "I'm hearing Casey, Y, and Z have concerns…." Glad to be able to nip it in the bud, though if Senator Casey wants a courtesy meeting please let me know. Thanks for checking.

Joe

From: Miller, Derek (Casey) (b) (6)
Sent: Monday, February 8, 2021 3:32 PM
To: Gaeta, Joseph (OLA) (b) (6)
Subject: RE: Kristen Clarke

Joe. No concerns here that anyone can recall. We assume it's some sort of residual haunting or trauma left over from (b) (6) that flickers in the subconscious of DOJ staff from time to time.

Curious though, what did you hear?

Also – we tweeted in support of the slate that included Clarke when announced.

https://twitter.com/SenBobCasey/status/1347602805138350082?s=20

From: Gaeta, Joseph (OLA) (b) (6)

Sent: Monday, February 8, 2021 2:24 PM
To: Miller, Derek (Casey) (b) (6)
Subject: Kristen Clarke

Derek,

I heard that Senator Casey may have some concerns with Kristen Clarke, Biden's Civil Rights Division nominee. Say it ain't so! But if so, I'm her navigator for the nomination process so I'd appreciate the chance to talk about how we can address any issues and get to yes.

Joe

Joe Gaeta
Deputy Assistant Attorney General
Office of Legislative Affairs (OLA)
U.S. Department of Justice

Kristen Clarke Has Long Partnered With Law Enforcement, and is Looking For a Productive, Respectful Relationship Working With Law Enforcement Leaders as the Assistant Attorney General of the Civil Rights Division

- Having started her career as a staff attorney and then federal prosecutor enforcing laws and civil rights laws in the administration of President George W. Bush, a return to the Department of Justice will be a homecoming for Clarke.

- **Clarke worked closely and productively with the FBI, ATF and state law enforcement on federal investigations early in her career.**

    - Clarke served as a federal prosecutor at the U.S. Department of Justice in the Criminal Section of the Civil Rights Division. During this time, she worked closely with federal and state and local law enforcement officials to conduct investigations into issues such as human trafficking, hate crimes and official misconduct.

- **Clarke worked with law enforcement to investigate and prosecute domestic violence cases, including intimate partner violence, family violence, assaults, and stalking. [See below the support from crime victims and domestic violence survivors].**

    - Clarke served as a Special Assistant Attorney General in the U.S. Attorney's Office in the District of Columbia. In this role, she worked closely with local law enforcement to conduct investigations, secure civil protection orders and carry out prosecutions into domestic violence matters.

- **Clarke worked hand-in-hand with New York State Police at the N.Y. Attorney General's Office, and partnered with sheriffs across the state of New York on best practices for working with communities with limited English proficiency.** As Chief of the Civil Rights Bureau in the New York State Attorney General's Office, Clarke worked with sheriffs' offices to institute best practices on language access to build trust and improve policing of communities with limited English proficiency. This collaborative work led to comprehensive language policies for forces across the state. Clarke further worked closely with New York State Police while serving the N.Y. Attorney General's office.

- **Clarke conducted training for the National Sheriffs' Association in 2017 on 21st Century Community Policing.** As head of the Lawyers' Committee for Civil Rights Under Law, Clarke helped lead a conversation about rebuilding trust between law

enforcement and the community, and all the stakeholders that interact with the criminal justice system.

- **Clarke partnered with the International Association of Chiefs of Police to Enhance the Response to Hate Crimes.** Over a series of months with law enforcement leaders across the country, Clarke and the IACP developed strategies in 2019 to enhance officers' response to hate crimes and hate incidents. These model policies have since been adopted by police forces across the globe. IACP President Paul Cell said of the joint project: "I believe the IACP and Lawyers' Committee have provided unique expertise to establish an achievable action agenda that will help stakeholders respond effectively to these crimes, improve the well-being of targeted communities, and enhance the quality of overall community-police relations."

- **Clarke has the complete and fulsome support of crime victims -- including hate crime victims -- who have observed her work throughout her career to seek justice on behalf of the most vulnerable.**

    - Domestic violence survivors and survivors of violent crime resoundingly support Clarke's nomination to give voice to those afflicted by violent crime. [See letters below].

    - Clarke has worked with law enforcement supporting these crime victims to seek justice and accountability for those who commit violent crimes against the most vulnerable.

- **Clarke is committed to working together with the FOP, police unions, and other law enforcement leaders to promote public safety and public trust and accountability.**

    - Clarke had extremely productive and mutually beneficial discussions with the FOP board and major law enforcement organizations, and looks forward to future discussions on how to build more trust and enhance public safety together.

    - Clarke is pleased that the FOP will look forward to working with her collaboratively in a way that benefits communities all over the country.

Endorsements/Statements

(AP News re: Kristen Clarke Support from Law Enforcement)

- **Major Cities Chiefs Association** (police executives representing the largest cities in the United States and Canada). [Link to Letter]

- **National Association of Police Organizations (NAPO) Executive Director Bill Johnson to Bloomberg on Feb. 2021:**

    - "The National Association of Police Organizations ("NAPO") looks forward to working with **Kristen Clarke as she heads the U.S. Department of Justice's Civil Rights Division. Ms. Clarke and I have already spoken several times since her nomination and are both deeply committed to strengthening and maintaining open lines of communication and honest and timely dialogue.** The tasks with which the Civil Rights Division is entrusted are of both great importance and great sensitivity. It is vital that the **Division and American law enforcement officers strive to maintain an effective and mutually respectful working relationship. NAPO has committed to always providing the most accurate sense of the challenges and conditions faced by our brother and sister officers, and Ms. Clarke has already been open and welcoming to our views. We both realize that we may not always agree with each other on every issue, but at the same time I believe we share a common goal of fair, effective, ethical and safe law enforcement."**

- **International Association of Chiefs of Police (IACP) Executive Director Vince Talucci** personal letter. [Link to Letter]

- **National Organization of Black Law Enforcement Executives (NOBLE)** (founded in 1976; 60 chapters and 3,000+ members nationwide). [Link to Letter]

- **National Association of Women Law Enforcement Executives (NAWLEE)** [Link to Letter]

- **Hispanic American Police Command Officers Association (HAPCOA)** (oldest and largest association of Hispanic police officers). [Link to Letter]

- **71 Bipartisan Former State Attorneys General** (led by former Republican State Attorney General Grant Woods). [Link to Letter]

- **Crime Victim/Survivor Services -- 100+ [Link to Letter]**

- **Domestic Violence Survivors [Link to Letter][Link to Letter]**

###

International Association of Chiefs of Police Executive Director Vincent Talucci

“While the International Association of Chiefs of Police (IACP) has peripheral engagement with the Civil Rights Division, my experience suggests that successful candidates selected to lead the Division are **communicative, fair, and transparent**. Given our direct working relationship in our respective roles, **you have demonstrated those qualities** in our collective Lawyers’ Committee and IACP efforts. Our partnership personifies the impact the policing and civil rights communities can have when working together to address complex issues -- as our joint efforts have spanned from addressing challenges within a local police organization to building a national effort to enhance the response to hate crimes.

I wish you well in the confirmation process and offer my appreciation for your willingness to serve. If confirmed, **I look forward to continuing our solid working relationship as you bring your professional hallmarks -- communicativeness, fairness, and championing of transparency – to your new role.**

- Vincent Talucci
  IACP Executive Director / Chief Executive Officer
  Link to Letter

Major Cities Chiefs Association (MCCA)

“The MCCA believes these nominees will be **effective leaders and valuable partners for local law enforcement agencies**. On behalf of the MCCA membership, I respectfully request the Committee act swiftly and support the nominations of Ms. Monaco, Ms. Gupta, and Ms. Clarke.”

- Major Cities Chiefs Association | Link to Letter

The National Organization of Black Law Enforcement Executives (NOBLE)

“The National Organization of Black Law Enforcement Executives (NOBLE) formally acknowledges the work and commitment to service that has been exhibited by Ms. Kristen Clarke. She is a long-time partner of NOBLE and the recipient of our 2016 Civil Rights Justice by Action Award. **Ms. Clarke has displayed the qualities of leadership, empathy, excellence, and persistence in supporting and defending the U.S. Constitution while ensuring equal protection and justice for all Americans**. This has been exhibited countless

times in roles such as President of the Lawyers' Committee for Civil Rights Under Law and Manager of the Civil Rights Bureau of the New York Department of Law."

- The National Organization of Black Law Enforcement Executives (NOBLE)
  Link to Letter

Hispanic American Police Command Officers Association (HAPCOA)

"HAPCOA is the oldest and largest association of Hispanic American command officers from law enforcement and criminal justice agencies at the municipal, county, state, school, university and federal levels. HAPCOA acknowledges the **work ethic and commitment** of Ms. Clarke and believes that she will be an **effective leader** as the next Head of the DOJ Civil Rights Division.

- Hispanic American Police Command Officers Association (HAPCOA)
  Link to Letter

National Association of Women Law Enforcement Executives (NAWLEE)

"Please allow this letter to act a **formal endorsement of Kristen Clarke** as the next Assistant Attorney General of the Civil Rights Division from the National Association of Women Law Enforcement Executives.

The work of Ms. Clarke in areas of civil rights enforcement including matters related to criminal justice, education and housing discrimination, fair lending, barriers to reentry, voting rights, immigrants' rights, gender inequality, disability rights, reproductive access and LGBTQ+ issues has shown she is committed to ensure equal protection for all community members.

As Ms. Clarke is someone that has broken the "glass ceiling", NAWLEE believes she will do much to support the need for more women in ranking positions within law enforcement agencies from across the county."

- National Association of Women Law Enforcement Executives (NAWLEE)
  Link to Letter

National Association of Police Organizations (NAPO) Executive Director Bill Johnson

"The National Association of Police Organizations ("NAPO") looks forward to working with **Kristen Clarke as she heads the U.S. Department of Justice's Civil Rights Division. Ms. Clarke and I have already spoken several times since her nomination and are both deeply committed to strengthening and maintaining open lines of communication and honest and timely dialogue.** The tasks with which the Civil Rights Division is entrusted are of both great importance and great sensitivity. It is vital that the **Division and American law enforcement officers strive to maintain an effective and mutually respectful working relationship. NAPO has committed to always providing the most accurate sense of the challenges and conditions faced by our brother and sister officers, and Ms. Clarke has already been open and welcoming to our views. We both realize that we may not always agree with each other on every issue, but at the same time I believe we share a common goal of fair, effective, ethical and safe law enforcement."**

- NAPO Executive Director Bill Johnson, Provided to Bloomberg on February 10, 2021

Bipartisan Former State Attorneys General (71 signatories; led by former Arizona State Attorney General Grant Woods (R))

"We are former State Attorneys General in each of our respective states, who belong to both Republican and Democratic parties. We often worked with the U.S. Department of Justice and senior officials...under both Republican and Democratic Administrations, and believe that the slate of Justice Department nominees announced by President Biden represent outstanding selections of individuals who have sterling reputations and leadership qualities that will meet the mission of the Justice Department.

Kristen Clarke is someone with **immense credibility among community leaders** in each of our states -- she has handled cases of hate crimes, constitutional policing, human trafficking, and voting rights, and, most recently, has done effective work on violent extremism and the threat that it poses to our citizens. Clarke further worked in a leadership position within the New York State Attorney General's office, leading the Civil Rights Bureau there -- where she led a religious rights initiative as well as other civil rights initiatives on behalf of the State. We are further proud that she is an alumnus of a State Attorney General's office.

- Bipartisan Former State Attorneys General
  Link to Letter

Crime Victim/Survivor Services

"We, the undersigned, include crime survivors, victim/survivor advocates, and allied criminal and

juvenile justice professionals. Individually and collectively, we whole-heartedly support the appointment of Kristen Clarke to serve this Administration as its Assistant Attorney General for the Civil Rights Division, within the U.S. Department of Justice.

Ms. Clarke is well acquainted with the importance of crime survivors' rights and services, through her previous work in the Justice Department's Civil Rights Division, where she personally led critical cases involving hate crimes and human trafficking. **We appreciate her understanding of the often-devastating impact of crime on victims, particularly those who are marginalized and/or under-served.**

Her career-long commitment to marginalized crime survivors and communities is evidenced by her leadership of the James Byrd, Jr. Center to Stop Hate at the Lawyers' Committee for Civil Rights Under law. **She has been a strong proponent for standing up for those who suffer from online harassment, online solicitation of violence, and accountability for social media platforms that do not adequately safeguard their platforms according to their terms of service.**

We are confident that **Kristen Clarke, if confirmed as the USDOJ Assistant Attorney General for the Civil Rights Division, understands the important needs and rights of crime survivors; and will respect and reflect the interests of crime survivors – and those who serve them – in her important leadership role.**

- Crime survivors, victim/survivor advocates, and allied criminal and juvenile justice professionals
  Link to Letter

National Coalition to End Domestic Violence

"As an attorney with DOJ's Civil Rights Division, Clarke dealt with cases related to systemic racism such as police misconduct and hate crimes. The racism and misogyny built into the criminal and civil justice systems create barriers for those survivors who want to engage with such systems. **Clarke's demonstrated success in addressing issues related to systemic barriers to justice indicate that she will be the champion survivors need.**

Kristin Clarke's documented expertise in promoting civil rights and holding those who violate it accountable clearly demonstrates her qualifications for the position of Assistant Attorney General for Civil Rights at the Department of Justice. Her personal commitment to equal justice for all means she will be a champion for equal justice for all survivors.

- National Coalition to End Domestic Violence
  Link to Letter

From: Garrison, Ches (Judiciary-Dem)
Subject: Whitehouse Letter to Attorney General Garland
To: Greenfeld, Helaine A. (OLA); Gaeta, Joseph (OLA)
Cc: Aronson, Alex (Judiciary-Dem)
Sent: March 11, 2021 4:56 PM (UTC-05:00)
Attached: 3.11.2021 SW Ltr to AG Garland.pdf

Hi Helaine & Joe,

I hope you're both doing well and the transition to DOJ has been smooth! Please find the attached letter that Senator Whitehouse would like to send to AG Garland. Let us know if you have any questions.

Thanks,

Ches Garrison
Senior Counsel | Senator Sheldon Whitehouse | (b) (6)

SHELDON WHITEHOUSE
RHODE ISLAND

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March 11, 2021

The Honorable Merrick Garland
Attorney General
U.S. Department of Justice
Office of the Attorney General
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Attorney General Garland,

I write to bring to your attention to four episodes that occurred before your tenure at the Department of Justice (Department), but have evaded oversight; and to ask that you facilitate proper oversight by the Senate of these incidents. I also raise separate concerns about an office of the Department—the Office of Legal Counsel—whose conduct has brought discredit on the organization. Having served as a United States Attorney and as my state's Attorney General, I am keenly aware of the cautions that arise when legislators make requests or recommendations to law enforcement officials. The matters I raise below I think fall well within proper bounds for oversight inquiry, but I wanted you to know I am well aware of the cautions.

1. Civil Fraud Investigation of the Fossil Fuel Industry under Tobacco Case Precedent.

The Department of Justice brought a successful civil action against the tobacco industry for fraudulently denying the dangerous nature of its products. The Department won that case at trial before Judge Gladys Kessler, whose 1,683-page landmark opinion is a lasting testament both to judicial diligence and to the scale of the fraud that was perpetrated.[1] The Department's verdict was entirely upheld in a strong opinion by the Court of Appeals, and the Supreme Court declined review.[2]

Considerable public commentary ensued about whether similar civil proceedings should be considered against the fossil fuel industry for fraudulently denying the dangerous nature of its products.[3] There was known overlap of participants in the tobacco fraud with those in the fossil

[1] *See United States v. Philip Morris USA, Inc.*, 449 F.Supp.2d 1 (D.D.C. 2006).
[2] *See United States v. Philip Morris USA, Inc.*, 566 F.3d 1095 (D.C. Cir. 2009), *cert. denied*, 561 U.S. 3501 (2010).
[3] *See* Lana Ulrich, *Climate change in the courts: Big Oil and Big Tobacco*, National Constitution Center (July 15, 2016).

fuel industry's scheme, including public relations firms, research institutes, and even some of the same researchers.[4] I went back and reviewed the Department's tobacco complaint, the Kessler decision, and the circuit court opinion, and I thought the successful tobacco case made an obvious template for a civil investigation of the fossil fuel industry's behavior. Indeed, if anything, the fossil fuel industry's scheme seemed more complex and nefarious.[5] So, at a Senate Judiciary Committee hearing I asked Attorney General Lynch to take a look. She said she would.

Time went by, and there appeared to be no activity at the Department. No lawyer appeared to have been assigned to the matter. Despite the broad authority of the Attorney General to conduct preliminary discovery, not a single document appeared to have been requested or reviewed. Despite considerable academic research into the fossil fuel industry scheme,[6] no inquiry appeared to have been made to any knowledgeable expert. The Department's own lawyers in the tobacco case were alive and well, but appeared not to have been consulted. The tobacco case had taken a lot of work and generated predictable political blowback; and it appeared, to use an old prosecutors' phrase, that the Department might be "taking a dive" on considering similar claims regarding the fossil fuel industry scheme.

So I followed up, and when I eventually got a response, it came from a person at the FBI so ill-informed that he explained the inaction using the wrong standard of proof: a criminal standard of proof for a civil case.[7] Clearly, no one had done basic due diligence, as even a cursory review of the Department's complaint or the District Court's decision would have disclosed the correct standard of proof. The case being civil in nature ought to have been an obvious cue. It seemed at that point that the Department had not only "taken a dive," but then produced an expedient but obviously inapposite pretext to explain itself.

The fossil fuel industry's complex scheme to deny the dangers of its products' use, using arrays of front groups,[8] hidden flows of money,[9] and cut-out organizations,[10] may well be the Fraud of the Century. All told, the five largest publicly traded oil companies spent over $1 billion in the three years following the 2016 Paris Agreement on "misleading climate-related branding and

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[4] Benjamin Hulac, *Tobacco and Oil Industries Used Same Researchers to Sway Public*, Scientific American (July 20, 2016).

[5] *Id*.

[6] *See* Shannon Hall, *Exxon Knew about Climate Change almost 40 years ago*, Scientific American (Oct. 26, 2015).

[7] *See* June 30, 2017 letter from Deputy Assistant Director Hacker to Senator Whitehouse (stating "the government must prove beyond a reasonable doubt" in order to charge a RICO violation, instead of preponderance of the evidence standard of proof required for civil actions).

[8] *The Climate Denial Machine: How the Fossil Fuel Industry Blocks Climate Action*, Climate Reality Project (Sept. 5, 2019) (hereinafter "Climate Reality Project").

[9] *Big Oil's Real Agenda on Climate Change*, InfluenceMap (March 2019).

[10] *See* Climate Reality Project, *supra* note 8.

lobbying."[11] The Department's seeming failure to undertake basic due diligence—to see if a civil case similar to the successful tobacco case should be brought to force the fossil fuel industry to cease and desist from fraudulent behavior — demands an honest, if overdue, explanation. If the explanation is fear of political pressure from the industry in question, that should be further explained.

I hope we agree that the course of justice should run fearlessly, and that an honest and informed case review is the first step in that course. Should such a review confirm my suspicions outlined here, I hope the Department will take an honest look at the fossil fuel industry's potential liability.

2. The FBI's Background Investigation into Allegations Against Brett Kavanaugh.

The second matter of concern is what appears to have been a politically-constrained and perhaps fake FBI investigation into alleged misconduct by now-Supreme Court Justice Brett Kavanaugh, rather than what Director Wray promised: a background investigation "consistent with [the FBI's] long-standing policies, practices, and procedures."[12] As you will recall, Dr. Christine Blasey Ford testified to the Senate Judiciary Committee on September 27, 2018 about an alleged sexual assault incident that took place while Dr. Ford and Justice Kavanaugh were in high school.[13] Her shards of recollection were consistent with the nature of recollections of victims of traumatic experiences of sexual assault. Dr. Ford subjected herself to personal danger, public scorn, and professional cross-examination to testify before us, and presented credible and compelling testimony.

Dr. Ford's testimony obviously justified further investigation to seek corroborating or inconsistent evidence. The nominee disputed her testimony, so there were questions of fact to resolve. Furthermore, other allegations were brought against Judge Kavanaugh, requiring their own investigation.[14] At least two law firms contacted the FBI with the names of credible witnesses who had information pertaining to the investigations. One firm provided names of potential witnesses that had information "highly relevant to … allegations" of misconduct by Judge Kavanaugh.[15] The other firm's letter recounted how counsel for a witness with whom agents had met provided the FBI with "more than twenty additional witnesses likely to have relevant information" and included an affidavit from a credible witness.[16] Max Stier, the widely respected president of the Partnership for Public Service, and a college classmate of Mr.

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[11] *Id*.

[12] Testimony of FBI Director Christopher Wray Before the Senate Committee on the Judiciary, *Hearing: Oversight of the Federal Bureau of Investigation* (July 23, 2019).

[13] Haley Sweetland Edwards, *How Christine Blasey Ford's Testimony Changed America*, TIME (Oct. 4, 2018).

[14] Robin Pogrebin & Kate Kelly, *Brett Kavanaugh Fit In With the Privileged Kids. She Did Not.*, N.Y. Times (Sept. 14, 2019).

[15] *See* Oct. 4, 2018 letter from Katz, Marshall, and Banks, LLP to Director Wray

[16] *See* Oct. 4, 2018 letter from Kaiser Dillon, PLLC to Director Wray.

Kavanaugh, offered specific corroborating evidence,[17] but the FBI refused to interview Mr. Stier.[18]

Some of these allegations were brought to the attention of committee members on behalf of witnesses who had "tried in vain to reach the F.B.I. on their own," but could find no one at the Bureau willing to accept their testimony.[19] When members made inquiries we faced the same experience: the FBI had assigned no person to accept or gather evidence. This was unique behavior in my experience, as the Bureau is usually amenable to information and evidence; but in this matter the shutters were closed, the drawbridge drawn up, and there was no point of entry by which members of the public or Congress could provide information to the FBI. Senator Coons asked for a clear procedure at the time, to no avail.[20]

After several days with the drawbridge up against evidence or information, the FBI ultimately opened up an entry point for additional allegations and other potential corroborating evidence through a "tip line." When allegations flowed in through that "tip line," we received no explanation of how, or whether, those allegations were processed and evaluated.[21] Senators were later given only highly restricted access, over intermittent one-hour windows, to review various materials the FBI had gathered. In addition to showing some cursory efforts to corroborate Dr. Ford's hearing testimony, our brief review showed that a stack of information had indeed flowed in through the "tip line."

It did not appear, however, that any review had been undertaken of any of the information that flowed through this tip line. We could get no explanation of the tip line procedures. In 2011, the FBI had posted a video, "Inside the FBI's Internet Tip Line,"[22] in which the Bureau described procedures for review of tip line information in criminal investigations, for sorting out investigative wheat from the chaff such tip lines customarily produce, and for forwarding credible information appropriately within the Bureau for further investigation. The FBI appears not to have followed these procedures, and the Bureau has repeatedly refused to answer questions from Senate Judiciary Committee members about this matter. This 'tip line' appears to have operated more like a garbage chute, with everything that came down the chute consigned without review to the figurative dumpster.

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[17] Adam Cohen, *The Ascent: Dissecting the Political Maneuvers that Enable Justice Kavanaugh's Confirmation*, N.Y. Times Book Rev. (Jan. 12, 2020), at 9.

[18] *Id.*

[19] *Id.*

[20] *See* Aug. 1, 2019 Letter from Sens. Whitehouse and Coons to Director Wray, https://www.whitehouse.senate.gov/imo/media/doc/2019-08-01%20Ltr%20to%20FBI%20Wray%20re%20supplemental%20Kavanaugh%20investigation.pdf .

[21] *See id.*

[22] Federal Bureau of Investigations, *Inside the FBI's Internet Tip Line*, YOUTUBE (Feb. 24, 2011), https://www.youtube.com/watch?v=KJlDZ4OMIMM.

In July 2019, Director Wray appeared at an oversight hearing before the Senate Judiciary Committee, where he assured senators he was "committed to making sure the FBI does all of its work by the book, utterly without partisan interference." He further testified that he had met with Bureau personnel to ensure that the Kavanaugh background investigation was "consistent with our long-standing policies, practices, and procedures for background investigations." But Director Wray has refused to answer Congressional inquiries about whether that was actually the case. Senators' Questions for the Record from that July 2019 oversight hearing remain unanswered today, as does Senator Coons' and my letter of August 1, 2019.[23] Such stonewalling does not inspire confidence in the integrity of the investigation.

If standard procedures were violated, and the Bureau conducted a fake investigation rather than a sincere, thorough and professional one, that in my view merits congressional oversight to understand how, why, and at whose behest and with whose knowledge or connivance, this was done. The FBI "stonewall" of all questions related to this episode provides little reassurance of its propriety. If, on the other hand, the "investigation" was conducted with drawbridges up and a fake "tip line" and that was somehow "by the book," as Director Wray claimed, that would raise serious questions about the "book" itself. It cannot and should not be the policy of the FBI to *not* follow up on serious allegations of misconduct during background check investigations.

3. The Antitrust Investigation into California's Fuel-Emission Agreements.

The third episode of concern relates to an Antitrust Division investigation initiated in the last administration against several major automobile companies.[24] Again, much information has been withheld — often a warning sign. In this case, the alleged conduct was Ford Motor Company, BMW of North America, Honda, and Volkswagen coming together to negotiate with the State of California new state fuel efficiency regulations.[25] The seemingly obvious application of the First Amendment's Freedom of Petition Clause, the antitrust state action doctrine, and the *Noerr-Pennington* exception raises further warning flags. The background to this episode, and a whistleblower's testimony, raise further concerns.

My nutshell version of the background is as follows. In 2011, the auto industry agreed to meet higher federal fuel efficiency standards set by the Obama administration.[26] Under the Trump administration, the auto industry sought some adjustments to those agreed-upon standards.[27]

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[23] *See* Aug, 1, 2019 Letter from Sens. Whitehouse and Coons to Director Wray, https://www.whitehouse.senate.gov/imo/media/doc/2019-08-01%20Ltr%20to%20FBI%20Wray%20re%20supplemental%20Kavanaugh%20investigation.pdf.

[24] *See* Aug. 28, 2019 Letter to automobile companies from Assistant Attorney General Makan Delrahim.

[25] Coral Davenport & Hiroko Tabuchi, *Automakers, Rejecting Trump Pollution Rule, Strike a Deal With California*, N.Y. Times (July 15, 2019).

[26] Press Release, The White House, *Obama Administration Finalizes Historic 54.5 MPG Fuel Efficiency Standards* (Aug. 28, 2012) (on file with Nat'l Archives).

[27] Davenport & Tabuchi, *supra* note 25.

Through that opening barged gasoline companies, including Marathon Petroleum, to pursue a massive rollback of the new fuel efficiency targets well beyond anything sought by the auto companies, and even to undo the authority of states to have their own fuel efficiency standards.[28] This intervention caused several automakers to quietly begin negotiations with California—the leader of the seventeen states that maintain a common state fuel efficiency standard—to get the adjustments they wanted.[29]

In July 2019, California and these automakers announced an agreement to adjust state fuel efficiency standards for the seventeen-state consortium to an average of 51 mpg by 2026.[30] According to an August 20, 2019 *New York Times* report, this "enraged" President Trump,[31] as it foiled the fossil fuel industry's plot to blow up the fuel efficiency standards regime. The following day, President Trump sent tweets decrying the arrangement. And on August 22, 2019, according to whistleblower testimony by an Antitrust Division official, the Division's "political leadership instructed staff to initiate an investigation that day"[32]; that contrary to the Division's standard practice the investigation's initiating paperwork did "not include a staff 'recommendation' but instead state[d] that '[t]he Antitrust Division would like to open an investigation"[33]; and that the letter was generated by the Division's policy staff, which does not ordinarily conduct enforcement investigations of this type.[34] On August 28, 2019, Assistant Attorney General Delrahim sent the letter to the four auto companies, alleging potential violations of federal antitrust laws.[35]

The place of these letters in the larger saga raises obvious concerns that they were sent to threaten or punish those auto companies, that their true origin may have been in the White House, and that they were perhaps devised in concert with Marathon Petroleum and the oil industry in a joint political effort. Once again, the Department's refusal to provide complete or meaningful responses to our questions inhibits our understanding of this matter. That failure to submit to scrutiny should cut against the Department, however, and not to its benefit. The blockade of information frustrated Chairman Graham sufficiently that he summoned Deputy Attorney General Rosen to his office on June 15, 2020 to go through with me the list of our

[28] Hiroko Tabuchi, *The Oil Industry's Covert Campaign to Rewrite American Car Emissions Rules*, N.Y. Times (Dec. 13, 2018).

[29] Juliet Eilperin & Brady Dennis, *Major automakers strike climate deal with California, rebuffing Trump on proposed mileage freeze*, Wash. Post (July 25, 2019).

[30] Davenport & Tabuchi, *supra* note 25.

[31] Coral Davenport & Hiroko Tabuchi, *Trump's Rollback of Auto Pollution Rules Shows Signs of Disarray*, N.Y. Times (Aug. 20, 2019).

[32] *See* June 24, 2020 testimony of John Elias before House Committee on the Judiciary.

[33] *Id*.

[34] *Id.*

[35] *See* August 28, 2019 letter to automobile companies from Assistant Attorney General Makan Delrahim.

stonewalled questions, with specific reference to this matter, and to urge improved cooperation. The Department's responses remained incomplete and unsatisfactory.

4. Department Policy Regarding IRS Referrals for False Statement Cases.

In *Citizens United*, the Supreme Court struck down provisions of the Bipartisan Campaign Reform Act ("BCRA")[36] and allowed unlimited spending in elections. The decision wrought a seismic shift in our political ecosystem. When *Citizens United* allowed unlimited political spending in elections, the value to hiding donors' identities exploded, and political activity by organizations formed under section 501(c)(4) of the Internal Revenue Code 501(c)(4) exploded in parallel, exploiting the IRS's weak enforcement and outdated regulations. The money poured in precisely because these organizations do not have to publicly disclose their contributors,[37] and could be turned to political work, contrary to Congress's clear statutory intent. Since 2010, 501(c)(4) organizations have spent over $900 million on political expenditures, compared to $103 million in the previous decade.[38]

Under intense political pressure, the IRS failed to protect against this novel explosion of nonprofit political activity performed for hidden donors. According to one *ProPublica* study, from 2015-2019, the IRS failed to strip any non-profit of its tax-exempt status, despite receiving thousands of complaints of abuse from watchdog groups and concerned taxpayers.[39] The IRS ignored flagrant discrepancies between sworn statements made to the IRS and sworn statements made by the same groups to election regulators.[40]

This is where the Department has a role, examined in an April 9, 2013 hearing of the Senate Judiciary Committee Subcommittee on Crime and Terrorism entitled "Current Issues in

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[36] *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

[37] *See, e.g.*, Trevor Potter & B. B. Morgan, *The History of Undisclosed Spending in U.S. Elections & How 2012 Became the Dark Money Election*, 27 Notre Dame J.L. Ethics & Pub. Pol'y 383, 463-64 (2013) (discussing the formation of Crossroads GPS, a 501(c)(4) spin-off of super PAC American Crossroads, formed to protect donors from disclosure).

[38] *Outside Spending*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/index.php?type=A&filter=N (last visited Jan 26, 2021).

[39] Maya Miller, *How the IRS Gave Up Fighting Political Dark Money Groups*, ProPublica (April 18, 2019), https://www.propublica.org/article/irs-political-dark-money-groups-501c4-tax-regulation.

[40] In 2012, ProPublica investigated 501(c)(4) filings from 104 organizations that had reported electioneering activity to the Federal Election Commission or state equivalents, saying "here is what we spent on elections." ProPublica cross-checked those claims with what the organizations had reported to the IRS. Thirty-two groups had told the IRS they spent no money to influence elections, either directly or indirectly. Both statements cannot be true. *See* Kim Baker, *How Nonprofits Spend Millions on Elections and Call it Public Welfare*, ProPublica (Aug. 18, 2012), https://www.propublica.org/article/how-nonprofits-spend-millions-on-elections-and-call-it-public-welfare; *see also*, Hearing: "*Current Issues in Campaign Finance Law Enforcement*," U.S. Senate Committee on the Judiciary, Subcommittee on Crime and Terrorism, Apr. 9, 2013.

Campaign Finance Law Enforcement."[41] As the hearing and outside reporting established,[42] there have been numerous instances of 501(c)(4) organizations, or organizations seeking 501(c)(4) status, answering "no" to questions on IRS forms that ask whether they are engaging in political activity, while reporting millions of dollars in political advertising to federal and state election agencies. These discrepancies would seem to predicate "false statement" investigations under 26 U.S.C. § 7206[43] and 18 U.S.C. § 1001.[44]

The Department of Justice appears to have undertaken no investigation, evidently on grounds that it customarily defers to the Internal Revenue Service and requires a referral from the IRS in criminal tax cases. This policy seems misguided as to prima facie election false statement cases, for two reasons. First, the IRS has no special expertise and is not equipped to investigate and prosecute crimes related to elections. As former Federal Election Commission Chairman Bradley Smith wrote in his testimony, the IRS "is not equipped or structured to do the job it was asked to do in overseeing political activities." Second, unlike technical tax law violations where prosecutions need to align with IRS tax policy, false statements are, as the Department of Justice witness said at the hearing, the Department's "bread-and-butter" cases.

Given the intensity of the political pressure that was brought to bear against IRS enforcement in this area, one can sympathize with the Department's hesitancy to take on these seemingly prima facie cases, but the course of justice should run fearlessly and true, and veering away from "false statement" cases because they are politically hard is wrong.

All three of these episodes share the plain and obvious specter of political influence, an apparent failure of duty in regard to dispassionate, fearless and professional enforcement of the law, and

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[41] Hearing: "*Current Issues in Campaign Finance Law Enforcement*," U.S. Senate Committee on the Judiciary, Subcommittee on Crime and Terrorism, Apr. 9, 2013.

[42] In 2012, ProPublica investigated 501(c)(4) filings from 104 organizations that had reported electioneering activity to the Federal Election Commission or state equivalents, saying "here is what we spent on elections." ProPublica cross-checked those claims with what the organizations had reported to the IRS. Thirty-two groups had told the IRS they spent no money to influence elections, either directly or indirectly. *See* Kim Baker, *How Nonprofits Spend Millions on Elections and Call it Public Welfare*, PROPUBLICA (Aug. 18, 2012), https://www.propublica.org/article/how-nonprofits-spend-millions-on-elections-and-call-it-public-welfare; *see also*, Kim Barker, *Controversial Dark Money Group Among Five that Told IRS They would Stay Out of Politics Then Didn't*, ProPublica, (Jan. 2, 2013), https://www.propublica.org/article/controversial-dark-money-group-among-five-that-told-irs-they-would-stay-out.

[43] 26 U.S.C. § 7206(1) makes it a felony punishable by up to three years of imprisonment and $100,000 in fines for a person who: "[w]illfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter."

[44] 18 U.S.C. § 1001, makes it a felony punishable by up to 5 years and fines of up to $250,000 ($500,000 for a corporation) for "whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully – (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry."

marked failures of transparency and candor. I ask your cooperation in full and unstinting inquiry into these three unfortunate episodes.

5. The Office of Legal Counsel

My last concern is the Department's Office of Legal Counsel (OLC). This office has had a distinguished history. In recent years, however, it has more and more appeared to run political errands, and its reputation has dimmed.[45]

OLC's role in the warrantless wiretapping and detainee torture programs sparked grave consternation even in the Department.[46] In the former program, when the hidden state of affairs came to light, Attorney General Ashcroft, Deputy Attorney General Comey, and other senior officials threatened to resign *en masse* if the White House did not reform the program OLC had approved.[47] The infamous "torture memos" were recanted by the Department itself shortly after their content was revealed.[48] None had taken note of military justice experience with waterboarding. One omitted mention of a Fifth Circuit case that described the waterboarding technique and repeatedly referred to it as "torture."[49] An OPR investigation was shut down before completion, when Associate Deputy Attorney General Margolis determined no "duty of candor" was implicated.[50]

Another OLC memo that has not been withdrawn creates a procedural box canyon for the theory that no president can be investigated or prosecuted for a criminal offense.[51] This ruling is self-fulfilling, and has effectively made it the executive branch's call how this important question affecting the executive branch should be answered. Amidst separation of powers among executive, legislative and judicial branches, this OLC theory evades judicial scrutiny and review, though in our government of laws it is the responsibility of courts to state what the law is.

Where courts have had the chance to review OLC opinions, the results have been disturbing. Federal district courts in the District of Columbia and the Southern District of New York have

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[45] Erica Newland, *Opinion: I Worked in the Justice Department. I Hope its Lawyers Won't Give Trump an Alibi*, Wash. Post (Jan. 10, 2019) (OLC sometimes "wouldn't look that closely at the claims the president was making" and author felt that her and her colleagues were sometimes "using the law to legitimize lies").

[46] *See e.g.*, Jan Crawford Greenburg & Ariane de Vogue, *Former AG Accused of Playing Politics with Justice*, ABC News (June 24, 2008).

[47] Christopher Weaver, *The Men Behind the Memos*, ProPublica (Jan. 28, 2009).

[48] Press Release, U.S. Dept. of Justice Office of Pub. Affairs, Department of Justice Releases Four Office of Legal Counsel Opinions (Apr. 16, 2009) (on file with DOJ).

[49] *See United States v. Lee*, 744 F.2d 1124 (5th Cir. 1984).

[50] Memorandum for the Attorney General and Deputy Attorney General from Associate Deputy Attorney General David Margolis (Jan. 5, 2010) (on file with DOJ) (emphasis added).

[51] Memorandum Opinion from the Office of Legal Counsel to the Attorney General (Oct. 16, 2000) (on file with DOJ) (discussing a sitting president's amenability to indictment and criminal prosecution).

been — to put it mildly — unpersuaded by OLC work offered as argument before them.[52] As a supervisor of lawyers, I see the critiques leveled in those judicial opinions as signaling a need for some serious management oversight, far from the once-Olympian standard of OLC. It is not clear that the OLC opinions found so wanting by actual Article III judges have been modified to comport with the courts' caustic reviews.

I am not sure what should be done about OLC, but the response to its work, both from within the Department when secret OLC work later comes to light, and from the courts of the country when OLC opinions are presented for judicial scrutiny, is a signal that attention must be paid.

Your consideration of these views is greatly appreciated.

Sincerely,

Senator Sheldon Whitehouse

with congratulations and best regards

[52] *See Comm. on the Judiciary v. McGahn*, 415 F.Supp.3d 148 (D.D.C. 2019) (holding that a president's senior-level aide is not a president's "alter ego," as asserted by OLC, and did not qualify for absolute immunity from Congressional subpoenas seeking testimony); *Trump v. Vance*, 395 F.Supp.3d 283 (S.D.N.Y. 2019) (finding OLC's assertion of the president's absolute immunity from criminal process of any kind could be "far-reaching" and "potentially enabl[e] both the President and any accomplices to escape being brought to justice"); *Comm. on the Judiciary v. Miers*, 558 F.Supp.2d 53 (D.D.C. 2008) (holding that former White House counsel was not entitled to absolute or qualified immunity and must comply with subpoena to testify before House Judiciary Committee).

From: Gonzalez, Patricio (Finance)
Subject: Heads up - DOJ request
To: Gaeta, Joseph (OLA)
Cc: Goshorn, Daniel (Finance)
Sent: March 10, 2021 11:55 AM (UTC-05:00)
Attached: 082420 Wyden Letter to AG Barr RE Halkbank.pdf

Hi Joe – Hope the new gig is treating you well. Wanted to give you a heads up Chairman Wyden will be sending over a request letter soon (probably tomorrow) related to Halkbank. This will be a follow up on an issue he was pursuing with AG Barr last Congress (see attached letter from August) and will include a set of questions/doc requests.

If you have any questions, don't hesitate to let me know.

Patricio

United States Senate
COMMITTEE ON FINANCE
WASHINGTON, DC 20510–6200

August 24, 2020

The Honorable William Barr
Attorney General
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear Attorney General Barr,

As the Ranking Member of the Senate Finance Committee, I am writing to you concerning my ongoing investigation of the integrity of correspondent banking services and the application of U.S. economic sanctions, including the Department of Justice's prosecution of Turkish state-owned bank Halkbank and potential improper interference by President Trump in this matter.[1] Halkbank has been indicted in the United States as part of the largest ever scheme utilizing correspondent bank accounts to aid Iran in circumventing U.S. sanctions. Halkbank officials have admitted to conspiring to evade sanctions, and funnel Iranian oil profits back to the country through complex gold purchases disguised as money transfers.[2]

On February 3, 2020, I wrote to you requesting your assistance with my investigation. My request included specific questions about the troubling actions the Trump administration has taken with respect to Halkbank. On February 7, your Chief of Staff assured me that the Department of Justice would "work to respond to [my] letter in a timely manner."[3] In the intervening five months, I have not received any response to the specific requests for assistance in my letter or any update on the Department's work to respond to my requests. The Department's failure to cooperate with these reasonable requests for information related to ongoing investigations raises serious concerns about the Department's independence and willingness to engage with Congress in good faith in a manner that facilitates effective oversight.

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[1] *Wyden Launches Investigation Into Halkbank Scandal*, Press Release, Oct. 24, 2019; https://www.finance.senate.gov/ranking-members-news/wyden-launches-investigation-into-halkbank-scandal.
[2] *Gold dealer turned star witness details alleged bribes to senior Turkish official*, Washington Post, Nov. 29, 2017; https://www.washingtonpost.com/world/national-security/gold-dealer-turned-star-witness-details-alleged-bribes-to-senior-turkish-official/2017/11/29/271ebcf2-d52e-11e7-b62d-d9345ced896d_story.html.
[3] Letter from Mary Blanche Hankey to Hon. Ron Wyden (Feb. 7, 2020).

Subsequent to my first letter, former National Security Adviser John R. Bolton detailed concerns that President Trump was granting personal favors to the autocratic leader of Turkey, and Bolton reports that you shared his concerns about the appearance that President Trump's actions created.[4] In particular, Bolton asserts that President Trump promised Turkish President Recep Tayyip Erdogan that Trump would use his authority to halt any further enforcement actions against the bank, and that Trump consequently instructed Treasury Secretary Mnuchin to interfere in the matter.[5] Further, Bolton asserts that on more than one occasion the Department of Justice was aware of Secretary Mnuchin's efforts to halt the investigation and prosecution of Halkbank.[6] Finally, Bolton asserts that instead of "insulting" Turkish cabinet officials with individual sanctions, Trump misused the 1962 Trade Expansion Act to raise tariffs on Turkish steel and aluminum.[7]

A spokeswoman for you refuted early reports of these Administration interactions[8] as "gross mischaracterizations," noting in particularly that you never stated that you felt the "President's conversations with foreign leaders (were) improper."[9] However, reports of interference by President Trump are corroborated by the facts uncovered in my own investigation. In a November 20, 2019 letter to me, Treasury Department officials confirmed the following:

> As was publicly reported, when Prime Minister Erdogan raised concerns directly with President Trump in April 2019, the President referred the issue to the Executive Branch departments responsible by law for the investigation and enforcement of economic sanctions-the Treasury and DOJ.

Treasury officials went on to identify seven meetings held between Secretary Mnuchin and senior Turkish officials, despite the Secretary's admitted "integral" role in the enforcement of U.S. sanctions generally, and the prosecution of Halkbank specifically. Most concerning was an April 15, 2019 Oval Office meeting with President Trump, Turkish Finance Minister Berat Albayrak, President Erdogan's son-in-law, as well as President Trump's own son-in-law Jared Kushner, and Secretary Mnuchin. This was the second meeting Secretary Mnuchin held with Albayrak in 3 days, and appears to coincide with the admitted interference in the Halkbank prosecution by President Trump. Even more troubling, President Trump, Secretary Mnuchin,

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[4] JOHN BOLTON, THE ROOM WHERE IT HAPPENED 412 (2020) ("Barr said he was very worried about the appearances Trump was creating, especially his remarks on Halkbank to Erdogan in Buenos Aires at the G20 meeting, what he said to Xi Jinping on ZTE, and other exchanges").

[5] *Id.* at 177 ("Trump started by saying we were getting very close to a resolution on Halkbank. He had just spoken to Mnuchin and Pompeo, and said we would be dealing with Erdogan's great son-in-law (Turkey's Finance Minister) to get it off his shoulders. Erdogan was very grateful, speaking in English no less.")

[6] *Id.* at 170 ("Several times, Mnuchin was exuberant he had reached a deal with Turkey's Finance Minister. [. . .] In each case, the deal fell apart when Justice tanked it, which was why trying this route to get Brunson's release was never going to work.")

[7] *Id.* at 171.

[8] *Bolton Was Concerned That Trump Did Favors for Autocratic Leaders, Book Says*, New York Times, Jan. 27, 2020; https://www.nytimes.com/2020/01/27/us/politics/john-bolton-trump-book-barr.html.

[9] *Justice Department says Bolton 'grossly mischaracterizes' Barr's take on Trump's talks with Xi, Erdogan*, USA Today, Jan. 28, 2020; https://www.usatoday.com/story/news/politics/2020/01/28/john-bolton-book-william-barr-denies-he-shared-concerns-trump/4595133002/.

and Jared Kushner held this White House meeting despite the fact that Albayrak, along with President Erdogan, appear to be personally implicated in the Halkbank scheme.[10] These reports are part of a larger story highlighting President Trump's efforts to accommodate the intense pressure campaign by the Turkish government to get investigations into Halkbank dropped, including a high-priced lobbying effort by Ballard Partners on Turkey's behalf.[11] In 2017, President Trump reportedly asked Secretary of State Tillerson to pressure the Justice Department to drop the case against a co-conspirator in the Halkbank-assisted sanctions evasion schemes, Reza Zarrab, who was reported to have an office in Trump Tower Istanbul and was a client at the time of the President's attorney Rudy Giuliani.[12] In a 2015 interview, President Trump stated about Turkey, "I have a little conflict of interest because I have a major, major building in Istanbul."[13]

According to Treasury officials in a November 20, 2019 letter to me, President Trump assigned you to assist with President Erdogan's requests involving Halkbank, and that he relayed this to Erdogan during an April 2019 phone call. Around June of 2019, you also reportedly had a phone call with your Turkish counterpart, Abdulhamit Gul, where you discussed Turkey accepting a deferred prosecution agreement, and that a deal would need to be made with the U.S. attorney in Manhattan.[14]

Although Halkbank was eventually charged in the Southern District of New York in a six-count indictment related to the bank's participation in a multibillion-dollar scheme to evade U.S. sanction on Iran on October 15, 2019,[15] these charges came just days after the Turkish invasion

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[10] Federal prosecutors alleged the following in their indictment, "Though some at HALKBANK, the defendant, supported continuing the scheme, Halkbank General Manager-1 initially was reluctant to do so because of concern that Zarrab's arrest and notoriety would draw unnecessary attention to the scheme. At Zarrab's request, however, the then-Prime Minister of Turkey and his associates, including a relative of the then-Prime Minister who later held multiple Turkish cabinet positions, instructed HALKBANK to resume the scheme, and HALKBANK agreed." Erdogan was prime minister during the Halkbank scheme, and Albayrak then had been the Turkish Minister of Energy. *Turkish Bank Charged in Manhattan Federal Court for Its Participation in a Multibillion-dollar Iranian Sanctions Evasion Scheme*, Department of Justice Press Release, Oct. 15, 2019; https://www.justice.gov/opa/pr/turkish-bank-charged-manhattan-federal-court-its-participation-multibillion-dollar-iranian.

[11] *Trump-Erdogan Call Led to Lengthy Quest to Avoid Halkbank Trial*, Bloomberg, Oct. 16, 2019; https://www.bloomberg.com/news/articles/2019-10-16/trump-erdogan-call-led-to-lengthy-push-to-avoid-halkbank-trial.

[12] *Trump Urged Top Aide to Help Giuliana Client Facing DOJ Charges*, Bloomberg, Oct. 9, 2019; https://www.bloomberg.com/amp/news/articles/2019-10-09/trump-urged-top-aide-to-help-giuliani-client-facing-doj-charges; *Trump Tower: Dictators' Home Away From Home*, Daily Best, Sep. 30, 2015 Updated April, 14, 2017; https://www.thedailybeast.com/trump-tower-dictators-home-away-from-home.

[13] *Trump's Decision on Syria Crystalizes Questions About His Business – And His Presidency*, Washington Post, Oct. 7, 2019; https://www.washingtonpost.com/politics/2019/10/07/trumps-decision-syria-crystallizes-questions-about-his-business-his-presidency/

[14] *Trump-Erdogan Call Led to Lengthy Quest to Avoid Halkbank Trial*, Bloomberg, Oct. 16, 2019; https://www.bloomberg.com/news/articles/2019-10-16/trump-erdogan-call-led-to-lengthy-push-to-avoid-halkbank-trial.

[15] *Turkish Bank Charged in Manhattan Federal Court for Its Participation in a Multibillion-dollar Iranian Sanctions Evasion Scheme*, Department of Justice Press Release, Oct. 15, 2019; https://www.justice.gov/opa/pr/turkish-bank-charged-manhattan-federal-court-its-participation-multibillion-dollar-iranian.

of northern Syria and the resulting political backlash.[16] I am concerned that absent these unrelated actions by the Turkish government, the Administration's interference in favor of Turkey's Halkbank requests could have undermined years of effort by U.S. law enforcement, and may still do so.

My investigation seeks to ensure that the Trump Administration is properly enforcing our U.S. sanctions and trade laws. To assist this investigation I once again ask that you respond to the following:

1. Did President Trump, or did anyone at his direction, ever instruct or suggest you to take any action with regard to Halkbank, or any co-conspirators such as Reza Zarrab? If so, when and what were you asked to do? Did any such request raise any concerns about undue influence by President Trump in the investigation of the matter?

2. Did President Trump, or did anyone at his direction, attempt to interfere, intervene, or otherwise engage with the Justice Department's independent inquiry of the Halkbank scheme, or of any co-conspirators such as Reza Zarrab? If so, when and in what manner?

3. In a 2015 interview, President Trump stated about Turkey, "I have a little conflict of interest because I have a major, major building in Istanbul." Given his admitted conflict of interest, and the direct ties between Halkbank executives and Trump Towers Istanbul, do you feel it is appropriate for President to be communicating with the Department of Justice about this matter?

4. Did you ever discuss Halkbank with Abdulhamit Gul? If so, when did those conversations take place? Did you ever discuss the topic of a deferred prosecution agreement for Halkbank with Abdulhamit Gul? If so, when did those conversations take place? Did you ever mention or suggest to Abdulhamit Gul that Turkey discuss such an agreement with the U.S. Attorney for the Southern District of New York, or SDNY staff? Did you ever suggest or in any way offer the idea, to anyone, that Turkey take a deferred prosecution agreement for Halkbank?

5. Have you ever had meetings or conversations related to Halkbank with anyone at the Justice Department? If so, when did those take place? Have you been, in any way, involved with the Halkbank investigation? If so, describe the nature of your involvement.

6. Identify any meetings or conversations you or any other senior Justice Department officials have held with President Erdogan, Finance Minister Berat Albayrak, or any other senior Turkish officials since your confirmation, identify the participants in those conversations and meetings, and the nature of those discussions including whether or not they included Halkbank.

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[16] *Trump Defends Syria Decision Amid Republican Backlash*, CNN, Oct. 8, 2019; https://www.cnn.com/2019/10/07/politics/mitch-mcconnell-republican-response-syria-kurds/index.html.

7. Identify any meetings or conversations you or any other senior Justice Department officials have held with Ballard Partners or any other lobbyists on behalf of the Turkish government since your confirmation, identify the participants in those conversations and meetings, and the nature of those discussions including whether or not they included Halkbank.

8. Did you or any other senior Justice Department officials ever appeal directly to the Treasury Department, at any level, on behalf of President Trump concerning Turkey or the Turkish government?

9. According to a statement by the Department of Justice about the conversation between you and former National Security Advisor Bolton, "There was no discussion of 'personal favors' or 'undue influence' on investigations, nor did Attorney General Barr state that the President's conversations with foreign leaders (were) improper."[17] Do you feel it was improper for President Trump to meet Turkish President Erdogan in the Oval Office or to meet with other senior Turkish officials there, after they had been implicated by the prosecutors in Halkbank's sanctions evasion scheme?

10. Given the serious nature of the disclosures in the Treasury Department's response to my investigation and in recent reporting, will you commit to recusing yourself from any further involvement in the investigation and prosecution of Halkbank?

Please provide answers to these questions no later than September 14, 2020. Thank you for your attention to this matter.

Sincerely,

Ron Wyden
Ranking Member

[17] *Bolton Was Concerned That Trump Did Favors for Autocratic Leaders, Book Says*, New York Times (June 17, 2020); https://www.nytimes.com/2020/01/27/us/politics/john-bolton-trump-book-barr.html.

From: Gaeta, Joseph (OLA)
Subject: FW: Letters from Sen. Blumenthal
To: Stoopler, David (Judiciary-Dem); Miles, Adam (OIG)
Cc: Greenfeld, Helaine A. (OLA)
Sent: February 20, 2021 1:36 PM (UTC-05:00)
Attached: 2021.02.19 - Letter re Nassar IG Report - Final.pdf

David,

Copying your letter to Adam Miles at OIG.

RICHARD BLUMENTHAL
CONNECTICUT

COMMITTEES:
AGING
ARMED SERVICES
COMMERCE, SCIENCE, AND TRANSPORTATION
JUDICIARY
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February 19, 2020

Monty Wilkinson
Acting Attorney General
Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20530

Dear Acting Attorney General Wilkinson:

The Inspector General of the Department of Justice reportedly opened an investigation of the FBI's potential mishandling of reports of Larry Nassar's sexual abuse on or about September 2018, but has yet to release a final report over two years later.[1] The substance of the investigation is serious: seventeen months elapsed between when USA Gymnastics reported Nassar to the FBI and his arrest in December of 2016.[2] It has been reported that during that extended period, Nassar abused forty additional girls.[3] In June 2020, nearly eight months ago, public reporting indicated that the lead investigator had characterized the matter as a "criminal investigation."[4] That reporting also noted that the investigation was likely essentially finished, as "[t]ypically . . . a referral to the Public Integrity Section [of the Department of Justice] would be made at the end of an administrative inquiry when a report was complete."[5] This suggests that at least one pending criminal referral may be impeding the release of the Inspector General's report.

I urge you to ensure the prompt resolution of any outstanding issues and the timely release of this report. The survivors of Larry Nassar have stressed the need for this work to be concluded quickly to avoid the expiration of statutes of limitations, and to ensure that those who are guilty

[1] Michael Balsamo, *Inspector General Reviews FBI Handling of Nassar Allegations*, AP (Sep. 5, 2018), https://apnews.com/article/877530b4fc5442ae907f7113bf008cd7.
[2] Nancy Armour, *U.S. Senator Asks Justice Department to Release Investigation into FBI Delays in Larry Nassar Report*, USA Today (June 3, 2020), https://www.usatoday.com/story/sports/olympics/2020/06/03/senator-wants-justice-department-report-fbi-delays-larry-nassar-case/3138840001/.
[3] *Id.*
[4] Sarah Fitzpatrick & Lisa Cavazuti, *More Than 120 Larry Nassar Victims Call for DOJ to Release Report on FBI's Handling of Case*, NBC News (June 17, 2020), https://www.nbcnews.com/news/sports/more-120-larry-nassar-victims-call-doj-release-report-fbi-n1231211.
[5] *Id.*

RICHARD BLUMENTHAL
CONNECTICUT

COMMITTEES:

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http://blumenthal.senate.gov

are brought to justice.[6] They have also noted that—independent of any prosecutions—simply having the facts come out is important for their healing.[7]

I hope that you will make this matter a priority.

Sincerely,

cc:
Judge Merrick B. Garland, nominee – Attorney General, Department of Justice
Michael E. Horowitz, Inspector General, Office of the Inspector General, Department of Justice

[6] Survivors of Larry Nassar, Letter RE: Public Release of OIG Report on FBI Actions in the Larry Nassar Case (June 17, 2020), https://assets.documentcloud.org/documents/6949719/Nassar-5-Year-Anniversary-OIG-Letter-5-27-20.pdf.
[7] *Id.*

From: Holmes, Lee (Judiciary-Rep)
Subject: Letter to Acting AG
To: Greenfeld, Helaine A. (OLA); Gaeta, Joseph (OLA)
Cc: Nikas, Katherine (Judiciary-Rep); Brest, Phillip (Judiciary-Dem); Davis, Kolan (Finance); Zogby, Joseph (Judiciary-Dem)
Sent: February 2, 2021 1:00 PM (UTC-05:00)
Attached: LOG to Acting AG Wilkinson re Protecting Ongoing Probes--FINAL.pdf

Helaine, Joe—I've attached a letter from Chairman Graham to the Acting Attorney General. Thank you.

Lee

LINDSEY O. GRAHAM
SOUTH CAROLINA

290 RUSSELL SENATE OFFICE BUILDING
WASHINGTON, DC 20510
(202) 224-5972

UNITED STATES SENATE

February 2, 2021

Mr. Monty Wilkinson
Acting Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Dear Acting Attorney General Wilkinson,

For the duration of Special Counsel Mueller's investigation into Russian interference in the 2016 election, I rejected calls to end that investigation. I was even the primary sponsor of bipartisan legislation, favorably reported out of the Senate Judiciary Committee, to protect Special Counsel Mueller's probe from being terminated. Special Counsel Mueller of course found no evidence of collusion between the Trump campaign and Russia, but it was important for public trust that the probe be completed without interference.

We now find the shoe on the other foot. We have two properly predicated, ongoing investigations Democrats would rather go away: Special Counsel John Durham's investigation of the Crossfire Hurricane investigation and the investigation by the Delaware U.S. Attorney's Office into Hunter Biden. Special Counsel Durham's probe has already yielded a felony conviction.

I am writing to respectfully request that you refrain from interfering in any way with either investigation while the Senate processes the nomination of Judge Merrick Garland to the position of Attorney General. The American public deserve the truth and must know that these investigations will continue without political interference.

Thank you in advance for your prompt attention to this request.

Sincerely,

Lindsey O. Graham
Chairman
Senate Judiciary Committee

cc: The Honorable Dianne Feinstein

From: Smirniotopoulos, Amalea (Judiciary-Dem)
Subject: Court Opinions on OLC
To: (b)(6) Lisa Monaco
Cc: Prasanna, Sandeep A. (OLA); Gaeta, Joseph (OLA); Aronson, Alex (Judiciary-Dem)
Sent: January 29, 2021 3:58 PM (UTC-05:00)
Attached: Committee on the Judiciary v. Miers, 558_F.Supp.2d_53.pdf, Trump v. Vance, 395_F.Supp.3d_283.pdf, Committee on the Judiciary v. McGahn, 415_F.Supp.3d_148.pdf

Hi Ms. Monaco—

It was a pleasure meeting you during your courtesy call with Sen. Whitehouse this morning. Attached here are the two district court decisions that Sen. Whitehouse referenced this morning (*Committee on the Judiciary v. McGahn* and *Trump v. Vance*), as well as an earlier case which takes a similarly dim view of OLC opinions (*Committee on the Judiciary v. Miers*).

Best,
Amalea

violation is found, the proper remedy would be to require AAN to disclose reporting information from post-June 2011."). Thus, there is nothing for the Circuit to review even if the Court certified the question for appeal. See Ray v. Am. Nat'l Red Cross, 921 F.2d 324, 325 (D.C. Cir. 1990) ("The basic requirement of an interlocutory appeal under section 1292(b) is that the district court have made an order. The statute does not contemplate that a district judge may simply certify a question without first deciding it.") (internal quotation omitted). If AAN succeeds on the merits, this point will become moot; and if it fails, it will have the opportunity to explain why the Court's initial inclinations are wrong. It would therefore be premature for the Circuit to consider remedies for potential FECA violations that have yet to be established.

III. Conclusion

For the foregoing reasons, it is hereby

ORDERED that [ECF No. 33] Defendant's Motion for Certification for Interlocutory Appeal is DENIED. It is further

ORDERED that [ECF No. 33] Defendant's Motion for a Stay Pending Interlocutory Appeal is DENIED as moot.

SO ORDERED.

COMMITTEE ON the JUDICIARY, UNITED STATES HOUSE OF REPRESENTATIVES, Plaintiff,

v.

Donald F. MCGAHN II, Defendant.

Civ. No. 19-cv-2379 (KBJ)

United States District Court, District of Columbia.

Signed November 25, 2019

Background: The House Committee on the Judiciary brought action, seeking declaratory judgment that former White House counsel was required to comply with a subpoena and appear before the Committee to testify in connection with Committee's investigation of interference into the 2016 presidential election and the Special Counsel's findings of fact concerning potential obstruction of justice by the President. Parties cross-moved for summary judgment.

Holdings: The District Court, Ketanji Brown Jackson, J., held that:

(1) it possessed subject-matter jurisdiction over action;

(2) dispute as to whether former White House counsel was absolutely immune from compliance with subpoena was amenable to judicial resolution and, thus, justiciable;

(3) separation of powers principles did not preclude judicial resolution of dispute;

(4) Committee possessed Article III standing to seek judicial enforcement of subpoena; and

(5) former White House counsel was not entitled to absolute immunity precluding his forced compliance with Committee's subpoena.

Committee's motion granted.

1. Constitutional Law ⚿963

The question of whether or not the Constitution empowers one of the branches of government to act in a certain way is a pure question of law.

2. Federal Civil Procedure ⚿2534

A court reviewing a question of law on cross-motions for summary judgment decides the legal issues presented and grants summary judgment to the party who, based on the court's conclusions, is entitled to judgment as a matter of law. Fed. R. Civ. P. 56.

3. Courts ⚿89

The doctrine of "stare decisis" provides that when a point or principle of law has been once officially decided or settled by the ruling of a competent court in a case in which it is directly and necessarily involved, that legal principle will no longer be considered as open to examination or to a new ruling by the same tribunal, or by those which are bound to follow its adjudications, unless it be for urgent reasons and in exceptional cases.

See publication Words and Phrases for other judicial constructions and definitions.

4. Courts ⚿89

Where a prior on-point precedent is not binding, the stare decisis doctrine does not compel a court to follow a prior decision that it believes erroneous; in that circumstance the later court should confront the prior case and correct the error.

5. Courts ⚿89

While the stare decisis doctrine is not an inexorable command, it generally is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.

6. Witnesses ⚿9, 16

One who has the authority to issue a subpoena possesses the right to obligate another person to provide testimony and/or documents; in other words, the issuer can mandate the performance of another with respect to the production of such information. Fed. R. Civ. P. 45.

7. Witnesses ⚿9

Because subpoenas operate by compulsion, an authorized issuer of a valid subpoena has the right to enforce the production obligation that a subpoena creates, consistent with the law. Fed. R. Civ. P. 45.

8. Witnesses ⚿8

The recipient of a valid subpoena has a presumptive duty to perform in accordance with the subpoena's requirements. Fed. R. Civ. P. 45.

9. Witnesses ⚿8, 9

A valid subpoena ordinarily gives rise to a legally enforceable duty to perform in the requested manner, and a court order is the well-established mechanism for the enforcement of that obligation; if the court finds that the recipient has breached the duty to perform that the subpoena creates, it issues an order that compels the recipient to comply with the subpoena. Fed. R. Civ. P. 45.

10. Federal Courts ⚿2323

District Court possessed subject-matter jurisdiction over action brought by House Committee on the Judiciary, seeking to enforce compliance with duly issued congressional subpoena issued to former White House counsel, as House's subpoena power implicitly derived from Article I of the Constitution. U.S. Const. art. 1; 28 U.S.C.A. § 1331; Fed. R. Civ. P. 45.

11. Federal Courts ⚿2211, 2321

Federal courts have statutory authority to entertain legal claims that arise under the Constitution and the laws of the United States. 28 U.S.C.A. § 1331.

12. Statutes ⚿1214

Redundancies across statutes are not unusual events in drafting, and in such circumstances, a court must give effect to both provisions provided there is no positive repugnancy between the two laws.

13. Federal Courts ⚿2145

Dispute as to whether former White House counsel was absolutely immune from compliance with subpoena issued by House Committee on the Judiciary was amenable to judicial resolution and, thus, justiciable. U.S.C.A. Const. Art. 3, § 1 et seq.; 28 U.S.C.A. § 1331.

14. Federal Courts ⚿2011, 2051

Generally, federal courts assess their subject-matter jurisdiction over disputes on the basis of the claims that are presented, not on the identity of the parties. 28 U.S.C.A. § 1331.

15. Constitutional Law ⚿2550
United States ⚿248

Separation of powers principles did not preclude judicial resolution of dispute as to whether former White House counsel was absolutely immune from compliance with subpoena issued by House Committee on the Judiciary; resolution of impasse, a legal dispute, was required so that other branches of government could properly function. U.S.C.A. Const. Art. 3, § 1 et seq.; 28 U.S.C.A. § 1331.

16. United States ⚿231(3)
Witnesses ⚿9

Committees of the House of Representatives have the implied right under Article I to enforce subpoenas in federal court when Executive branch officials do not respond as required. U.S. Const. art. 1; Fed. R. Civ. P. 45.

17. Federal Civil Procedure ⚿103.2
Federal Courts ⚿2101

Because Article III limits the constitutional role of the federal judiciary to resolving cases and controversies, a showing of standing is an essential and unchanging predicate to any exercise of jurisdiction. U.S.C.A. Const. Art. 3, § 1 et seq.

18. Federal Civil Procedure ⚿103.2

One of the requirements to demonstrate Article III standing is that the plaintiff must have suffered an injury in fact, which is an invasion of a legally protected interest which is: (1) concrete and particularized; and (2) actual or imminent, not conjectural or hypothetical. U.S.C.A. Const. Art. 3, § 1 et seq.

19. United States ⚿248
Witnesses ⚿9

House Committee on the Judiciary sustained concrete and particularized injury in fact traceable to former White House counsel's failure, at President's direction, to comply with subpoena for his testimony and, thus, possessed Article III standing to seek judicial enforcement of subpoena; subpoena was issued pursuant to Committee's authority under House Rules, Committee had opened an investigation into potential misconduct by President and his associates, and it had not been able to complete its mission of investigating facts and circumstances chronicled in Special Counsel report due to failure of former White House counsel, the most important fact witness in investigation, to appear before Committee. U.S.C.A. Const. Art. 1, Art. 3, § 1 et seq.

20. United States ⚿231(3)

As a committee of Congress, the House Committee on the Judiciary has

broad power under Article I to conduct its investigations however it sees fit, so long as it does not impinge upon the constitutional rights of those it undertakes to question. U.S. Const. art. 1.

21. Constitutional Law ⚿2455

The judiciary is clearly discernible as the primary means through which constitutional rights may be enforced.

22. Declaratory Judgment ⚿61, 272, 312.1

The elements for seeking a declaration of rights under the Declaratory Judgment Act (DJA) are: (1) plaintiff has established a case of actual controversy; (2) it has invoked an independent basis for federal jurisdiction; and (3) it has filed an appropriate pleading. 28 U.S.C.A. § 2201(a).

23. United States ⚿231(3), 248
Witnesses ⚿9

If a duly authorized committee of Congress issues a valid legislative subpoena to a current or former senior-level presidential aide, the law requires the aide to appear as directed, and assert any legal applicable privilege in response to questions asked of him or her, as appropriate.

24. United States ⚿248
Witnesses ⚿5

Former White House counsel was not entitled to absolute immunity precluding his forced compliance with a House Committee on the Judiciary subpoena requiring him to appear before the Committee to testify in connection with Committee's investigation of interference into the 2016 presidential election, and the Special Counsel's findings of fact concerning potential obstruction of justice by the President.

25. United States ⚿220(4, 5)

The Constitution's Speech and Debate Clause mandates that members of the House and Senate and their aides may not be made to answer, either in terms of questions or in terms of defense from prosecution, for the events that occurred as part of the legislative process. U.S. Const. art. 1, § 6, cl. 1.

Seth Wayne, Annie L. Owens, Joshua Geltzer, Institute for Constitutional Advocacy and Protection, Adam Anderson Grogg, Josephine T. Morse, Megan Barbero, Sarah Edith Clouse, Todd Barry Tatelman, Douglas N. Letter, U.S. House of Representatives Office of General Counsel, Washington, DC, for Plaintiff.

Elizabeth J. Shapiro, James J. Gilligan, Steven A. Myers, Andrew Marshall Bernie, Cristen Cori Handley, James Mahoney Burnham, Serena Maya Schulz Orloff, U.S. Department of Justice, Washington, DC, for Defendant.

MEMORANDUM OPINION

KETANJI BROWN JACKSON, United States District Judge

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I. INTRODUCTION

In 2008, in the context of a dispute over whether the Committee on the Judiciary of the House of Representatives ("the Judiciary Committee") had the power to compel former White House Counsel Harriet Miers and then-White House Chief of Staff Joshua Bolten to testify and produce documents in connection with a congressional investigation, the Department of Justice ("DOJ") made three legal contentions of "extraordinary constitutional significance." *Comm. on the Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 55 (D.D.C. 2008) (Bates, J.). First, DOJ argued that a duly authorized committee of Congress acting on behalf of the House of Representatives cannot invoke judicial

process to compel the appearance of senior-level aides of the President for the purpose of receiving sworn testimony. *See id.* at 66–67, 78. Second, DOJ maintained that a President can demand that his aides (both current and former) ignore a subpoena that Congress issues, on the basis of alleged absolute testimonial immunity. *See id.* at 100. And, third, DOJ asserted that the federal courts cannot exercise subject-matter jurisdiction over any such subpoena-related stalemate between the Legislature and the Executive branch, on separation of powers grounds. *See id.* at 72–73, 93–94. The district court that considered these propositions rejected each one in a lengthy opinion that thoroughly explained why the federal courts have subject-matter jurisdiction over such disputes, *see id.* at 64–65; why the Judiciary Committee had standing to sue and a cause of action to proceed in federal court, *see id.* at 65–94; and why the claim that a President's senior-level aides have absolute testimonial immunity is meritless, *see id.* at 99–107. Most importantly, the *Miers* opinion also persuasively demonstrated that DOJ's conception of the limited power of both Congress and the federal courts relative to the expansive authority of the President—which, purportedly, includes the power to shield himself and his aides from being questioned about any aspect of their present or former White House work—is not grounded in the Constitution or in any other federal law. *See id.* at 99, 106–07; *cf. Comm. on Oversight & Gov't Reform v. Holder*, 979 F. Supp. 2d 1, 10–11 (D.D.C. 2013).

The more things change, the more they stay the same. On May 20, 2019, President Donald J. Trump directed former White House Counsel Donald F. McGahn II to decline to appear before the Judiciary Committee in response to a subpoena that the Committee had issued to McGahn in connection with its investigation of Russia's interference into the 2016 presidential election and the Special Counsel's findings of fact concerning potential obstruction of justice by the President. (*See* Letter from Pat A. Cipollone, Counsel to the President, to William A. Burck (May 20, 2019), Ex. E to Decl. of Michael M. Purpura ("Purpura Decl."), ECF No. 32-3, at 46–47.)[1] Months of negotiations ensued, which produced no testimony from McGahn, and on August 7, 2019, the Judiciary Committee filed the instant lawsuit. Invoking Article I of the U.S. Constitution, the Judiciary Committee implores this Court to "[d]eclare that McGahn's refusal to appear before the Committee in response to the subpoena issued to him was without legal justification" (Compl., ECF No. 1, at 53), and it also seeks an "injunction ordering McGahn to appear and testify forthwith before the Committee" (*id.*).

The Judiciary Committee and DOJ (which is representing McGahn in the instant legal action) have now filed cross-motions for summary judgment, which are before this Court at present. (*See* Pl.'s Mot. for Prelim. Inj. or, in the alternative, for Expedited Partial Summ. J. ("Pl.'s Mot."), ECF No. 22; Def.'s Mot. for Summ. J. ("Def.'s Mot."), ECF No. 32.) In its motion, the Judiciary Committee reiterates the basic contention that, having received a subpoena from a duly authorized committee of Congress exercising its investigative powers under Article I of the Constitution, "McGahn is legally obligated to testify" (Mem. in Supp. of Pl.'s Mot. ("Pl.'s Mem."), ECF No. 22-1, at 14), and "has no valid interest in defying the Committee's subpoena" (*id.* at 54). In response, DOJ renews its (previously unsuccessful)

1. Page number citations to the documents that the parties have filed refer to those that the Court's electronic case filing system automatically assigns.

threshold objections to the standing and right of the Judiciary Committee to seek to enforce its subpoenas to senior-level presidential aides in federal court, and it also robustly denies that federal courts have the authority to exercise subject-matter jurisdiction over subpoena-enforcement claims brought by House committees with respect to such Executive branch officials. (*See* Def.'s Mot. at 32–33, 43, 53); *see also Miers*, 558 F. Supp. 2d at 65–94. DOJ further insists that the Judiciary Committee's claim that McGahn is legally obligated to testify fails on its merits, primarily because DOJ's Office of Legal Counsel ("OLC") has long maintained that present and former senior-level aides to the President, such as McGahn, are absolutely immune from being compelled to testify before Congress if the President orders them not to do so. (*See* Def.'s Mot. at 60–74.)

For the reasons explained in this Memorandum Opinion, as well as those laid out in *Miers*, the Judiciary Committee's motion for partial summary judgment is **GRANTED**, and DOJ's cross-motion for summary judgment is **DENIED**. In short, this Court agrees with Judge Bates's conclusion that federal courts have subject-matter jurisdiction to resolve legal disputes that arise between the Legislature and the Executive branch concerning the scope of each branch's subpoena-related rights and duties, under section 1331 of Title 28 of the United States Code and the Constitution. *See Miers*, 558 F. Supp. 2d at 64–65. Jurisdiction exists because the Judiciary Committee's claim presents a legal question, and it is "emphatically" the role of the Judiciary to say what the law is. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803). It also plainly advances constitutional separation-of-powers principles, rather than subverts them, when a federal court decides the question of whether a legislative subpoena that a duly authorized committee of the House of Representatives has issued to a senior-level aide of the President is valid and enforceable, or, alternatively, is subject to the President's invocation of absolute testimonial immunity. Furthermore, *Miers* was correct to conclude that, given the indisputable Article I power of the House of Representatives to conduct investigations of potential abuses of power and subpoena witnesses to testify at hearings concerning such investigations, the Judiciary Committee has both standing and a cause of action to file an enforcement lawsuit in federal court if the Executive branch blocks a current or former presidential aides' performance of his duty to respond to a legislative subpoena. *See id.* at 65–75, 78–94.

DOJ's arguments to the contrary are rooted in "the Executive's interest in 'autonomy[,]' " and, therefore, "rest[ ] upon a discredited notion of executive power and privilege." *Id.* at 103. Indeed, when DOJ insists that Presidents can lawfully prevent their senior-level aides from responding to compelled congressional process and that neither a federal court nor Congress has the power to do anything about it, DOJ promotes a conception of separation-of-powers principles that gets these constitutional commands exactly backwards. In reality, it is a core tenet of this Nation's founding that the powers of a monarch must be split between the branches of the government to prevent tyranny. *See* The Federalist No. 51 (James Madison); *see also Buckley v. Valeo*, 424 U.S. 1, 120, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). Thus, when presented with a case or controversy, it is the Judiciary's duty under the Constitution to interpret the law and to declare government overreaches unlawful. Similarly, the House of Representatives has the constitutionally vested responsibility to conduct investigations of suspected abuses of power within the government,

and to act to curb those improprieties, if required. Accordingly, DOJ's conceptual claim to unreviewable absolute testimonial immunity on separation-of-powers grounds—essentially, that the Constitution's scheme countenances unassailable Executive branch authority—is baseless, and as such, cannot be sustained.

During the hearing that this Court held regarding the parties' cross-motions for summary judgment, the Court asked DOJ's counsel whether its absolute immunity assertion with respect to McGahn was somehow different than the absolute immunity that former White House Counsel Harriet Miers had claimed, or whether it was DOJ's position that the *Miers* case was simply wrong to conclude that absolute testimonial immunity is not an available legal basis for thwarting compelled congressional process with respect to senior-level presidential aides. Counsel answered "both." (Hr'g Tr., ECF No. 44, at 31:5–10.) Upon review of the motions and the relevant law, however, it is clear to this Court that the correct response to its inquiry is "neither." That is, the United States District Court for the District of Columbia has seen these same facts and these same legal arguments before, and DOJ has done little to persuade this Court that the case should turn out differently in the end. Instead, this Court concurs with the thrust of *Miers*'s conclusion that, whatever the scope of the President's executive privilege with respect to the information that Congress seeks to compel, and whatever the merits of DOJ's assertion that senior-level aides are the President's "alter egos" for the purpose of invoking an immunity, DOJ has failed to bridge the yawning gap between a presidential aide's right to withhold privileged information in the context of his or her compelled congressional testimony (which no one disputes), and the President's purported power to direct such aides to refuse to show up and be questioned *at all* (which appears only in a string of OLC opinions that do not themselves constitute legal precedents and are manifestly inconsistent with the constitutional jurisprudence of the Supreme Court and the D.C. Circuit in many respects).

Thus—to be crystal clear—what is at issue in this case is solely whether senior-level presidential aides, such as McGahn, are legally required to respond to a subpoena that a committee of Congress has issued, by appearing before the committee for testimony despite any presidential directive prohibiting such a response. The Court distinguishes this issue from the very different question of whether the specific information that high-level presidential aides may be asked to provide in the context of such questioning can be withheld from the committee on the basis of a valid privilege. In other words, "the Court only resolves, and again rejects, the claim by the Executive to absolute immunity from compelled congressional process for senior presidential aides." *Miers*, 558 F. Supp. 2d at 56; *see also id.* (noting that "[t]he specific claims of executive privilege that [a subpoenaed presidential aide] may assert are not addressed—and the Court expresses no view on such claims"). And in reaching this conclusion, "[t]he Court holds only that [McGahn] (and other senior presidential advisors) do not have absolute immunity from compelled congressional process in the context of this particular subpoena dispute." *Id.* at 105–06. Accordingly, just as with Harriet Miers before him, Donald McGahn "must appear before the Committee to provide testimony, and invoke executive privilege where appropriate." *Id.* at 106.

II. BACKGROUND

A. Factual Background

The material facts that underlie this lawsuit are not in dispute. On March 4, 2019,

the Judiciary Committee opened an investigation into allegations that President Trump and his associates had engaged in various forms of misconduct during the lead up to the 2016 presidential election and in the years since. (*See* Pl.'s Stmt. of Material Facts Not in Dispute ("Pl.'s Stmt. of Facts"), ECF No. 22-4, ¶ 75 (citing Press Release, H. Comm. on the Judiciary, *House Judiciary Committee Unveils Investigation Into Threats Against the Rule of Law* (Mar. 4, 2019)); *see also* H.R. Rep. No. 116-105, at 13 (2019) (announcing an investigation into "possible malfeasance, abuse of power, corruption, obstruction of justice, or other misconduct on the part of the President or other members of his Administration").)[2] In its complaint, the Judiciary Committee alleges that one of the driving forces behind its investigation is the separate investigation that Special Counsel Robert S. Mueller III conducted between 2017 and 2019 regarding alleged Russian interference in the 2016 presidential election, the results of which are memorialized in a 448-page report that the Special Counsel's Office issued on March 22, 2019. (*See* Compl., ECF No. 1, ¶¶ 1–3 (citing Robert S. Mueller III, *Report On The Investigation Into Russian Interference In The 2016 Presidential Election* (March 2019) ("Mueller Report").) In the complaint, the Judiciary Committee invokes the Mueller Report when describing the purposes of its investigation, which allegedly include determining "whether the conduct uncovered may warrant amending or creating new federal authorities, including among other things, relating to election security, campaign finance, misuse of electronic data, and the types of obstructive conduct that the Mueller Report describes"; and "whether any of the conduct described in the Special Counsel's Report warrants the Committee in taking any further steps under Congress' Article I powers . . . includ[ing] whether to approve articles of impeachment with respect to the President or any other Administration official." (Compl. ¶ 61 (quoting H.R. Rep. No. 116-105, at 13 (internal quotation marks omitted)).)

The Special Counsel's investigation and findings have been summarized elsewhere. *See, e.g.*, *In re Application of Comm. on Judiciary, U.S. House of Representatives, for an Order Authorizing Release of Certain Grand Jury Materials*, No. 19-gj-48, 414 F.Supp.3d 129, 138–45, 2019 WL 5485221, at *2–7 (D.D.C. Oct. 25, 2019). In any event, this Court need not detail them here. It suffices to note that investigators from the Special Counsel's office interviewed McGahn on several separate occasions—the Mueller Report indicates that the interviews with McGahn took place on at least five different dates (*see* Compl. ¶ 94)—and it is also noteworthy that McGahn's statements to those investigators are specifically mentioned in the Mueller Report multiple times and in connection with various topics, including the resignation of National Security Advisor Michael Flynn (*see id.* ¶ 35); the termination of FBI Director James Comey (*see id.* at 65–69); the decision by Attorney General Jefferson B. Sessions III to recuse himself from overseeing the Special Counsel's investigation (*see id.* ¶ 36); and President Trump's alleged attempts to remove Special Counsel Mueller (*see id.* ¶ 35). Following the release of the Mueller Report, President Trump made a number of comments in which he appeared to call into question the veracity of what McGahn

2. This investigation pre-dates the formal impeachment inquiry that the Speaker of the House announced on September 24, 2019. *See* Press Release, Speaker Nancy Pelosi, *Pelosi Remarks Announcing Impeachment Inquiry* (Sept. 24, 2019), https://www.speaker.gov/newsroom/92419-0.

had told the Special Counsel. (*See* Pl.'s Stmt. of Facts ¶¶ 70–74 (citations omitted).)

On March 4, 2019, in conjunction with the Judiciary Committee's investigation, Jerrold Nadler, the Chairman of the Judiciary Committee, sent a letter to McGahn asking that he voluntarily provide the Committee with certain documents delineated in an attachment to his letter. (*See* Letter from Jerrold Nadler, Chairman H. Comm. on the Judiciary, to Donald F. McGahn II (Mar. 4, 2019), Ex. R to Decl. of Todd B. Tatelman ("Tatelman Decl."), ECF No. 22-3.) In response to this request, McGahn's private attorney, William Burck, sent a letter to Chairman Nadler on March 18, 2019, indicating that Burck had forwarded the document request to the White House and to the Trump Campaign, because those entities "are the appropriate authorities to decide the scope of access to these documents, including whether a claim of executive, attorney-client and/or attorney work product privilege would protect such information from disclosure." (Letter from William A. Burck to Jerrold Nadler, Chairman H. Comm. on the Judiciary (Mar. 18, 2019), Ex. S to Compl., ECF No. 1-19.) When the Judiciary Committee had not received a response to its voluntary document request as of April 22, 2019, it issued a subpoena *ad testificandum* to McGahn (*see* Subpoena to Donald F. McGahn II ("Subpoena"), Ex. U to Tatelman Decl., ECF No. 22-3 at 497–508), pursuant to a resolution that the Committee had adopted on April 3, 2019, authorizing the issuance of subpoenas in conjunction with its investigation (*see* Pl.'s Stmt. of Facts ¶ 84). The subpoena instructed McGahn to produce documents pertaining to 36 specific topics, including the FBI's investigation of Michael Flynn, the termination of James Comey, Jeff Sessions's recusal decision, and the Special Counsel's investigation, by no later than May 7, 2019 (*see* Subpoena at 497, 499–501), and it also called for McGahn to appear to testify before the Judiciary Committee on May 21, 2019 (*id.* at 497).

On May 7, 2019, White House Counsel Pat Cipollone sent a letter to Burck in which he relayed instructions to McGahn from the Acting Chief of Staff to the President, Mick Mulvaney. (*See* Letter from Pat A. Cipollone, Counsel to the President, to William A. Burck (May 7, 2019), Ex. C to Purpura Decl., ECF No. 32-3, at 30.) The letter explained that McGahn was "not to produce White House records in response to the Committee's April 22 subpoena" on the grounds that the requested records "remain legally protected from disclosure under longstanding constitutional principles, because they implicate significant Executive Branch confidentiality interests and executive privilege." (*Id.*) Cipollone contemporaneously sent Judiciary Committee Chairman Nadler a letter making the same points about the protected nature of the documents, and informing him of the instructions that the White House had provided to McGahn. (*See* Letter from Pat A. Cipollone, Counsel to the President, to Jerrold Nadler, Chairman H. Comm. on the Judiciary (May 7, 2019), Ex. C to Purpura Decl., ECF No. 32-3, at 31.) Cipollone's letter to Nadler indicated that the White House Counsel's Office would be making the decision as to whether or not McGahn would respond to the Committee's subpoena. (*See id.* (asserting that the White House Counsel's Office "will respond to the Committee concerning its interest in the records").)

On that same day, Chairman Nadler sent a letter to Burck in which he emphasized that, absent a court order directing otherwise, McGahn must appear before the Committee and testify on May 21, 2019, or the Committee would hold him in contempt. (*See* Letter from Jerrold Na-

dler, Chairman H. Comm. on the Judiciary, to William A. Burck (May 7, 2019), Ex. II to Compl., ECF No. 1-35, at 3.) Chairman Nadler followed up on May 17, 2019, with a letter to McGahn, via his counsel, reemphasizing that it was the Committee's expectation that he appear, and explaining that, because the Committee intended "to focus on the very topics covered in the Special Counsel's Report ... there can be no valid assertion of executive privilege given that President Trump declined to assert any privilege over Mr. McGahn's testimony, or over any portion of the Report itself." (*See* Letter from Jerrold Nadler, Chairman H. Comm. on the Judiciary, to Donald F. McGahn II (May 17, 2019), Ex. W to Compl., ECF No. 1-23, at 2 (internal quotation marks and citation omitted).) Nadler closed this letter by stating that "even if the President ... invokes executive privilege over your testimony, and you decide to abide by that improper assertion, you are still required under the law and the penalty of contempt to 'appear before the Committee to provide testimony, and invoke executive privilege where appropriate.' " (*Id.* at 2 (quoting *Miers*, 558 F. Supp. 2d at 106).)

On May 20, 2019, the day before McGahn was to testify before the Committee, Cipollone sent a letter to Burck stating that President Trump was instructing McGahn not to appear at the scheduled hearing. (*See* Letter from Pat A. Cipollone, Counsel to the President, to William A. Burck (May 20, 2019), Ex. E to Purpura Decl., ECF No. 32-3, at 46–47.) Cipollone attached to his letter a memorandum from the Office of Legal Counsel, which opines that, as a former "senior advisor" to the President, McGahn is protected by "testimonial immunity" and that "Congress may not constitutionally compel [him] to testify about [his] official duties." (*Id.* at 48.)[3] Cipollone also sent a letter to Chairman Nadler informing him of the instructions that had been provided to McGahn. (*See* Letter from Pat A. Cipollone, Counsel to the President, to Jerrold Nadler, Chairman H. Comm. on the Judiciary (May 20, 2019), Ex. 2 to Decl. of Barry H. Berke ("Berke Decl."), ECF No. 22-2, at 21–22.) That same day, Burck sent a letter to Chairman Nadler informing him of this development and stating that, as a result of the President's instructions, McGahn was "facing contradictory instructions from two co-equal branches of government." (Letter from William A. Burck to Jerrold Nadler, Chairman H. Comm. on the Judiciary (May 20, 2019), Ex. X to Tatelman Decl., ECF No. 22-3, at 510.) Burck further explained that he found the OLC's opinion "persuasive" and that, "[u]nder these circumstances, and also conscious of the duties [McGahn], as an attorney, owes to his former client, Mr. McGahn must decline to appear at the hearing tomorrow." (*Id.*) Burck concluded his letter by stating that McGahn "remains obligated to maintain the status quo and respect the President's instruction[,]" but that if the Committee and Executive were to reach an accommodation, McGahn "would of course comply with that accommodation." (*Id.* at 511.)

Nadler responded immediately to McGahn, via his counsel, with a letter in which he described President Trump's command to McGahn not to appear as "unprecedented" and insufficient "to excuse your obligation to appear before the Committee." (Letter from Jerrold Nadler, Chairman H. Comm. on the Judiciary, to Donald F. McGahn II (May 20, 2019), Ex.

3. This memorandum would later be published as an OLC slip opinion. *See Testimonial Immunity Before Cong. of the Former Counsel to the President,* 43 Op. O.L.C. ——, Slip. Op. (May 20, 2019) ("McGahn OLC Mem.").

Z to Tatelman Decl., ECF No. 22-3, at 544.) In his letter, Nadler noted that the *Miers* case had rejected the contention that a former White House Counsel could refuse to appear in response to a congressional subpoena by virtue of absolute testimonial immunity (*see id.*), and he informed McGahn that it was the Committee's position that McGahn was " 'not excused from compliance with the Committee's subpoena by virtue of a claim of executive privilege that may ultimately be made' " (*id.* at 546 (quoting *Miers*, 558 F. Supp. 2d at 106)). Rather, the Committee expected McGahn to appear at the hearing and invoke executive privilege where appropriate, as Judge Bates had ordered former White House Counsel Harriet Miers to do. (*See id.*)

Ultimately, as a result of the White House's invocation of absolute testimonial immunity, McGahn did not appear to testify on May 21 (*see* Pl.'s Stmt. of Facts ¶¶ 91, 93), and on May 31, 2019, Nadler sent a letter to McGahn and Cipollone in which the Committee offered to accept a modified privilege log with respect to subpoenaed documents being withheld on the basis of privilege, and belated production of non-privileged documents. (*See* Letter from Jerrold Nadler, Chairman H. Comm. on the Judiciary, to Donald F. McGahn II and Pat A. Cipollone, Counsel to the President (May 31, 2019), Ex. Z to Tatelman Decl., ECF No. 22-3, at 536.) Nadler also offered "to discuss any reasonable accommodation(s) that would facilitate Mr. McGahn's appearance before the Committee," and he proposed a number of options "including limiting the testimony to the specific events detailed in the Special Counsel's report, identifying with greater specificity the precise areas of intended inquiry, and agreeing to the presence of White House counsel during any testimony, so that Mr. McGahn may consult regarding the assertion of executive privilege." (*Id.* at 537.) The Judiciary Committee did not receive any response to this letter. (*See* Pl.'s Stmt. of Facts ¶ 96.)

On June 17, 2019, a call took place between representatives of the Judiciary Committee and the White House, during which the Committee once again offered to limit the scope of any testimony from McGahn. (*See* Berke Decl. ¶ 8.) Follow-up calls regarding potential accommodations took place on June 18, 2019, and on June 21, 2019, and there was an in-person meeting on June 25, 2019, but no resolution was reached. (*See id.* ¶¶ 9–11.) During a subsequent call on July 1, 2019, the White House indicated that it "was not willing to accept any accommodation involving Mr. McGahn's public testimony." (*Id.* ¶ 12.) However, the White House did offer "to consider allowing Mr. McGahn to appear for a private interview rather than for public testimony, subject to appropriate conditions that the parties would have to negotiate." (Purpura Decl. ¶ 18.) In response, the Judiciary Committee indicated that it "was not willing to consider anything other than testimony at a public hearing." (*Id.* ¶ 19.) Another call took place on July 12, 2019, during which the Committee reiterated its slate of proposed accommodations, including limiting McGahn's testimony to the Mueller Report and allowing White House counsel to sit behind McGahn during his testimony, and it also offered to negotiate any issues that arose during his testimony. (*See* Berke Decl. ¶ 13.) The White House rejected this proposal during a subsequent call that took place on July 17, 2019 (*see id.* ¶ 14), and, separately, McGahn's counsel reaffirmed that McGahn would continue to comply with the President's directive not to testify (*id.* ¶ 15–16).

Although the White House and the Committee were not able to resolve their differences with respect to McGahn's testimo-

ny, they did reach an agreement regarding his production of the subpoenaed documents. (*See* Purpura Decl. ¶ 21.) Under this agreement, the White House would make responsive documents available to the Judiciary Committee after privilege review, subject to certain terms and conditions regarding access to and dissemination of the documents. (*See id.*)[4]

B. *Committee on the Judiciary, U.S. House of Representatives v. Miers*

One who doubts that history repeats itself need look back no further than an investigation that the Judiciary Committee conducted in 2007, with respect to the forced resignation of seven United States Attorneys, to prove the point. In that dispute, the Executive branch likewise refused to comply with voluntary requests for testimony and documents, and following an authorizing vote, the Judiciary Committee issued a subpoena to Harriet Miers, former White House Counsel to President George W. Bush. The Judiciary Committee's subpoena required that Miers produce documents and appear before the Committee to give testimony regarding any influence that the White House may have exerted over DOJ's decision to request the resignations of various United States Attorneys, some of whom were in the process of investigating prominent politicians or had rebuffed requests from Republican officials to undertake certain investigations. *Miers*, 558 F. Supp. 2d at 57–63. In response to the Judiciary Committee's subpoena, the Executive branch asserted that all of the documents sought were protected by executive privilege, and, accordingly, the White House informed the Committee that no documents would be forthcoming. *See id.* at 62.[5] With respect Miers's testimony, President Bush initially asserted executive privilege as well, but the White House ultimately took the position that "Miers was absolutely immune from compelled congressional testimony[.]" *Id.* In support of this legal position, the White House proffered an OLC opinion to this effect. *See id.*; *see also Immunity of Former Counsel to the President from Compelled Congressional Testimony*, 31 Op. O.L.C. 191 (2007).

Thereafter, the Judiciary Committee filed a lawsuit seeking a court order and a declaration that, among other things, "Miers must comply with a subpoena and appear before the Committee to testify[.]" *Miers*, 558 F. Supp. 2d at 55. In response, the Executive branch "moved to dismiss this action in its entirety on the grounds that the Committee lacks standing and a proper cause of action, that disputes of this kind are non-justiciable, and that the Court should exercise its discretion to decline jurisdiction." *Id.* at 55–56. On the merits, the Executive branch asserted that "sound principles of separation of powers and presidential autonomy dictate that the President's closest advisors must be absolutely immune from compelled testimony before Congress[.]" *Id.* at 56. For its part, the Judiciary Committee filed a cross-motion for partial summary judgment that

4. The White House also initially asserted testimonial immunity with respect to former aide Hope Hicks, (*see* Letter from Pat A. Cipollone, Counsel to the President, to Jerrold Nadler, Chairman H. Comm. on the Judiciary (June 18, 2019), Ex. CC to Compl., ECF No. 1-29), but Hicks ultimately appeared for a voluntary interview, during which White House and OLC objected to her answering numerous questions on the basis of "absolute immunity" (*see, e.g.*, Transcribed Interview of Hope Hicks, H. Comm. on the Judiciary, 116th Cong. (June 19, 2019), Ex. EE to Compl., ECF No. at 12, 15–16).

5. The Committee also issued a subpoena seeking the production of documents to then-current White House Chief of Staff Joshua Bolten. *Miers*, 558 F. Supp. 2d at 61.

argued that Miers had no legal right to refuse to appear and that there was no legal basis for the assertion of absolute testimonial immunity. *See id.* at 99.

Judge Bates resolved the parties' contentions in a detailed, 93-page slip opinion that ultimately denied the Executive branch's motion and granted the Committee's motion, thereby requiring Miers to appear and testify. *Id.* at 108. At the outset of his opinion, Judge Bates addressed the question of federal question subject-matter jurisdiction under 28 U.S.C. § 1331 (even though both parties conceded its existence) and found that section 1331 was the source of the court's subject-matter jurisdiction over the dispute. *See id.* 64–65. Turning to the question of standing, Judge Bates found that a prior decision from the D.C. Circuit—*United States v. AT & T*, 551 F.2d 384 (D.C. Cir. 1976) ("*AT & T I*")—was "on point and establishe[d] that the Committee has standing to enforce its duly issued subpoena through a civil suit." *Id.* at 68. Noting that general subpoena enforcement disputes are common in federal courts, Judge Bates further concluded that "this sort of dispute is traditionally amenable to judicial resolution and consequently justiciable[,]" *id.* at 68, 71, and that "courts have entertained subpoena enforcement actions (or motions to quash subpoenas) where the political branches have clashed over congressional subpoenas[,]" *id.* at 71; *see also id.* at 70 (explaining that "the [Supreme] Court has never held that an institution, such as the House of Representatives, cannot file suit to address an institutional harm").

Turning next to the Executive branch's contentions regarding the lack of a cause of action, Judge Bates found that, through the Declaratory Judgment Act, the Judiciary Committee could enforce the House's constitutional " 'power of inquiry[,]' " and that the associated " 'process to enforce' " that constitutional interest was " 'an essential and appropriate auxiliary to the legislative function.' " *Id.* at 75 (quoting *McGrain v. Daugherty*, 273 U.S. 135, 174, 47 S.Ct. 319, 71 L.Ed. 580 (1927)). Judge Bates also concluded that the Judiciary Committee had a limited "implied cause of action ... to seek a declaratory judgment concerning the exercise of its subpoena power[,]" which derived from the House's Article I legislative functions. *Id.* at 95.

With respect to whether the court should exercise its equitable discretion and thus decline to decide the parties' dispute based on separation-of-powers concerns, Judge Bates rejected "the contention that judicial intervention in this arena at the request of Congress would be unprecedented in the nation's history[,]" *id.* at 95–96, and also found that, because the Judiciary is the ultimate arbiter when it comes to claims of executive privilege, declining to consider the case would be more harmful to the balance of powers between the three Branches than deciding the case, *see id.* at 96. Judge Bates further dismissed the Executive branch's argument that a ruling would open the floodgates of litigation, noting that the possibility for such litigation has existed since the Nixon era. *See id.*

Having resolved the threshold issues, Judge Bates then turned to the merits of the case. *See id.* at 99. He "reject[ed] the Executive's claim of absolute immunity for senior presidential aides" and began his discussion of such immunity by noting that "[t]he Executive cannot identify a single judicial opinion that recognizes absolute immunity for senior presidential advisors in this or any other context." *Id.* Judge Bates explained that the Supreme Court's decision in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)—in which the Court rejected absolute immunity for Executive aides in the

context of civil lawsuits seeking monetary damages, except possibly where the aides were involved in the areas of national security or foreign policy—"virtually foreclosed" the absolute testimonial immunity argument that the defendants were advancing. *Id.* at 100. And Judge Bates found it telling that "the only authority that the Executive can muster in support of its absolute immunity assertion are two OLC opinions[,]" which he found to be "for the most part[,] conclusory and recursive." *Id.* at 104.[6] Thus, Judge Bates declared that Miers was not immune from compelled congressional process, and therefore, was legally required to "appear before the Committee to provide testimony, and invoke executive privilege where appropriate." *Id.* at 106; *see also id.* at 108.

The coda to the *Miers* case is that the Executive branch appealed Judge Bates's decision, but the parties reached a settlement, and the Executive branch subsequently dismissed its appeal. Notably, as an explicit condition of the settlement agreement, the Executive branch agreed not to request that Judge Bates vacate or set aside his opinion. *See* Letter from Irvin B. Nathan to Michael F. Hertz (Mar. 5, 2009), *Comm. on Judiciary, U.S. House of Representatives v. Miers*, No. 08-cv-0409, ECF No. 68-1, at 8–9 (Oct. 22, 2019). Consequently, the *Miers* Memorandum Opinion and Order remained in effect, and as it turns out, that case represents the only definitive legal ruling on the question of whether senior-level presidential aides are absolutely immune to compelled congressional process between 2008 and the present.

C. Procedural History

Despite *Miers*, the Judiciary Committee and the White House found themselves at a subpoena-related impasse once again, when, on May 20, 2019, President Trump directed Don McGahn not to appear before the Judiciary Committee, as previously described. The Judiciary Committee filed the instant lawsuit on August 7, 2019, and it asserts a single cause of action: "Article I of the Constitution[.]" (Compl. at 52.) Just as in *Miers*, the Committee in the instant case claims that "[t]here is no lawful basis for McGahn's refusal to appear before the Judiciary Committee" (*id.* ¶ 110); that he "enjoys no absolute immunity from appearing before the Judiciary Committee" (*id.* ¶ 111); and that "McGahn has violated ... his legal obligations by refusing to appear before the Judiciary Committee ... [and] by refusing to answer questions where there has been no assertion of executive or other privilege or where executive privilege has been waived" (*id.* ¶ 113). The Committee also alleges that, with respect to McGahn's testimony in particular, "[t]he President has waived executive privilege as to the subpoenaed testimony that relates to matters and information discussed in the [Mueller] Report." (*Id.* ¶ 112.) As a remedy for these alleged violation, the Judiciary Committee specifically asks this Court to award the following declaratory and injunctive relief:

1. Declare that McGahn's refusal to appear before the Committee in response to the subpoena issued to him was without legal justification;
2. Issue an injunction ordering McGahn to appear and testify forthwith before the Committee; and
3. Issue an injunction ordering McGahn to testify as to matters and information discussed in the Special Counsel's Report and any other matters and information over which ex-

6. Judge Bates went on to consider and reject a claim of qualified immunity for Miers, an argument that is not made in the instant case. *Miers,* 558 F. Supp. 2d at 105.

> ecutive privilege has been waived or is not asserted.

(*Id.* at 53.)

On August 26, 2019, almost three weeks after it filed the complaint, the Judiciary Committee filed a motion that requested a preliminary injunction or, alternatively, expedited partial summary judgment. (*See* Pl.'s Mot.) The parties subsequently agreed to have the Court treat this motion as one seeking expedited partial summary judgment. (*See* Min. Order of Sept. 3, 2019.)[7] The Judiciary Committee and DOJ then negotiated a schedule for the briefing of legal issues related to whether this Court has jurisdiction to declare that McGahn's refusal to appear is unlawful and to compel him to appear before the Committee—i.e., the first two prongs of the Committee's request for relief (*see* Def.'s Mot.; Reply in Supp. of Pl.'s Mot. and Opp'n to Def.'s Mot. ("Pl.'s Reply"), ECF No. 37; Reply in Supp. of Def.'s Mot. ("Def.'s Reply"), ECF No. 40))—and the parties also briefed the merits of the question of the validity of DOJ's claim of absolute testimonial immunity. Importantly, the issue of whether McGahn must answer any particular question that the Judiciary Committee poses and/or whether executive privilege applies to the answers McGahn might be compelled to give with respect to questions about the Mueller Report or otherwise (i.e., the third prong of the Committee's request for relief) is not currently before this Court.

In its motion for summary judgment, the Judiciary Committee relies heavily on Judge Bates's decision in *Miers*, and argues that this Court has subject-matter jurisdiction over the claims raised in the complaint by virtue of 28 U.S.C. § 1331. (*See* Pl.'s Mem. at 33).) The Judiciary Committee also asserts that it has standing to bring this lawsuit (*see id.* at 33–35), and that Article I of the Constitution and the Declaratory Judgment Act provide it with the means to vindicate its right to enforce the subpoena (*see id.* at 35–36). The Judiciary Committee further maintains that "[t]his case is justiciable and appropriate for this Court's review" even though it arises from a conflict between the two political branches of the federal government. (*Id.* at 36–37.) With respect to the merits of the contention that McGahn has absolute testimonial immunity, the Judiciary Committee argues that there is no support for such a claim anywhere in the caselaw (*see id.* at 39–45), and that McGahn must instead appear before the Judiciary Committee (*see id.* at 54).

DOJ's cross-motion responds that *Miers* was "wrongly decided" and that "[t]his Court should not repeat [Judge Bates's] errors." (Def.'s Mot. at 48.) It argues, as a threshold matter, that this Court lacks subject-matter jurisdiction over the Judiciary Committee's complaint, both because this type of inter-branch political dispute is not one that courts have traditionally adjudicated in light of separation-of-power principles (*see id.* at 32–33; *see also id.* at 40 (arguing that "[s]uits of this kind threaten the separation of powers and its system of checks and balances that has served the Nation well for 230 years"), and because the Judiciary Committee lacks a cognizable injury for standing purposes (*id.* at 36–37). DOJ further maintains that neither 28 U.S.C. § 1331 nor any other statute vests this Court with statutory subject-matter jurisdiction over the Judiciary Committee's complaint (*see id.* at 43–46), and likewise, that no substantive cause of action exists that allows the Judiciary

7. As mentioned previously, although the Judiciary Committee has named McGahn individually as the sole defendant in this lawsuit, DOJ is representing McGahn in the context of the instant case, and its arguments are made on behalf of the Executive branch.

Committee to sue in federal court to enforce its subpoena (*see id.* at 52–56).[8] Regarding the merits of the dispute, DOJ references OLC opinions and contends that the President is absolutely immune from providing compelled testimony to Congress. *See id.* at 60, 63. Moreover, as a derivative matter, DOJ argues that the President's immediate advisors—whom DOJ calls his "alter egos"—enjoy this same absolute testimonial immunity. (*See id.* at 64–66.) DOJ further maintains that current and former White House Counsels are the kinds of immediate advisors who are covered by this blanket immunity. (*See id.* at 68–71.)

This Court held a motions hearing on the parties' cross-motions for summary judgment on October 31, 2019. (*See* Min. Entry of Oct. 31, 2019.)

III. LEGAL STANDARDS

A. Cross-Motions For Summary Judgment Under Federal Rule of Civil Procedure 56

The Federal Rules of Civil Procedure provide the procedural parameters for the Court's consideration of the motions that the parties have presented in this case. Federal Rule of Civil Procedure 56 requires a court to grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In general, this means that the movant must demonstrate that there are no triable issues of fact in the case, such that the court can determine the outcome as a matter of law. Thus, in a typical case, the Rule 56 question is whether the moving party has met its burden of demonstrating the absence of a genuine dispute as to any material fact, or whether there is a genuine issue of fact that will need to be resolved at trial. *See, e.g.*, *Hoyte v. District of Columbia*, No. 13-cv-569, 401 F.Supp.3d 127, 135–37, 2019 WL 3779570, at *7 (D.D.C. Aug. 12, 2019) (denying in part cross-motions for summary judgment because there were genuine disputes of material fact and allowing certain claims to "proceed to trial").

[1, 2] The instant matter presents a different scenario. In this case, neither party suggests that there are material questions of fact that must be decided by a jury. Instead, it is understood and undisputed that the question of whether or not the Constitution empowers one of the branches of government "to act in a certain way is a pure question of law[.]" *Ctr. for Biological Diversity v. McAleenan*, No. 18-cv-0655, 404 F.Supp.3d 218, 232–34, 2019 WL 4228362, at *8 (D.D.C. Sept. 4, 2019) (quotation marks and citation omitted). In such a circumstance, this Court is not concerned about the evidence pertaining to facts; rather, it must review and resolve the conflict between the parties regarding their respective interpretations of the law. A court reviewing a question of law on cross-motions for summary judgment decides the legal issues presented and grants summary judgment to the party who, based on the court's conclusions, is entitled to judgment as a matter of law.

8. DOJ's brief also contends that this Court should exercise its equitable discretion to refrain from adjudicating this dispute based on separation-of-powers concerns, and should instead allow the inter-branch accommodation process to play out to its conclusion. (*See* Def.'s Mem. at 56–57). However, in response to a Notice that the Judiciary Committee filed on October 29, 2019, notifying the Court that the parties had reached an impasse (*see* ECF No. 41), DOJ expressly withdrew its accommodations argument (*see* Def.'s Resp. to Pl.'s Notice Regarding Status of Accommodation Process ("Def.'s Accommodation Resp.", ECF No. 42, at 2).

B. Common Law Adherence To Precedent

In addition to applying the Federal Rules of Civil Procedure, this Court also relies on a basic juridical norm that is applicable to the legal issues presented in this case. "Under the principles of the American system, common law jurisprudence serves as the source of background legal principles for judicial interpretation." Andrew C. Spiropoulos, *Just Not Who We Are: A Critique of Common Law Constitutionalism*, 54 Vill. L. Rev. 181, 183 (2009). In this regard, it is clear beyond cavil that judges should "abide by former precedents, where the same points come again in litigation[.]" 1 William Blackstone, Commentaries *69; *see also Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 134 S. Ct. 2024, 2036, 188 L.Ed.2d 1071 (2014) (noting that following precedent is "a foundation stone of the rule of law").

[3–5] This "rule of adherence to judicial precedents finds its expression in the doctrine of stare decisis[,]" which is Latin for "to stand by things decided." *Stare Decisis*, Black's Law Dictionary (11th ed. 2019) (quotation marks and citation omitted). This doctrine provides that, " 'when a point or principle of law has been once officially decided or settled by the ruling of a competent court in a case in which it is directly and necessarily involved,' " then that legal principle " 'will no longer be considered as open to examination or to a new ruling by the same tribunal, or by those which are bound to follow its adjudications, unless it be for urgent reasons and in exceptional cases.' " *Id.* (quoting William M. Lile et al., Brief Making and the Use of Law Books 321 (Roger W. Cooley & Charles Lesley Ames eds., 3d ed. 1914)); *see also Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 135 S. Ct. 2401, 2409, 192 L.Ed.2d 463 (2015) (explaining that, under the doctrine of stare decisis, "today's Court should stand by yesterday's decisions"). The vertical form of stare decisis—as between higher and lower courts within the same jurisdiction—is well known and generally accepted, but stare decisis also exists in horizontal form, and applies to courts of equal rank that are within, or outside, the same jurisdiction. *See* Richard W. Murphy, *Separation of Powers and the Horizontal Force of Precedent*, 78 Notre Dame L. Rev. 1075, 1085–86 (2003). Notably, however, where a prior on-point precedent is not binding, stare decisis doctrine does not compel a court to follow a prior decision that it believes erroneous; in that circumstance the later court should confront the prior case and "correct the error." *Gamble v. United States*, —— U.S. ——, 139 S. Ct. 1960, 1984, 204 L.Ed.2d 322 (2019) (Thomas, J., concurring); *see also Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001) (explaining that it would be "bad form to ignore contrary authority by failing even to acknowledge its existence"). And while the stare decisis doctrine is "not an inexorable command," it generally is the "preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827–28, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991).

It is interesting to note that the doctrine of stare decisis performs a limiting function that reflects the foundational principles that undergird the federal government's tripartite constitutional system. This is because deciding a legal issue anew each time that same question is presented, without any reference to what has been done before, nudges a court outside of its established domain of "say[ing] what the law is[,]" *Marbury*, 5 U.S. at 177, and into the realm of legislating what the law

should be, *see Gamble*, 139 S. Ct. at 1983 (Thomas, J., concurring) (asserting that "even common-law judges did not act as legislators, inserting their own preferences into the law as it developed"). Commentators have noted that such an unconstrained evolution in legal decision-making can undermine faith in the judicial system by creating the impression that judges are improperly enforcing their own "private sentiments" rather than working within a structured system in which similarly situated parties are treated similarly. 1 William Blackstone, Commentaries *69. It might also result in the Judiciary improperly enhancing its own powers to the detriment of the other branches. *See* Murphy, *supra*, at 1101 (explaining that "[o]ne theme to be found in [the Framers'] remarks is that adherence to precedent forestalls the accumulation of arbitrary power in the courts—which is also a primary function of separation of powers").

C. Subpoena-Related Rights, Duties, Privileges, And Immunities

Finally, in analyzing the arguments and issues that have been presented in this case, this Court draws from the well-established substantive legal standards that pertain to subpoenas generally, both those that apply in the context of standard civil cases that involve the issuance of subpoenas by parties seeking information and also those that House committees issue in the course of congressional investigations. As it turns out, a general sense of such subpoena-related standards provides a helpful key to understanding many of this Court's legal conclusions. For example, it is important to understand that subpoenas are creatures of law, that these instruments have particular legal significance, and that court orders are typically provided to enforce them. Such realizations shed substantial light on the reasons why this Court has rejected DOJ's contentions regarding the subpoena dispute at bar.

[6, 7] In Latin, the term "subpoena" means "under penalty." *Subpoena*, Black's Law Dictionary (11th ed. 2019). Simply put, a subpoena is a written mandate (also sometimes known as "a writ") that creates a legally enforceable procedural obligation to produce or provide documents or testimony, and it does so through an appeal to some authoritative body's power to sanction noncompliance. *See* William Mark Ormrod, *The Origins of the* Sub Pena *Writ*, 61 Hist. Research 11, 11, 16 (1988); *see also* Frederic W. Maitland, Equity, also, the Forms of Action at Common Law 5 (1909) (noting that the writ was so named "because it orders the man to appear upon pain of forfeiting a sum of money, *e.g. subpoena centum librarum*"); Oliver Wendell Holmes, *Early English Equity*, 1 L. Quart. Rev. 162, 162 n.2 (1885) (noting that, at common law, the penalty for failing to comply with a subpoena "was usually money, but might be life and limb").[9] To be properly issued, a

9. The historical roots of the concept of a "subpoena" go back to the times of ancient Rome and Athens. "[I]n the Athenian court, the witnesses who were summoned to attend the trial had their choice of three things: either to swear to the truth of the fact in question, to deny or abjure it, or else to pay a fine of a thousand drachmas." 3 William Blackstone, Commentaries *369. Later, with respect to old English common law, historians have noted that "[t]he specific use of the *sub pena* clause in writs summoning men before [the Privy] council and Chancery probably ... developed out of administrative orders used in the first half of the fourteenth century." William M. Ormrod, *The Origins of the* Sub Pena *Writ*, 61 Historical Research 11, 16 (1988). Fast forwarding a few decades, to the 1380s, the "writ of *subpoena*" was introduced by John Waltham, Chancellor to King Richard II. 3 William Blackstone, Commentaries *52; *see also* Erasmus Darwin Parker,

subpoena must be imposed by an authorized person or entity. *See* Arthur R. Miller, 9A Federal Practice and Procedure § 2451 (3d ed.). In essence, one who has the authority to issue a subpoena possesses the right to obligate another person to provide testimony and/or documents—i.e., the issuer can mandate the performance of another with respect to the production of such information. *See Universal Airline v. E. Air Lines*, 188 F.2d 993, 999 (D.C. Cir. 1951) (explaining that "[t]he function of the subpoena is to compel" the production of documents or the provision of testimony). Moreover, because subpoenas operate by compulsion, an authorized issuer of a valid subpoena also has the right to enforce the production obligation that a subpoena creates, consistent with the law. *See, e.g.*, *Fairholme Funds, Inc. v. Fed. Hous. Fin. Agency*, No. 13-cv-1053, 2019 WL 5864595, at *2 (D.D.C. Nov. 8, 2019); *BuzzFeed, Inc. v. U.S. Dep't of Justice*, 318 F. Supp. 3d 347, 364–65 (D.D.C. 2018).

[8] Consequently, a valid subpoena carries with it at least two legally recognized rights: (1) the right to direct the performance of another with respect to the production of documents and testimony, and (2) the right to enforce the performance obligation that is so imposed. For his part, the recipient of a valid subpoena has a presumptive duty to perform in accordance with the subpoena's requirements. *See, e.g.*, *GFL Advantage Fund, Ltd. v. Colkitt*, 216 F.R.D. 189, 194–96 (D.D.C. 2003) (granting a motion to compel compliance with a subpoena where the material sought by the subpoena was not privileged and the subpoena was not overbroad or issued for improper purposes). These well-established rights and duties are, of course, what distinguishes a subpoena from the requests for voluntary production of documents, testimony, or tangible things that typically precede the issuance of a subpoena.

1. Subpoenas In Standard Civil Actions

In the typical civil case, an attorney acting on behalf of a party and as an officer of the court can secure information for use in an existing federal lawsuit by issuing a subpoena to the custodian of the records or to the person from whom testimony is sought. *See* Fed. R. Civ. P. 45. Private parties ordinarily do not have the authority to mandate others' performance; this, with respect to subpoenas, the right to compel the recipient to provide documents and/or testimony derives from the Article III power of the court that is presiding over the underlying case. Indeed, the party issues its subpoenas in the name of the court, and typically does so after unsuccessful negotiations over a requested voluntary production. And, ultimately, whatever the status of the negotiations over the requested information, the party's issuance of an enforceable subpoena triggers a legal duty on the part of the recipient to perform in accordance with the subpoena, by providing the requested testimony and/or materials.

These rights and duties operate as a matter of law—that is, in the ordinary course, without a court's intervention—

The Origin and History of the Chancery Division, 29 L. Mag. Rev. 164, 170 (1904) (explaining that, before the creation of the writ of subpoena, other writs "threatened punishment for disobedience in indefinite terms," but the writ of subpoena involved "the substitution of a definite for an indefinite penalty"). By the 1450s, "the process by bill and *subpoena* [had] become the daily practice of the court." 3 William Blackstone, Commentaries *53; *see also id.* at *369 (noting that "[t]his compulsory process, to bring in unwilling witnesses, and the additional terrors of an attachment in case of disobedience, [was] of excellent use in the thorough investigation of truth").

during the pretrial, preparatory phase of a civil case. A subpoena-enforcement legal action only becomes necessary if the recipient refuses to provide documents or testimony despite having received a subpoena. *See* Fed. R. Civ. P. 45(g) (authorizing a court to hold in contempt "a person who, having been served, fails without adequate excuse to obey the subpoena"). In that circumstance, under the Federal Rules of Civil Procedure, the subpoena's issuer can file a separate civil lawsuit in the district court in which compliance has been mandated, *see, e.g.*, *Fairholme Funds*, 2019 WL 5864595, at *2, and in the context of that lawsuit, a federal judge determines various legal issues pertaining to the enforceability of the subpoena and the disputed scope of the required response. Common legal issues are those that pertain to the validity of the subpoena—e.g., whether the issuer was actually authorized to issue subpoenas, and whether this particular subpoena contains the necessary terms to give rise to an enforceable duty to perform—and also the extent of the recipient's duty to respond. *See, e.g.*, *Truex v. Allstate Ins. Co.*, No. 05-mc-0439, 2006 WL 241228, at *1 (D.D.C. Jan. 26, 2006) (denying an issuer's motion to compel performance where the subpoena at issue was invalid); *Weiss v. Mentor Corp.*, No. 92-mc-0203, 1992 WL 235889, at *2 (D.D.C. July 10, 1992) (evaluating claim of attorney work product privilege in the context of a motion to compel compliance with a subpoena).

[9] Significantly for present purposes, if a subpoena is valid and the recipient is not otherwise privileged to ignore it, then *some* response is due by ordinary operation of the law. Put another way, as explained above, a valid subpoena ordinarily gives rise to a legally enforceable duty to perform in the requested manner. And a court order is the well-established mechanism for the enforcement of that obligation: if the court finds that the recipient has breached the duty to perform that the subpoena creates, it issues an order that compels the recipient to comply with the subpoena. *See, e.g.*, *In re Denture Cream Prod. Liab. Litig.*, 292 F.R.D. 120, 129 (D.D.C. 2013) (granting in part motion to compel compliance with a subpoena and requiring the corporations involved to produce business records). Moreover, in deciding whether the subpoena-enforcement claim at issue is properly before it, the court usually does not inquire as to whether or not the subpoena's issuer had other ways to get the requested information. Rather, assuming that the subpoena-enforcement claim is properly before it (because a party with standing seeks resolution of the subpoena dispute in the correct venue with respect to an existing federal case), the court that is called upon to review a subpoena-enforcement dispute resolves the legal issues that are raised by the claims presented.

It is also important to recognize that the question of whether or not the recipient of a subpoena has to disclose, or may withhold, the *particular* information that the subpoena requests is entirely distinct from the question of whether the recipient of a subpoena has the legally enforceable duty to perform in response to a subpoena at all. As a general matter, the disclosure-of-information issue will be determined by the court based on its assessment of whether the documentary information that the subpoena requests, or the answers to the particular questions that a subpoenaed witness will be asked, can be withheld as subject to an applicable privilege, or whether the subpoena is improper for other reasons, such as overbreadth or undue burden. In standard civil cases, common law privileges such as the attorney-client privilege, the attorney work-product privilege, and the marital privilege are often

invoked to withhold subpoenaed information, and the privileged information is omitted from the testimony and/or redacted from the documents at issue. *See, e.g.*, *BuzzFeed, Inc.*, 318 F. Supp. 3d at 361–62 (assessing whether information sought by subpoena was protected by the federal law enforcement privilege); *GFL Advantage Fund*, 216 F.R.D. at 194–95 (evaluating whether subpoenaed materials were covered by the attorney-client privilege); *Weiss*, 1992 WL 235889, at *2 (considering a work-product privilege objection to producing subpoenaed materials). The Constitution establishes other privileges that can attach to prevent certain disclosures. *See, e.g.*, *United States Sec. & Exch. Comm'n v. Brown*, No. 09-cv-1423, 2010 WL 11602637, at *1–2 (D.D.C. Sept. 29, 2010) (evaluating whether production of documents would violate an individual's Fifth Amendment right against self-incrimination).

By contrast, it is relatively rare for the law to recognize an "immunity" to compulsory legal process—i.e., the right of the recipient of a valid subpoena to decline to produce *any* documents or provide *any* testimony. In effect, such an immunity is enormously powerful, because it operates to nullify the legal obligation to perform that a valid subpoena creates. The sole immunity to compulsory process that DOJ specifically identifies in its briefs, outside of the instant context, is the Constitution's Speech and Debate Clause. (*See* Def's Mot. at 68.) Article I provides that, with respect to "any Speech or Debate in either House," any U.S. Senator or Representative "shall not be questioned in any other Place[.]" U.S. Const. art. I, § 6, cl. 1. The Supreme Court has interpreted this provision to immunize members of Congress and their aides from having to appear and to provide testimony regarding "anything generally done in a session of the House by one of its members in relation to the business before it." *Gravel v. United States*, 408 U.S. 606, 624, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972) (internal quotation marks and citation omitted).

2. Legislative Subpoenas

Legislative subpoenas that are issued by congressional committees in the course of investigations derive from the Article I authority of the Congress, rather than the Article III auspices of the federal courts. It is reasonably clear that "legislative subpoenas are older than our country itself[,]" *Trump v. Mazars USA, LLP*, 940 F.3d 710, 718 (D.C. Cir. 2019); moreover, and the power of committees of the House of Representatives to conduct investigations that involve issuing subpoenas to witnesses for documents and testimony is similarly well established, *see Watkins v. United States*, 354 U.S. 178, 187–95, 77 S.Ct. 1173, 1 L.Ed.2d 1273 (1957); *see also Eastland v. U. S. Servicemen's Fund*, 421 U.S. 491, 504–05, 95 S.Ct. 1813, 44 L.Ed.2d 324 (1975); *Barenblatt v. United States*, 360 U.S. 109, 111–12, 79 S.Ct. 1081, 3 L.Ed.2d 1115 (1959); *Quinn v. United States*, 349 U.S. 155, 160, 75 S.Ct. 668, 99 L.Ed. 964 (1955); *Sinclair v. United States*, 279 U.S. 263, 291, 49 S.Ct. 268, 73 L.Ed. 692 (1929), *overruled on other grounds by United States v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995).[10] The duty of the recipient of a valid legislative subpoena to respond to that authorized call of action for the good of the country is also indisput-

10. Even before the ratification of the Constitution in 1787, "[t]he colonial assemblies, like the House of Commons, very early assumed, usually without question, the right to investigate ... [and] [t]hese investigations were sometimes conducted by the House itself and sometimes by committees clothed with authority to send for 'persons, papers, and records.' " C. S. Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 U. Pa. L. Rev. 691, 708 (1926).

able. In this regard, the Supreme Court has stated that "persons summoned as witnesses by competent authority have certain minimum duties and obligations which are necessary concessions to the public interest in the orderly operation of legislative and judicial machinery[,]" *United States v. Bryan*, 339 U.S. 323, 331, 70 S.Ct. 724, 94 L.Ed. 884 (1950), and has further noted that the Court itself has "often iterated the importance of this public duty, which every person within the jurisdiction of the Government is bound to perform when properly summoned" *id.* Indeed, the Supreme Court has specifically stated, in the most direct and eloquent terms, that "[i]t is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action. It is their unremitting obligation to respond to subpoenas, to respect the dignity of the Congress and its committees and to testify fully with respect to matters within the province of proper investigation." *Watkins*, 354 U.S. at 187–88, 77 S.Ct. 1173. Thus, for all intents and purposes, legislative subpoenas give rise to the same rights (i.e., the right to compel the performance of another and the right of enforcement) and the same duties (i.e., the obligation to respond in the absence of a privilege) that exist in the civil action context.

It should come as no surprise that the rights and duties that attach when a duly authorized committee of Congress issues a subpoena are ordinarily reverentially observed, or that subpoena-backed requests for information to be provided to the House in the context of its Article I investigations have traditionally been respected, consistent with core democratic and constitutional norms. *See, e.g.*, *Mazars*, 940 F.3d at 721 (noting that, in response to a legislative request for information during the investigation of "the Iran-Contra Affair, including the role of the President," President Ronald Reagan "declined to assert executive privilege, going so far as to furnish relevant excerpts of his personal diaries to Congress" (internal quotation marks and citation omitted)); *see also* Letter from Tobias Lear, Sec'y to the President, to Henry Knox, Sec'y of War (April 4, 1792) (on file with the Library of Congress) (communicating to Secretary Knox that he "will lay before the House of Representatives such papers, from [his] department, as are requested by the enclosed resolution," which empowered a House committee "to inquire into the causes of the failure of the late expedition under Major General St. Clair . . . [and] to call for such persons, papers, and records, as may be necessary to assist their inquiries."). Moreover, when disputes over congressional subpoenas do arise, the conflict is typically resolved through negotiations between House committee representatives and the person or persons to whom the subpoena is directed—a process commonly known as "accommodation"—and, thus, committees of Congress rarely have had to resort to the implementation of enforcement mechanisms. *See Mazars*, 940 F.3d at 721 ("Presidents, too, have often been the subjects of Congress'[ ] legislative investigations, though fewer of these have required judicial intervention"); *see, e.g.*, *id.* at 721–22 ("Thanks to a last-minute compromise between the White House and the Senate, the courts were kept out of a dispute" over whether a select committee investigating "the Whitewater land deal and related matters" during the Clinton administration "could subpoena meeting notes taken by President Clinton's former lawyer").

That said, enforcement comes with the territory, as explained above. It is generally accepted that the Legislature has at its disposal additional means of enforcing its subpoenas as compared to those that

are available to private parties who impose duties to perform by issuing subpoenas in the context of civil cases. *See Eastland*, 421 U.S. at 504–05, 95 S.Ct. 1813. Those additional tools include the power of inherent contempt. *See Watkins*, 354 U.S. at 216, 77 S.Ct. 1173 (citing *Anderson v. Dunn*, 19 U.S. 204, 6 Wheat. 204, 5 L.Ed. 242 (1821)). "[T]he long dormant inherent contempt power permits Congress to rely on its own constitutional authority to detain and imprison [one who defies a subpoena and is found in contempt] until the individual complies with congressional demands." Todd Garvey, Congressional Research Service, RL 34097, *Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure* 1 (May 12, 2017); *see also id.* at 10 (explaining that "[u]nder the inherent contempt power[,] the individual is brought before the House or Senate by the Sergeant-at-Arms, tried at the bar of the body, and can be imprisoned or detained in the Capitol or perhaps elsewhere"). Congress can also issue a contempt citation, and then certify this finding to the Executive branch for potential criminal prosecution. *See* 2 U.S.C. §§ 192, 194. DOJ has also traditionally accepted that a committee of Congress can rely on the standard enforcement mechanism that is available to others who issue valid and legally enforceable subpoenas: it can bring a civil action in federal court. *See Response to Cong. Requests for Info. Regarding Decisions Made Under the Indep. Counsel Act*, 10 Op. O.L.C. 68, 87 (1986) ("The most likely route for Congress to take would be to file a civil action seeking enforcement of the subpoena."); *see also 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).

Notably, on those occasions when legislative subpoena disputes have been brought to court, the related civil actions involve the same questions about relevance, subpoena validity, the allegedly privileged nature of the material requested, and the purported immunity of the recipient as courts consider in other cases of this kind. *See, e.g.*, *Mazars*, 940 F.3d at 732–40 (assessing whether legislative subpoena was valid and whether documents sought were relevant to the underlying congressional investigation); *Senate Select Comm. on Ethics v. Packwood*, 845 F. Supp. 17, 21–23 (D.D.C. 1994) (evaluating whether compliance with a legislative subpoena would violate an individual's Fourth and Fifth Amendment rights).

IV. ANALYSIS

In this case, the fact that duly authorized committees of Congress have the power to issue enforceable legislative subpoenas pursuant to Congress' authority to conduct oversight investigations under Article I of the Constitution is not in dispute. That is, DOJ does not appear to challenge the Judiciary Committee's compulsory process power, as a general matter. Instead, here as in *Miers*, DOJ contends that, nevertheless, the President can selectively block any House committee's exercise of its subpoena-related rights with respect to certain persons who qualify as the President's "alter egos"—namely, current and former senior-level presidential aides—because, in DOJ's view, such persons are absolutely immune from compelled congressional process. (*See, e.g.*, Def.'s Mot. at 64.) DOJ argues further that House committees cannot file lawsuits in federal court to seek enforcement of subpoenas that have been issued to aides whom the President has ordered not to testify (*id.* at 52–59), and that, in any event, the federal courts have no subject-matter jurisdiction to review any subpoena-enforcement ac-

tion that a House committee files if a senior-level presidential aide does not respond as directed (*see id.* at 31–52).

Setting aside the implications of these arguments for the law that governs subpoenas generally (*see supra* Part III.C), it is important to recognize that DOJ's contentions rely on basic assumptions about the relative power of the three branches of the federal government under our constitutional scheme. Indeed, as DOJ describes it, the Constitution of the United States strictly segregates the power of the federal government and sets its branches in perfect equipoise—i.e., the Legislature, the Executive, and the Judiciary are entirely distinct, completely independent, and unfailingly co-equal (a dynamic that DOJ calls "the separation of powers")—and this constitutional construct is such a driving force behind DOJ's legal analysis that other foundational tenets of the Constitution, as well as the widely accepted common law principles that pertain to subpoenas and subpoena enforcement, are cast aside.

For example, notwithstanding the background fact that federal courts routinely adjudicate subpoena-related disputes in the context of civil actions, DOJ vigorously asserts that federal courts lack subject-matter jurisdiction to adjudicate subpoena-related disputes that arise between Congress and the Executive branch. (*See* Hr'g Tr. at 75:17–18 (DOJ counsel asserting that the federal courts "absolutely have th[e] authority [to say what the law is] in any case or controversy under Article III" but "[t]his just isn't one").) DOJ also insists that, despite the fact that ordinary citizens bring subpoena-enforcement claims in the federal courts all the time, duly authorized committees of the House of Representatives cannot proceed against the Executive branch in court to seek enforcement of subpoenas for testimony and information issued to recalcitrant government officials in the context of congressional investigations. (*See id.* at 74:5–7 ("I'm making the argument that the Constitution does not allow . . . the House and the Executive Branch to sue each other in court[.]").) Meanwhile, says DOJ, the President has the authority to make unilateral determinations regarding whether he and his senior-level aides (both current and former) will respond to, or defy, the subpoenas that authorized House committees issue during constitutionally authorized investigations of potential wrongdoing within his administration. (*See id.* at 125:3–6 (counsel asserting that "if the person has testimonial immunity, and the President has asserted it, not the person—it's the President's to assert—then, yes, [Congress] wouldn't be able to compel the person").[11]

Unfortunately for DOJ, and as explained fully below, these contentions about the relative power of the federal courts, congressional committees, and the President distort established separation-of-powers principles beyond all recognition. Thus, ultimately, the arguments that DOJ advances to support its claim of absolute testimonial immunity for senior-level presidential aides transgress core constitutional truths (notwithstanding OLC's persistent heralding of these and similar propositions). By contrast, textbook constitutional law readily reveals that, precisely because the Constitution bestows upon the Judiciary the power to demarcate the boundaries of lawful conduct by government officials, the federal courts have subject-matter ju-

11. For a similar vantagepoint, see the circumstances described by George Orwell in the acclaimed book *Animal Farm*. *See* George Orwell, *Animal Farm* 141 (Otbe Book Publishing 2018) (''All animals are equal but some animals are more equal than others.'') (capitalization altered).

risdiction to entertain subpoena-enforcement disputes concerning legislative subpoenas that have been issued to Executive branch officials. It is similarly well established that, because the Constitution vests the Legislature with the power to investigate potential abuses of official authority—when necessary to hold government officials (up to, and including, the President) accountable, as representatives of the People of the United States—then House committees have both Article III standing and a cause of action to pursue judicial enforcement of their duly authorized and legally enforceable requests for information. What is missing from the Constitution's framework as the Framers envisioned it is the President's purported power to kneecap House investigations of Executive branch operations by demanding that his senior-level aides breach their legal duty to respond to compelled congressional process.

Luckily for this Court, an existing precedent that is on all fours with the instant matter (*Miers*) already systematically dismantles the edifice that DOJ appears to have erected over the years to enshrine the proposition that a President's senior-level aides have absolute immunity with respect to legislative subpoenas that Congress issues in the course of its investigations; *Miers* does this by squarely refuting each of the threshold and merits arguments that DOJ seeks to advance in the instant case. This Court finds *Miers*'s analysis compelling (albeit, admittedly, not controlling) and, consistent with stare decisis principles, the Court adopts Judge Bates's precedential reasoning herein, where referenced in the discussion below. Consequently, the Court cannot accept DOJ's present reliance on carefully curated rhetoric concerning historical accommodations practices. Nor can it abide DOJ's less-than-subtle suggestion that, under our constitutional scheme, the Legislature and the Judiciary are both hopelessly stymied when it comes to addressing alleged abuses by the Executive branch, such that, ultimately, the President wields virtually unchecked power.

Instead, with deference to the Supreme Court's foundational pronouncements of law concerning the intended intersectionality of our separate and co-equal branches of government, *see, e.g.*, *INS v. Chadha*, 462 U.S. 919, 951, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635, 72 S.Ct. 863, 96 L.Ed. 1153 (1952) (Jackson, J., concurring); *Marbury*, 5 U.S. at 176–77, this Court reiterates *Miers*'s well-sourced and thoroughly explained bottom-line conclusion: that, as a matter of law, senior-level current and former presidential aides, including White House Counsels, must appear before Congress if compelled by legislative process to do so. This means that such aides cannot defy a congressional subpoena on the basis of absolute testimonial immunity, even if the President for whom they work (or worked) demands that response.

A. Federal Courts Have The Power To Adjudicate Subpoena-Related Disputes Between Congress And The Executive Branch

In the *Miers* case, DOJ "concede[d]" that "28 U.S.C. § 1331 provides subject matter jurisdiction" over the Judiciary Committee's subpoena-enforcement lawsuit, a conclusion with which Judge Bates agreed. *Miers*, 558 F. Supp. 2d at 64. *Miers* also rejected DOJ's jurisdictional claim that "this dispute is not one traditionally thought to be amenable to judicial resolution[,]" *id.* at 67, and that, therefore, the House's subpoena-enforcement claim should not be permitted to proceed, *id.* at 71–73. In this regard, the *Miers* opinion stands for the proposition that courts have federal question jurisdiction over subpoena

enforcement disputes between the Legislature and the Executive branch, and that such disputes are justiciable, regardless of the fact that the other two branches of government occupy places on the opposite side of the "v" in the case caption. This Court agrees with *Miers*'s analysis and conclusions for the reasons that follow in this section of this Memorandum Opinion, as well as those in Part IV.B.

1. Federal Courts Routinely Exercise Subject-Matter Jurisdiction Over Subpoena-Enforcement Claims Under 28 U.S.C. § 1331

[10, 11] Federal courts are courts of limited jurisdiction, *see Spokeo, Inc. v. Robins*, —— U.S. ——, 136 S. Ct. 1540, 1547, 194 L.Ed.2d 635 (2016), which means that their power to adjudicate legal disputes must be affirmatively established by law. As a general matter, under section 1331 of Title 28 of the United States Code, federal courts have statutory authority to entertain legal claims that arise under the Constitution and the laws of the United States. *See Arbaugh v. Y & H Corp.*, 546 U.S. 500, 513, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006) (explaining that "[a] plaintiff properly invokes § 1331 jurisdiction when she pleads a colorable claim 'arising under' the Constitution or laws of the United States") (citation omitted). *Miers* reasoned that a claim by the Judiciary Committee that an Executive branch official "failed to comply with duly issued congressional subpoenas" fits this category, because the House "subpoena power derives implicitly from Article I of the Constitution[.]" *Miers*, 558 F. Supp. 2d at 64. Judge Bates also observed that the D.C. Circuit had addressed the question of the federal courts' statutory subject-matter jurisdiction with respect to a controversy similar to the one at issue in the *Miers* case (and here): a dispute over a House committee's issuance of a subpoena to AT & T concerning certain documents that the company possessed in relation to an FBI wiretapping program. The Circuit had conclusively determined that the federal courts have jurisdiction under 28 U.S.C. § 1331 because of the "fundamental constitutional rights involved[,]" *AT & T I*, 551 F.2d at 389, which was enough for Judge Bates to conclude that claims that the Judiciary Committee made in the *Miers* case "arise[ ] under the Constitution for purposes of § 1331[,]" *Miers*, 558 F. Supp. 2d at 64.

This conclusion is not at all surprising. Indeed, if electronic searches of popular case databases are any guide, the power of the federal courts to review and resolve subpoena-enforcement claims in standard civil actions is rarely challenged, and federal courts routinely exercise subject-matter jurisdiction over disputes concerning subpoenas that arise in the context of cases in which federal claims are being litigated. *See, e.g.*, *Fairholme Funds*, 2019 WL 5864595, at *2; *BuzzFeed, Inc.*, 318 F. Supp. 3d at 364–65; *Truex*, 2006 WL 241228, at *1; *GFL Advantage Fund*, 216 F.R.D. at 194–96; *Weiss*, 1992 WL 235889, at *2; *see also* Fed. R. Civ. P. 45. Thus, Courts appear to have determined that these miscellaneous lawsuits that are filed for the purpose of seeking a court order to enforce a subpoena, arise under federal law for the purpose of section 1331 where the underlying case is, itself, federal in nature. The Court concludes that this same analysis concerning the applicability of section 1331 to the legal claim at issue applies here. Thus, insofar as the Judiciary Committee's power to issue subpoenas "derives implicitly from Article I of the Constitution," *Miers*, 558 F. Supp. 2d at 64, which it appears that DOJ does not contest, the subpoena-enforcement claim that the Judiciary Committee has brought to this Court for resolution likewise arises

under the Constitution for the purpose of section 1331.

As a reminder, DOJ conceded as much in the matter before Judge Bates. It retreats from that concession now, however, and launches an attack on this Court's statutory subject-matter jurisdiction, by deflecting attention away from the well-accepted scope of a federal court's authority under 28 U.S.C. § 1331 and homing in on another statutory provision: 28 U.S.C. § 1365. Pointing to that statute, DOJ maintains that the federal courts do not, in fact, have statutory subject-matter jurisdiction to entertain subpoena-enforcement claims brought by committees of the House. (*See* Def.'s Mot. at 45–46 (asserting that section 1365 establishes federal court "jurisdiction over some congressional subpoena-enforcement actions [i.e., those brought by the Senate] but not others [i.e., those brought by the House]").) It is interesting to note that DOJ appears to have rejected OLC's internal advice about the viability of this legal argument, for it presses this jurisdictional contention here despite the fact that, according to OLC, "[t]he legislative history of these statutes . . . counsels against th[e] conclusion" that section 1365 impacts the jurisdiction of federal courts to entertain subpoena-enforcement lawsuits that involve subpoenas issued to Executive branch officials. *Response to Cong. Requests for Info.*, 10 Op. O.L.C. 68, 87 n.31 (1986).

Regardless, another precedential opinion from this district (which concerned whether a different House committee could sue to enforce a legislative subpoena for documents that it had issued to the Attorney General) addressed precisely the same statutory jurisdictional argument that DOJ brings here, and unequivocally rejected it. *See Holder*, 979 F. Supp. 2d 1. In *Holder*, Judge Amy Berman Jackson first noted that section 1365, on its face, did not apply to the dispute before it. *See id.* at 17 (explaining that "section 1365 specifically states that it does not have anything to do with cases involving a legislative effort to enforce a subpoena against an official of the executive branch withholding records on the grounds of a governmental privilege"). She then went on to thoroughly evaluate the "chronology of events surrounding the enactment of section 1365" and ultimately concluded that "the jurisdictional gap that it was meant to cure was not a lack of jurisdiction over actions like this one" but rather problems related to the amount-in-controversy requirements for federal jurisdiction that were in place in the 1970s, which were first identified in a case involving enforcement of a Watergate Senate subpoena, *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 366 F. Supp. 51 (D.D.C. 1973), and follow-on issues related to jurisdiction over suits against officers brought in their personal versus official capacities, *Holder*, 979 F. Supp. 2d. at 18–19; *see also id.* (explaining that the legislative history indicates that the language of section 1365 " 'is not intended to be a Congressional finding that the Federal courts do not now have the authority to hear a civil action to enforce a subpoena against an officer or employee of the Federal government' " (alteration omitted) (quoting S. Rep. No. 95-170, at 91–92 (1977)); *Response to Cong. Requests for Info. Regarding Decisions Made Under the Indep. Counsel Act*, 10 Op. O.L.C. at 87 n.31 (noting the same legislative history as support for its conclusion the Legislature likely can enforce subpoenas against Executive branch officials through a civil action).

[12] This Court agrees with Judge Berman Jackson's analysis in this regard, and sees no reason to reach a contrary conclusion. Indeed, "redundancies across statutes[,]" jurisdictional or otherwise,

"are not unusual events in drafting[,]" and the Supreme Court has commanded that, in such circumstances, a court "must give effect to both" provisions provided that "there is no 'positive repugnancy' between the two laws[.]" *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992) (quoting *Wood v. United States*, 16 Pet. 342, 363, 10 L.Ed. 987 (1842)). Indeed, courts must be cautious when evaluating an argument that a subsequently enacted statute, by implication and overlap, limits the scope of jurisdiction that section 1331 confers, *Mims v. Arrow Financial Servs., LLC*, 565 U.S. 368, 383, 132 S.Ct. 740, 181 L.Ed.2d 881 (2012), particularly because Congress is well-aware of how to expressly strip jurisdiction from federal courts, *see EEOC v. Lutheran Social Servs.*, 186 F.3d 959, 963 (D.C. Cir. 1999); *I.A.M. Nat. Pension Fund Ben. Plan C. v. Stockton TRI Indus.*, 727 F.2d 1204, 1209 (D.C. Cir. 1984). This Court's adoption of the holdings of *Miers* and *Holder* is sufficient to explain why the Court rejects DOJ's statutory subject-matter arguments in this case.

2. Separation-Of-Powers Principles Do Not Compel The Conclusion That This Court Lacks Subject-Matter Jurisdiction Over The Instant Dispute

DOJ's primary reason for insisting that the federal courts lack subject-matter jurisdiction to review the Judiciary Committee's subpoena-enforcement claim relates to its views of the Constitution's limits on the exercise of judicial authority. In its briefs, DOJ asserts repeatedly, in various ways and at different points, that it is the Constitution's separation-of-powers principles that preclude this Court's consideration of the instant subpoena-enforcement lawsuit. (*See, e.g.*, Def.'s Mot. at 18–23.) And while it is difficult to ferret out the differences between the various separation-of-powers-related arguments that DOJ makes in this regard, it appears that this battle is being waged on two related fronts. First of all, DOJ insists that "[t]his dispute is not of the type traditionally thought capable of resolution through the judicial process[.]" (Def.'s Mot. at 32 (capitalization altered).) It further maintains that "[l]awsuits of this kind imperil the Constitution's allocation of power among the Branches of the Federal Government." (*Id.* at 40.)[12]

Boiled to bare essence, and much like the absolute testimonial immunity claim that DOJ makes with respect to the merits of the Judiciary Committee's case, these threshold contentions about the limited scope of the Judiciary's power to hear the claim at issue under the Constitution are based on "the Executive's interest in 'autonomy[,]' " *Miers*, 558 F. Supp. 2d at 103, and that interest, in turn, "rests upon a discredited notion of executive power and privilege[,]" *id.*, as explained below. Consequently, none of DOJ's purported constitutional concerns about the exercise of jurisdiction by the federal courts under the

12. In its opposition and cross-motion brief (ECF No. 32), DOJ also argues that, even if Article III's prerequisites to the Court's subject-matter jurisdiction and the Judiciary Committee's standing are satisfied, a federal court should "stay its hand" with respect to resolving disputes between the Legislature and the Executive branch over congressional subpoenas, due to "the acute separation-of-powers concerns presented by judicial intervention in political disputes between the elected branches." (*Id.* at 56.) As noted previously, DOJ has expressly withdrawn this argument by Notice (*see* Def.'s Accommodation Resp. at 2), conceding that the parties are now at an impasse over whether or not McGahn has a legal duty to appear before the Judiciary Committee for testimony (*id.*). Therefore, this Court has not reached, or ruled upon, the "accommodations" species of DOJ's separation-of-powers argument.

circumstances presented here is persuasive.

a. *The legal claim at issue here is not non-justiciable*

[13] The first of DOJ's assertions has the subtle overtones of a justiciability argument. For example, DOJ suggests that what is at issue when the other two branches of government look to the Judiciary to resolve inter-branch disputes over the enforceability of a subpoena is a " 'political turf war' " (Def.'s Mot. at 32 (quoting *U.S. House of Representatives v. Mnuchin*, 379 F. Supp. 3d 8, 10 (D.D.C. 2019)), and that "to preserve the independence and autonomy of all three co-equal branches, the political branches must do battle in the political arena, not appeal to the Judiciary as a superior branch of government for a definitive resolution" (Def.'s Mot. at 32; *see also id.* at 35 (noting that, "even outside the context of disputes between the political Branches, the House itself has questioned whether its demands for information are ever justiciable"); *id.* at 41 (arguing that "[t]he process of negotiation and accommodation protects the political branches from excessive judicial interference and the Judiciary from the undue politicization and risk to its long-term independence")). Whatever the scope or scale of the *other* inter-branch disputes that DOJ is referencing with this argument, this assertion is plainly misplaced with respect to the *instant* action, since, as noted above, a subpoena-enforcement dispute is not a "political" battle at all. Instead, claims regarding the enforceability of a subpoena raise garden-variety legal questions that the federal courts address routinely and are well-equipped to handle. *See Miers*, 558 F. Supp. 2d at 71.

Consider the particular claim that the Judiciary Committee makes in the instant action. Its complaint specifically alleges that, in the course of a congressional investigation, the Committee issued a duly authorized legislative subpoena to former White House Counsel Donald F. McGahn II pursuant to its Article I powers (Compl. ¶ 72), and that "[t]here is no lawful basis for McGahn's refusal to appear" (*id.* ¶ 110). Thus, the Judiciary Committee's pleading presents pure questions of law for the Court's resolution: in essence, the Committee is asking this Court to determine what the law establishes with respect to its right to compel McGahn's testimony per the subpoena it has issued, and also what the law says about his duty to respond, as the recipient of the Committee's directive. There is nothing non-justiciable about such legal questions. Indeed, federal courts across the country address these very inquiries in the context of enforcement actions involving private parties all the time. (*See supra* Part III.C.1.) DOJ's talk of "political turf war[s]" and its soaring protestations about the Committee's claim being not "capable of judicial resolution" (Def.'s Mot. at 32–33) obscure the fact that issues such as whether a particular subpoena is valid and enforceable, and whether and to what extent the recipient of such a subpoena has a legal duty to respond, are straightforward, fully justiciable questions of law. *See Miers*, 558 F. Supp. 2d at 71.

[14] Notably, the mere fact that a committee of Congress, as opposed to some other litigant, has brought the instant subpoena-enforcement claim at bar has nothing whatsoever to do with whether this Court has subject-matter jurisdiction to entertain it. In general, federal courts assess their subject-matter jurisdiction on the basis of the claims that are presented, not on the identity of the parties. *See Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 844 (9th Cir. 2011) ("[I]n federal-question cases, the identity of the parties is irrelevant and the district

court's jurisdiction is grounded in the federal question(s) raised by the plaintiff."); *Teamsters, Chauffeurs, Warehousemen & Helpers, Local 764 v. Greenawalt*, 880 F. Supp. 1076, 1081 (M.D. Pa. 1995) ("Rarely, if ever, does the existence or non-existence of federal question jurisdiction turn on the identity of the parties to the lawsuit."). And the Supreme Court has specifically confirmed that not all legal claims that impact the political branches are properly deemed non-justiciable political questions. *See, e.g.*, *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196, 132 S.Ct. 1421, 182 L.Ed.2d 423 (2012) (explaining that, although the legal claim at issue implicated the political status of Jerusalem as the capital of Israel, "Zivotofsky requests that the courts enforce a specific statutory right. To resolve his claim, the Judiciary must decide if Zivotofsky's interpretation of the statute is correct, and whether the statute is constitutional. This is a familiar judicial exercise."); *see also Chadha*, 462 U.S. at 942, 103 S.Ct. 2764 (explaining that "the presence of constitutional issues with significant political overtones does not automatically invoke the political question doctrine" and that "[r]esolution of litigation challenging the constitutional authority of one of the three branches cannot be evaded by the courts because the issue have political implications"). Put another way, for the purpose of evaluating subject-matter jurisdiction, standard legal claims do not automatically transform into non-justiciable policy decisions just because they concern a political entity.

The veritable death-knell with respect to DOJ's present non-justiciability suggestions is the D.C. Circuit's jurisdictional analysis in *AT & T I*, a case that involved a "clash of the powers of the legislative and executive branches of the United States" under circumstances that are not dissimilar to the subpoena-enforcement conflict at issue here. *AT & T I*, 551 F.2d at 389.[13] The D.C. Circuit specifically acknowledged that, like one of the Watergate cases that had proceeded it, the lawsuit "present[ed] a clash of congressional subpoena power and executive privilege." *Id.* at 390 (referencing *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974) and *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974)). The panel nonetheless determined that the federal courts have subject-matter jurisdiction over the conflict under 28 U.S.C. § 1331, and it also expressly noted that the issue presented in the case—i.e., the enforceability of a House subcommittee's subpoena seeking certain documents relating to a warrantless wiretapping program—was a fully justiciable one. *Id.* at 389–91. Significantly for present purposes, the Circuit observed that, "at a minimum, the mere fact that there is a conflict between the legislative and executive branches over a congressional subpoena does not preclude judicial resolution of the conflict. *United States v. Nixon* . . . resolved an analogous conflict between the executive and judicial branches and stands for the justiciability of such a case." *Id.* at 390 (citing *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090). In the wake of the *AT*

13. In *AT & T I*, a House subcommittee had issued a legislative subpoena to a private entity (AT & T) demanding documents that concerned warrantless wiretapping that the company had undertaken at the request of the FBI. *See* 551 F.2d at 385. The Executive branch interceded by directing AT & T—"as an agent of the United States"—to refuse to comply with the subpoena. *Id.* at 387. When it appeared that AT & T would, in fact, comply despite this command from the President, DOJ filed suit against AT & T, and the chairman of the House subcommittee that issued the subpoena was permitted to intervene as a defendant. *Id.*

& T I decision, DOJ's insistence that the instant dispute over the enforceability of the House's legislative subpoena is not of the type of claim that the federal courts can resolve without doing violence to the Constitution (Def.'s Mot. at 32–33) cannot be sustained.[14]

b. *The historical record indicates that the Judiciary has long entertained subpoena-enforcement actions concerning compelled congressional process*

Pivoting to the second variation of their separation-of-powers argument, DOJ calls upon history and asserts that "centuries of historical practice" (*id.* at 32) plainly demonstrates that the U.S. Constitution does not contemplate that the federal courts have the power to exercise jurisdiction over subpoena-related disputes between the Congress and the Executive branch. (*See id.* at 33 (interpreting *Raines v. Byrd*, 521 U.S. 811, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997), as having established that "[t]he fact that past Congresses never resorted to the courts to resolve these and other inter-branch disputes underscored that the suit was not one traditionally thought to be capable of resolution through the judicial process." (internal quotation marks omitted)).) While it appears to be true that "for two hundred years after the Founding" lawsuits between the Congress and the Executive branch "did not exist, even though disputes between the Legislative and Executive Branches over congressional requests for information have arisen since the beginning of the Republic" (*id.* at 33), the jurisdictional lesson that DOJ appears to have learned from the historical record seems to be at odds with the Supreme Court's own recounting of the relevant facts.

In the case of *Watkins v. United States*, 354 U.S. 178, 77 S.Ct. 1173, 1 L.Ed.2d 1273 (1957), Chief Justice Earl Warren tells a detailed and remarkable story of the legislative power of inquiry as it existed in seventeenth century England, and in particular, of Parliament's "broad and varied use of the contempt power" to enforce its own mandates, as well as its reservation unto itself of "absolute and plenary authority over . . . privileges[,]" *id.* at 188, 77 S.Ct. 1173. Fatefully, and importantly, the Houses of Parliament expressly decided that "judicial review of the exercise of the contempt power or the assertion of privilege" would be "precluded[,]" *id.* at 188, 77 S.Ct. 1173. And apparently as a direct consequence of Parliament's determination "that no court had jurisdiction to consider such questions[,]" the unreviewable contempt power that Parliament had claimed was, predictably, "abused." *Id.* at 188, 189, 77 S.Ct. 1173.

Significantly for present purposes, Chief Justice Warren takes care to emphasize that, "[i]n the early days of the United States, there lingered direct knowledge of

14. DOJ's effort to minimize the impact of the D.C. Circuit's holding in this regard is unpersuasive. (*See* Tr. at 50:12–16 ("[T]o the extent that [*AT & T I*] addresses jurisdiction, it's in a drive-by. And the Supreme Court has said many times that courts are not bound by drive-by jurisdictional holdings. So I don't think *AT & T* is in any sense binding on the jurisdictional question."). *AT & T*'s jurisdictional and justiciability pronouncements are not drive-by rulings by any stretch of the imagination; indeed, the D.C. Circuit sua sponte raised the issue of jurisdiction under section 1331. *See id.* at n.7 ("We are aware that 28 U.S.C. § 1331 was not alleged as the basis for jurisdiction. Although Fed. R. Civ. P. 8(a)(1) requires plaintiffs to make an allegation of the basis asserted for the district court's jurisdiction, courts are not restricted to the statutory basis alleged if the factual allegations fairly support an alternative basis in a more proper or simple manner."). Thus, unless and until that case is overturned, it is binding precedent in this Circuit. (*See supra* Part III.B.)

the evil effects of absolute power[,]" *id.* at 192, 77 S.Ct. 1173, and thus, "*[f]rom the very outset the use of contempt power by the legislature was deemed subject to judicial review*[,]" *id.* (emphasis added). This is a much different narrative about the historical understanding of the ability of the courts to entertain claims concerning the enforceability of a legislative subpoena than DOJ offers here. And this Court's acknowledgement that DOJ's particular argument is that the federal courts do not have subject-matter jurisdiction to adjudicate a dispute over a legislative subpoena *at Congress' behest*, and that it has not made direct representations about whether the federal courts historically entertained claims that *private citizens* brought to challenge compelled congressional process, does not diminish that divergence. Regardless, the historical record plainly reflects that, since the Revolution, judicial review has been available to ensure that the use of compulsory congressional process and/or the invocation of a privilege with respect to compelled performance is consistent with the law. *See id.* at 193–94, 77 S.Ct. 1173 (discussing *Kilbourn v. Thompson*, 103 U.S. 168, 26 L.Ed. 377 (1881), in which the Supreme Court found, in 1881, that "the House had ... exceeded the limits of its own authority" when it initiated an inquiry that was judicial, and not legislative, in nature); *see also Mazars*, 940 F.3d at 718–21 (describing at length a series of cases throughout history in which the Supreme Court adjudicated challenges to legislative subpoenas issued by Congress). *Watkins* also touched upon the fact that the Supreme Court had previously considered the competing interests of the Executive and the Legislature with respect to subpoenas pertaining to legislative investigations, and had suggested caution with respect to the merits of claims that the Congress had overstepped its bounds, given "the danger to effective and honest conduct of the Government if the legislature's power to probe corruption in the executive branch were unduly hampered." *Watkins*, 354 U.S. at 194–95, 77 S.Ct. 1173 (first citing *McGrain*, 273 U.S. at 194–95, 47 S.Ct. 319, and then *Sinclair*, 279 U.S. at 263, 49 S.Ct. 268). This, too, indicates that the Supreme Court's primary concern about the exercise of judicial authority was that judges might be too aggressive concerning the remedies they ordered with respect to adjudicating challenges to compelled congressional process, not that the federal courts lacked the authority to even entertain such claims.

Consequently, DOJ's present suggestion that the history of our constitutional Republic simply does not contemplate that the other branches of government would enlist the Judiciary to resolve disputes over the scope of compelled congressional process in the context of legislative investigations—and thus that a federal court oversteps its bounds if it exercises subject-matter jurisdiction over a claim like the one the Judiciary Committee brings here (*see* Def.'s Mot. at 32–36)—seems inconsistent with *Watkins*'s clear assessment that the federal courts of the United States have *always* had the power to review legal claims with respect to legislative subpoena-enforcement actions, and once again, it is well established that subject-matter jurisdiction generally turns on the legal claim being asserted regardless of who makes it. Indeed, the *Watkins* Court specifically noted that federal courts possess a "responsibility placed by the Constitution upon the judiciary to insure that the Congress does not unjustifiably encroach upon an individual's right to privacy nor abridge his liberty of speech, press, religion or assembly[,]" *id.* at 198–99, 77 S.Ct. 1173, while at the same time, they must take care to provide "ample scope ... to the Congress as the sole constitutional deposi-

tory of legislative power[,]" *id.* at 215, 77 S.Ct. 1173; *see also, e.g.*, *id.* at 216, 77 S.Ct. 1173. And DOJ does not, and apparently cannot, explain *why* this constitutional duty disappears, or is neutralized, if the subpoena-related dispute arises between branches of government, rather than between Congress and an individual party who contends that the Legislature's compelled congressional process is unlawful.

Watkins also seems to explain the dearth of cases during the two-century period in which DOJ says that lawsuits concerning "Congress' access to information held by the Executive Branch . . . did not exist[.]" (Def.'s Mot. at 33.) DOJ lays out a chronology of recorded conflicts between Presidents and the House of Representatives with respect to Congress' access to information between 1792 and 2008 (*see* Def.'s Mot. at 33–35), and because "for nearly two hundred years the Legislative Branch never sought to invoke the power of the Judiciary to decide which side should prevail in a political battle with the Executive" concerning congressional requests for information (*id.* at 35), DOJ implies that courts must have had the view that their power to adjudicate legal disputes between the branches was unauthorized. It might well be so that courts were not engaged in resolving such conflicts. But *Watkins* suggests a different implication: Congress "so sparingly employed the power to conduct investigations, . . . [that] there [were] few cases *requiring* judicial review of the power." *Watkins*, 354 U.S. at 193, 77 S.Ct. 1173 (emphasis added).

To be sure, there was an uptick in Congress' use of its investigative power in the late nineteenth century, and yet, as DOJ emphasizes, "there were [still] very few cases dealing with the investigative power." *Id.* at 194, 77 S.Ct. 1173. But that dearth of court decisions hardly establishes that "zero-sum litigation in federal court" had been categorically ruled out as a matter of constitutional law, as DOJ suggests. (Def.'s Mot. at 36.) It is just as logical, and perhaps even more so, to conclude that the Executive branch understood from prior case law the slim odds of successfully resisting the primary tool that the Congress had to check its abuses—a subpoena issued in the context of an authorized investigation—if its challenges were litigated in federal court, and thus, the Executive branch routinely consented to negotiate the terms of its performance. As the Supreme Court suggested in *Watkins*, even early on in the history of our Nation, there were "several basic premises on which there [was] general agreement" including the fact that "[t]he power of the Congress to conduct investigations is inherent in the legislative process" and that "[t]hat power is broad." *Watkins*, 354 U.S. at 187, 77 S.Ct. 1173. Moreover, it was uncontroversial that Congress' investigatory authority "encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes"; that "[i]t includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them"; and that it also "comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste." *Id.* Thus, rather than shedding light on the accepted scope of the federal courts' authority to resolve inter-branch disputes over compelled congressional process, the absence of recorded federal cases concerning the myriad "clashes between the two political Branches over congressional attempts to obtain testimony" that DOJ's brief identifies (Def.'s Mot. at 34) better supports the far less sensational conclusion that, with respect to legislative subpoena fights, the Executive branch wisely picked its battles.

Consequently, and somewhat ironically, DOJ's main historical assertions dovetail in a manner that ultimately counteracts its own conclusions. That is, "[t]he fact that past Congresses never resorted to the courts to resolve" to inter-branch disputes concerning congressional requests for information (Def.'s Mot. at 33) merely means that, unlike the Judiciary Committee of today, they did not *have* to, because instead of reaching an impasse over the Executive branch's rank refusal to cooperate with congressional investigations, the Executive branch's concerns about the scope and intrusiveness of Congress' requests for information were resolved through "the centuries-old process of political negotiation" (*id.* at 36). *See also Mazars*, 940 F.3d at 721 (explaining that "Presidents, too, have often been the subjects of Congress'[ ] legislative interventions," but, in contrast to disputes between House committees and private-citizen recipients of legislative subpoenas, "fewer of these have required judicial intervention").

Finally, this Court notes that DOJ's contention that the Constitution's separation of powers bars the judiciary from adjudicating disputes between Congress and the Executive concerning the enforceability of legislative subpoenas is an argument that it has not been consistently maintained, even in *modern* times. For example, a review of the publicly available dockets in *Trump v. Committee on Ways & Means, U.S. House of Representatives*, No. 19-cv-2173 (Nichols, J.), *Trump v. Committee on Oversight & Reform of U.S. House of Representatives*, No. 19-cv-1136 (Mehta, J.), and *Trump v. Mazars USA, LLP*, No. 19-5142 (D.C. Cir.), indicates that DOJ stood silent with respect to the jurisdictional question, as President Trump (in his personal capacity) has invoked the authority of the federal courts, on more than one occasion, seeking resolution of a dispute over the enforceability of a legislative subpoena concerning his tax returns. A lawsuit that asserts that a legislative subpoena should be *quashed* as unlawful is merely the flip side of a lawsuit that argues that a legislative subpoena should be *enforced*. And it is either DOJ's position that the federal courts have jurisdiction to review such subpoena-enforcement claims or that they do not. By arguing vigorously here that the federal courts have no subject-matter jurisdiction to entertain the Judiciary Committee's subpoena-enforcement action, yet taking no position on the jurisdictional basis for the President's maintenance of lawsuits to prevent Congress from accessing his personal records by legislative subpoena, DOJ implicitly suggests that (much like absolute testimonial immunity) the subject-matter jurisdiction of the federal courts is properly invoked only at the pleasure of the President.[15]

The fact that DOJ has also recently expressly declined to press a jurisdictional argument in another subpoena-enforcement case that is currently pending before the D.C. Circuit is instructive. *See In re Application of Comm. on Judiciary, U.S. House of Representatives, for an Order Authorizing Release of Certain Grand Jury Materials*, No. 19-gj-48, 414

15. To be fair, in these lawsuits, President Trump has argued that the congressional committee subpoenas are unenforceable in his *personal* capacity. But when DOJ was invited file an amicus brief at the appellate level in *Mazars*, it did not raise an objection to the courts' jurisdiction; instead, it emphasized that federal courts "must" determine—after a "searching evaluation"—whether the legislative subpoena ought to be quashed because, for instance, it is "impermissibly attempting to interfere with or harass the Head of the Executive Branch." Amicus Brief of the United States at 1–2, *Trump v. Mazars USA, LLP*, 940 F.3d 710 (D.C. Cir. 2019), 2019 WL 3714770, at *1–2.

F.Supp.3d 129, 2019 WL 5485221 (D.D.C. Oct. 25, 2019), *appeal docketed*, No. 19-5288 (D.C. Cir. Oct. 28, 2019) (hereinafter *In re Application for Grand Jury Materials*). Pending on appeal in the D.C. Circuit is a ruling concerning an application that the Judiciary Committee submitted to the Chief Judge of this Court, requesting that grand jury information in DOJ's possession concerning the Mueller Report be released to the Committee, over DOJ's objection. (The Committee had previously sent a subpoena to Attorney General William Barr requesting the information, but that legislative command was ignored.) Chief Judge Howell issued a Memorandum Opinion and Order granting the Committee's request for all of the portions of the Mueller Report that had been redacted to preserve grand jury secrecy and any underlying transcripts or exhibits referenced in the redactions. *Id.* at 181–82, 2019 WL 5485221, at *38. DOJ proceeded to seek an emergency stay of Chief Judge Howell's ruling in the D.C. Circuit. *See* Emergency Mot. for Stay Pending Appeal ("DOJ Stay Br."), *In re Application of Comm. on Judiciary, U.S. House of Representatives, for an Order Authorizing Release of Certain Grand Jury Materials*, No. 19-5288 (D.C. Cir.).

During oral argument, when one of the panelists asked DOJ about the district court's subject-matter jurisdiction to entertain the House's legal action, DOJ counsel remarked that, while the Executive branch was "not advancing that argument[,]" it believed that DOJ "certainly has both standing and jurisdiction" to seek review of the district court's injunction. Hr'g Tr. at 17:5–9, *In re Application of Comm. on Judiciary, U.S. House of Representatives, for an Order Authorizing Release of Certain Grand Jury Materials*, No. 19-5288 (D.C. Cir.). And, indeed, DOJ did not challenge Chief Judge Howell's jurisdiction to consider the House's application in any of its briefs or during any of the hearings in front of either the District Court or the Circuit. But if DOJ's position is that the federal courts have the authority to entertain a legal claim concerning the House's contested request for allegedly privileged grand jury materials, how can it be heard to argue, nearly simultaneously, that the instant Court has no jurisdiction to entertain a legal claim concerning the enforceability of a House committee's subpoena compelling the testimony of senior-level presidential aides? Both of these requests for information were made by the Judiciary Committee in the context of ongoing investigations. *Compare* DOJ Stay Br. at 10, *with In re Application for Grand Jury Materials*, 414 F.Supp.3d at 169–70, 2019 WL 5485221, at *28, *and Mazars*, 940 F.3d at 714. And any differences between the instant case and the case on appeal before the Circuit appear to relate simply and solely to the merits of the parties' respective legal arguments regarding the enforceability of the House's mandate that the information be disclosed.[16]

16. Though the circumstances that have given rise to these two legal actions surely differ, there appear to be only two relevant distinctions between the legal claims that the Judiciary Committee is making in these two cases. In the *In re Application for Grand Jury Materials* litigation, the Committee's purported right to the materials at issue (grand jury information) arguably derives both from its own Article I authority to conduct investigations pursuant to its impeachment powers, and also from the court's limited authority to make exceptions to grand jury secrecy under Federal Rule of Criminal Procedure 6(e). See 414 F.Supp.3d at 148–49, 2019 WL 5485221, at *11. Rule 6(e) is not a source of authority in the case at bar. In addition, the Committee's grand jury document request concerns materials that are purportedly protected from disclosure under Rule 6(e), while, in the instant case, the President has invoked executive privilege on the grounds that McGahn has

Such differences have nothing to do with the threshold question of the court's constitutional power to entertain the House's legal claim that it is entitled to access the requested (or subpoenaed) information over the Executive branch's objection; therefore, one would expect that DOJ's jurisdictional position would not vary.

c. *Traditional separation-of-powers principles do not support DOJ's suggestion that the federal courts cannot resolve legal disputes between the other branches of government*

If the point of DOJ's historical practice arguments is to emphasize that, for centuries, significant inter-branch conflicts have, in fact, been resolved without the need for court involvement (and thereby place its marker on the seemingly radical notion that the federal courts do not have the constitutional authority to resolve *any* direct dispute between the Executive and the Legislature (*see, e.g.*, Hr'g Tr. at 60:18)), then DOJ must contend with, and somehow reconcile, the fact that the federal courts have adjudicated disputes that impact the divergent interests of the other branches of government for centuries. *See, e.g.*, *Ex parte Merryman*, 17 F. Cas. 144, 148 (C.C.D. Md. 1861) (Taney, C.J.) (holding that Congress, and not the President, can suspend the writ of habeas corpus); *see also Bowsher v. Synar*, 478 U.S. 714, 106 S.Ct. 3181, 92 L.Ed.2d 583 (1986) (evaluating whether Congress improperly assigned executive powers to the Comptroller General); *Chadha*, 462 U.S. at 919, 103 S.Ct. 2764 (considering whether the House could veto an Executive branch deportation order); *Nixon v. Sirica*, 487 F.2d 700, 715 (D.C. Cir. 1973) ("Throughout our history, there have frequently been conflicts between independent organs of the federal government, as well as between the state and federal governments. When such conflicts arise in justiciable cases, our constitutional system provides a means for resolving them—one Supreme Court."). DOJ must also face at least two other inconvenient facts: the widely accepted contentions that (1) the Constitution of the United States empowers each branch of the federal government to be a check upon the others, and (2) the Judiciary's constitutional check is the power to tell the other branches what the law is. *See Chadha*, 462 U.S. at 962–63, 103 S.Ct. 2764; *Buckley*, 424 U.S. at 121–23, 96 S.Ct. 612; *Marbury*, 5 U.S. at 177. The Supreme Court has never suggested that the Judiciary has the power to perform its constitutionally assigned function *only* when it speaks to private citizens, or when it is called upon to resolve a legal dispute between a private citizen and one of the branches of government. And DOJ's odd idea that federal courts' indisputable power to adjudicate questions of law evaporates if the requested pronouncement of law happens to occur in the context of a dispute *between* branches appears nowhere in the annals of established constitutional law.

To the contrary, the Framers spoke specifically to the importance of maintaining an established rule of law to regulate government conduct—and, thus, to the significance of the judicial function—when they explained why a system that separates the powers of government and includes checks on the exercise of government power is crucial to sustaining a democracy:

> [T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroach-

absolute testimonial immunity. Both of these distinctions pertain to the merits issues in these cases, not to the Court's subject-matter jurisdiction.

> ments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of the attack.... It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

The Federalist No. 51 (James Madison). The Framer's specific reference to providing government officials in each of the separate branches with "the necessary constitutional means and personal motives to resist the encroachments of the others[,]" *id.*, is especially noteworthy, because, here, DOJ's artificial limit on the federal courts' jurisdiction to consider disputes between the branches seemingly *decreases* the incentive for the Legislature or the Executive branch to behave lawfully, rather than bolsters it, by dramatically reducing the potential that a federal court will have occasion to declare conduct that violates the Constitution unlawful. And there can be no doubt that providing the branches with the power to limit each other's behavior, for the protection of the People, was the original intent of the Framers, as evidenced both by the constitutional scheme they adopted and by the remarks they made to explain the separation-of-powers construct. Indeed, far from DOJ's present suggestion that the separation-of-powers construct means that the political branches must resolve their disputes in the political arena and never head to federal court, Federalist No. 51 proceeds to explain that political checks are not the sole solution, and that the branches themselves must also be vested with the power to police the abuses of the others. *See id.* ("A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.... We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other that the private interest of every individual may be a sentinel over the public rights.").

Nor is it the case that the separate and co-equal stature of the three branches of government means that the Judiciary cannot comment on the lawfulness of other branches' conduct. *Cf. Ex parte Merryman*, 17 F. Cas. at 148 (holding that, by suspending the writ of habeas corpus, "the president has exercised a power which he does not possess under the Constitution," and sending the ruling to the President "in order that he might perform his constitutional duty, to enforce the laws, by securing obedience"); *see also Marbury*, 5 U.S. at 177. In the seminal case of *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), the Supreme Court further observed that, while "the men who met in Philadelphia in the summer of 1787 were practical statesmen, experienced in politics, who viewed the separation of powers as a vital check against tyranny[,] ... they likewise saw that a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively." *Id.* at 121, 96 S.Ct. 612; *see also Youngstown*, 343 U.S. at 635, 72 S.Ct. 863 (Jackson, J., concurring) ("While the Constitution diffuses power to better secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins

upon its branches separateness but interdependence, autonomy but reciprocity."). And where, as here, the Executive branch and the Legislature are at loggerheads over an issue of law that the courts are well-equipped to decide, the notion that the Judiciary loses its established authority to say what the law is seems implausible. It is far more likely that the better view of constitutional separation-of-powers principles is that they deem the exercise of judicial authority with respect to the dispute at issue even *more* important, if not crucial, for the continued functioning of the government.

To the extent that more recent case law could be read to cast doubt on this Court's conclusion that the federal courts have the constitutional power to adjudicate legal disputes between the Legislature and the Executive branch (*see* Def. Mem. at 32–36), it is worth noting that such cases actually comport quite well with the Framers' conceptions of the true separation-of-powers problems discussed above. For example, binding case law rightly indicates that federal courts do overstep the bounds of their authority if they entertain a claim in a dispute between the other branches that does not actually involve a question of law. *See Zivotofsky*, 132 S. Ct. at 1432 (Sotomayor, J., concurring) (explaining that judicial forbearance is required in "circumstances in which a dispute calls for decisionmaking beyond courts' competence"). Likewise, there is a separation-of-powers violation if the Judiciary proceeds when the Constitution itself expressly vests the power in another branch of government to decide the issue in question. *See id.* at 1431 ("When a case would require a court to decide an issue whose resolution is textually committed to a coordinate political department . . . abstention is warranted because the court lacks authority to resolve that issue."); *see also, e.g.*, *Nixon v. United States*, 506 U.S. 224, 113 S.Ct. 732, 122 L.Ed.2d 1 (1993) (holding that a claim regarding the validity of a Senate impeachment rule was non-justiciable because the Constitution vests the Senate with the sole power to try impeachments). In these narrow circumstances, the Judiciary plainly transgresses the boundaries of its constitutional authority, either because it has entertained a claim that does not raise a legal issue and thus was never in its province to decide, or because it has undertaken to decide certain claims despite a direct constitutional command to desist. Neither is the case with respect to the subpoena-enforcement claims at issue here, as the Court's previous discussion plainly establishes. (*See supra* Part IV. A.2.a.)[17]

[15] The bottom line is this: even when the question of this Court's constitutional authority to entertain the Judiciary Com-

17. The Court finds it noteworthy that DOJ does not provide a single authority that actually stands for the proposition that the Constitution is violated *whenever* the federal courts entertain *any* kind of dispute between the Legislature and the Executive branch. (*See* Hr'g Tr. at 60:18.) DOJ's argument in this regard appears to rely the position that the Executive branch would be inappropriately rendered subordinate to the other two branches of government if the Legislature can file suit against the Executive branch in court. (*See id.* 68:1–10.) But in the absence of a case that stands for this proposition, it seems a better view of the Executive's predicament is that, if anything, all of the branches are equal in that all are subordinate *to the law*, and the courts are only the messengers, to the extent that the Judiciary has the power to determine what the law is. *See* Richard H. Fallon, Jr., *Executive Power and the Political Constitution*, 2007 Utah L. Rev. 1, 17 (2007) ("[I]t is arguable that the power to decide cases necessarily implies the power to decide them authoritatively, and authority in some cases depends on executive obedience."). To find otherwise is to flout what is unquestionably the most significant tenet that exists in our system of government: that each branch of the federal government has limited power under the Con-

mittee's subpoena-enforcement claim is viewed through the rose-colored lenses of DOJ's separation-of-powers filter, history and past practice plainly support judicial resolution of stalemates between the Legislature and the Executive branch with respect to the rights that the law establishes and the duties that the law imposes. The Framers carefully crafted a constitutional scheme that contained institutional checks over the exercise of the powers they had divided, and thus implicitly endorsed the exercise of authority by the branch that was vested with power to break a legal stalemate (and, indeed, without judicial resolution, how else would an impasse between the Legislature and Executive branch concerning compelled congressional process be resolved?). Thus, in this Court's view, rather than demanding forbearance by the courts, separation-of-powers principles instead require the federal courts to proceed to resolve the instant legal impasse so that the other branches of government can function. Put another way, the Framers made clear that the proper functioning of a federal government that is consistent with the preservation of constitutional rights hinges just as much on the intersectionality of the branches as it does on their separation, and it is the assigned role of the Judiciary to exercise the adjudicatory power prescribed to them under the Constitution's framework to address the disputed legal issues that are spawned from the resulting friction. *See Myers v. United States*, 272 U.S. 52, 293, 47 S.Ct. 21, 71 L.Ed. 160 (1926) (Brandeis, J., dissenting) ("The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.").

stitution, and that no one, not even the head of the Executive branch, is above the law. DOJ's insistence that the Judiciary does not have the power to declare the law in the context of an inter-branch legal dispute cannot be easily squared with acceptance of these universal constitutional maxims.

B. House Committees Have The Power To Enforce Their Subpoenas In Federal Court When Executive Branch Officials Do Not Respond As Required

[16] For all its talk about the limited authority of the Judiciary and the Legislature under the Constitution, DOJ does not appear to contest the fact that duly authorized committees of Congress have the power under Article I to issue enforceable legislative subpoenas—in the sense that, when a House committee issues an authorized legislative subpoena in the context of a congressional investigation, that act gives rise to a legal right to compel the recipient's performance.[18] Consequently, and importantly, the constitutional arguments that DOJ has made in the context of this case pertain solely to its view that the Judiciary Committee lacks the authority to enforce its valid legislative subpoenas *in federal court*. (*See, e.g.*, Def.'s Mot. at 36–40, 52–56.) Here, as in *Miers*, DOJ attempts to shoehorn its emasculating effort to keep House committees from turning to the courts as a means of vindicating their constitutional interests into various categories of established legal arguments, some of which overlap substantially with jurisdictional contentions that the Court has already considered and rejected. (*See, e.g.*, *id.* at 36–40 (arguing that the Judiciary

18. Of course, any protestation would be futile, since this broad power of Congress is well established. *See, e.g., McGrain,* 273 U.S. at 174, 47 S.Ct. 319; *Mazars,* 940 F.3d at 722–23.

Committee lacks standing because it has not articulated a concrete and particularized injury).)

In the discussion that follows, this Court focuses, in particular, on DOJ's contention that a House committee does not suffer a cognizable injury for standing purposes when a subpoenaed Executive branch official fails to appear for the scheduled testimony (*id.* at 36–40), and that, in any event, such committee has no cause of action to proceed in federal court (*id.* at 52–56). As the Court explains, these arguments about the Judiciary Committee's inability to bring its legal claims in federal court cannot be reconciled with how the law ordinarily assesses the type of injury that the Judiciary Committee alleges for standing purposes, or with the fact that filing a lawsuit is the most common, and least intrusive, means of vindicating the Committee's thwarted investigation rights. The Court also rejects DOJ's broader assertion that, even if the Judiciary Committee has an injury in fact and a cause of action to proceed in federal court, constitutional separation-of-powers principles prevent the Committee from doing so.

1. Defiance Of A Valid Subpoena Indisputably Qualifies As A Cognizable Injury In Fact, And In The Context Of Congressional Investigations, The Harm Is Significant And Substantial

[17, 18] With respect to the Judiciary Committee's alleged lack of Article III standing to bring its subpoena-enforcement claims in federal court, DOJ maintains that "the Committee fails to state a cognizable injury[.]" (Def.'s Mot. at 36.)[19] In this regard, DOJ insists that the Committee's allegation that "McGahn's failure to comply with its subpoena for his testimony deprives it of 'information to which it is entitled' " is not enough to give rise to Article III standing (*id.* at 37 (quoting Pl.'s Mem. at 22, 37)), because "Congress has no cognizable institutional interest in obtaining information for its own sake" (*id.*). It also asserts that, other than this noncognizable "freestanding right to information[,]" the Judiciary Committee has only asserted the kinds of abstract injuries that the Supreme Court has found to be insufficient to support standing in cases like *Raines v. Byrd*, 521 U.S. 811, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997). (Def.'s Mot. at 37–38; *see also id.* (declaring that the Judiciary Committee's stake in the instant litigation is "deficient" for standing purposes because "[t]he sole injury arguably stated by the Committee is a theoretical impairment of the House's ability to evaluate proposed articles of impeachment; proposed legislation concerning election security, campaign finance, and other issues; and the adequacy of safeguards to protect the integrity of investigatory matters referred by the Special counsel to other components of the Department of Justice (a

19. "Because Article III limits the constitutional role of the federal judiciary to resolving cases and controversies, a showing of standing is an essential and unchanging predicate to any exercise of our jurisdiction." *Fla. Audubon Soc. v. Bentsen*, 94 F.3d 658, 663 (D.C. Cir. 1996) (en banc) (internal quotation marks and citations omitted); *see also Gill v. Whitford*, —— U.S. ——, 138 S. Ct. 1916, 1929, 201 L.Ed.2d 313 (2018) ("To ensure that the Federal Judiciary respects the proper—and properly limited—role of the courts in a democratic society, a plaintiff may not invoke federal-court jurisdiction unless he can show a personal stake in the outcome of the controversy.") (internal quotation marks and citations omitted). And one of the requirements to demonstrate Article III standing is that "the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (internal quotation marks and citations omitted).

matter purportedly implicating the Committee's 'oversight' responsibilities)" (citations omitted)).)

The first puzzle that surfaces when one undertakes to assess DOJ's "no cognizable injury" argument is how this contention accounts for the fact that an injury in fact for Article III standing purposes is all but *assumed* in the myriad subpoena-enforcement cases that are filed in federal courts with respect to civil actions every day. The harm claimed by a private litigant when his subpoenas are rebuffed (which almost presumptively provides a sufficient stake to support his standing) and the injury that the Judiciary Committee claims here are not different in kind. Yet this Court could not find a single case in which the concreteness or particularity of the injury alleged by a private subpoena issuer was effectively challenged. As far as this Court can tell, no federal judge has ever held that defiance of a valid subpoena does not amount to a concrete and particularized injury in fact; indeed, it appears that no court has ever even *considered* this proposition. And perhaps for good reason: if defiance of duly issued subpoenas does *not* create Article III standing and does not open the doors of the court for enforcement purposes, it is hard to see how the wheels of our system of civil and criminal justice could keep turning.

Consequently, some courts have concluded that even the simple impairment of a prosecutor's right to issue a subpoena in the first place is enough to cause a cognizable injury. *See, e.g.*, *United States v. Colo. Supreme Court*, 87 F.3d 1161, 1165 (10th Cir. 1996) (finding a concrete, particularized, and actual injury where a Colorado ethics rule requires prosecutors to obtain judicial approval of any subpoena that seeks to compel an attorney to testify before a grand jury about a client); *see also United States v. Supreme Court of N.M.*, 839 F.3d 888, 899 (10th Cir. 2016) (reaching the same conclusion with respect to similar New Mexico ethics rule), *cert. denied*, —— U.S. ——, 138 S. Ct. 130, 199 L.Ed.2d 184 (2017). The D.C. Circuit also implicitly suggested that interference with an agency's right to compel compliance by subpoena is an injury that must be remedied, at least in the administrative context, when it held that courts "must enforce" an agency's subpoena so long as " 'the inquiry is within the authority of the agency, the demand is not too indefinite[,] and the information sought is reasonably relevant.' " *Resolution Tr. Corp. v. Thornton*, 41 F.3d 1539, 1544 (D.C. Cir. 1994) (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 652, 70 S.Ct. 357, 94 L.Ed. 401 (1950)). If the creation of hurdles to the issuance of prosecutorial subpoenas is a cognizable Article III injury, and if courts have no choice but to recognize Article III standing for those who seek to enforce reasonable administrative subpoenas, it would seem that the law is sufficiently clear that outright defiance of *any* duly issued subpoena, including the subpoena that the Judiciary Committee issued to McGahn, qualifies as a concrete, particularized, and actual injury for standing purposes.

This is not to suggest an equivalence between the harm that a private litigant experiences when his subpoena rights are thwarted, on the one hand, and the harm inflicted on a committee of Congress when a recipient of a legislative subpoena that is issued in the context of a congressional investigation defies its mandates, on the other. While the *nature* of the injury—i.e., the denial of the right to compel performance—is similarly actual and concrete, the Supreme Court has suggested that the *degree* of harm is an order of magnitude different. This is because, under our constitutional scheme, the Legislature is empowered to issue subpoenas in order to

conduct the investigations that are necessary to perform its crucial functions of enacting legislation and overseeing the operations of government, not to further its own private interests. *See Watkins*, 354 U.S. at 187, 200, 77 S.Ct. 1173. In this regard, the Supreme Court has long held that Congress *must* be deemed to "possess[ ] every other power essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption." *Burroughs v. United States*, 290 U.S. 534, 545, 54 S.Ct. 287, 78 L.Ed. 484 (1934).

Thus, Article I assigns to the House of Representatives the "sole Power of Impeachment", U.S. Const. art. I, § 2, cl. 5, and it also vests Congress as a whole with "[a]ll legislative Powers," U.S. Const. art. I, § 1. Moreover, it grants to Congress the "power of inquiry[,]" *McGrain*, 273 U.S. at 174, 47 S.Ct. 319, which the House and the Senate may delegate to their respective committees and subcommittees, and this power is an "integral part" of the legislative and impeachment authority. *Eastland*, 421 U.S. at 505, 95 S.Ct. 1813; *see also Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 499, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977). Additionally, the Supreme Court has recognized that "where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it." *McGrain*, 273 U.S. at 175, 47 S.Ct. 319. The Supreme Court specifically observed that "[e]xperience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed." *Eastland*, 421 U.S. at 504–05, 95 S.Ct. 1813.

The law also plainly establishes that one of these means of compulsion—known as "the subpoena power"—"may be exercised by a committee acting . . . on behalf of one of the Houses." *Id.* at 505, 95 S.Ct. 1813.[20] And with respect to the duty that a recipient of such a subpoena has to perform as Congress has demanded, the Supreme Court has specifically noted that "[a] subpoena has never been treated as an invitation to a game of hare and hounds, in which the witness must testify only if cornered at the end of the chase." *Bryan*, 339 U.S. at 331, 70 S.Ct. 724. "If that were the case, then, indeed, the great power of testimonial compulsion, *so necessary to the effective functioning of courts and legislatures*, would be a nullity." *Id.* (emphasis added).

For present purposes, all this means is that, when a committee of Congress seeks testimony and records by issuing a valid subpoena in the context of a duly author-

20. Thus, the "particularized" injury requirement, *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130, is satisfied. Pursuant to the House of Representative's authority to "determine the Rules of its Proceedings," U.S. Const. art. I, § 5, cl. 2, the House has empowered the Judiciary Committee to "conduct at any time such investigations and studies as it considers necessary or appropriate in the exercise of its responsibilities," House Rule XI.1(b)(1). Moreover, the Judiciary Committee has been authorized "to require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memoranda, papers, and documents as it considers necessary." House Rule XI.2(m)(1)(B). The Judiciary Committee alleges that the McGahn subpoena was issued pursuant to this authority. (*See* Compl. ¶¶ 71–72.) Therefore, his defiance of the Committee's subpoena, "affect[s] the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 560 n.1, 112 S.Ct. 2130. It is the House of Representative's particular constitutional rights, privileges, and duties that are being denied.

ized investigation, it has the Constitution's blessing, and ultimately, it is acting not in its own interest, but for the benefit of the People of the United States. If there is fraud or abuse or waste or corruption in the federal government, it is the constitutional duty of Congress to find the facts and, as necessary, take corrective action. Conducting investigations is the means that Congress uses to carry out that constitutional obligation. Thus, blatant defiance of Congress' centuries-old power to compel the performance of witnesses is not an abstract injury, nor is it a mere banal insult to our democracy. It is an affront to the mechanism for curbing abuses of power that the Framers carefully crafted for our protection, and, thereby, recalcitrant witnesses actually undermine the broader interests of the People of the United States. DOJ's hand-waving over the Judiciary Committee's purported failure to establish a "cognizable" injury for standing purposes (Def.'s Mot. at 36–40) masks the substantial harm that results from an Executive branch official's defiance of a congressional subpoena. But it is hard to imagine a more significant wound than such alleged interference with Congress' ability to detect and deter abuses of power within the Executive branch for the protection of the People of the United States.

[19] Here, the Judiciary Committee has filed a complaint that alleges that the Committee was dutifully attempting to fulfill its constitutional duties when it issued a subpoena to former White House Counsel Donald F. McGahn II. (*See, e.g.*, Compl. ¶ 1.) According to the Committee, it opened an investigation into potential misconduct by President Trump and his associates on March 4, 2019 (*see id.* ¶ 57), and its investigation allegedly took on a new dimension after Special Counsel Robert Mueller issued his report.[21] The Judiciary Committee further alleges that it has not been able to complete its mission of getting to the bottom of the facts and circumstances that are chronicled in the Mueller Report, partly because McGahn "is the most important fact witness in the [Committee's] consideration of whether to recommend articles of impeachment and its related investigation of misconduct by the President, including acts of obstruction of justice described in the Special Counsel's Report" (*id.* ¶ 97), and McGahn has refused to appear before the Committee to provide his testimony, at President Trump's direction (*see id.* ¶¶ 1, 7.) Consequently, the Committee requests that this Court "declare that McGahn's refusal to appear before the Committee in response to the subpoena issued to him" is unlawful, and "issue an injunction requiring McGahn

21. According to the Committee, the Mueller Report found that "'[t]he Russian government interfered in the 2016 presidential election in sweeping and systematic fashion'" (Compl. ¶ 1 (quoting Mueller Report Vol. 1 at 1)); that this interference was "intended to benefit the Trump Presidential campaign" (*id.* ¶ 26 (citing Mueller Report Vol. 1 at 1)); and that President Trump "repeatedly attempted to shut down the investigation into Russia's interference in America's 2016 election and to conceal his own involvement and potential misconduct from the public" (*id.* ¶ 32). The truth or falsity of the Mueller Report's findings and conclusions is immaterial to the present legal action, and neither party suggests otherwise. (*See* Pl.'s Stmt. of Facts at 3 n.1 ("In paragraphs 6-68, the Judiciary Committee does not recount information included in the Report to establish the truth of the matters asserted. Rather, the Committee relays what the Special Counsel has told Congress and the American people in order to explain the basis for the Committee's investigation."); *see also* Def.'s Resp. to Pl.'s Stmt. of Facts, ECF No. 32-2, ¶¶ 6–68 (maintaining that the Mueller Report itself provides the "complete and accurate statement of its contents" and that the Judiciary Committee's recitation of its contents "is not a material fact under Fed. R. Civ. P. 56(c)").

to appear forthwith before the Committee[.]" (Compl. at 53.)

With respect to its evaluation of the sufficiency of the Judiciary Committee's injury allegations, this Court must accept these statements of fact as true. *See Lujan*, 504 U.S. at 561, 112 S.Ct. 2130 (explaining that, at the pleading stage, allegations regarding standing are treated in the same manner as all other factual allegations and must be accepted as true). Furthermore, although a heightened evidentiary standard applies to standing arguments made in the context of cross-motions of summary judgment, *see id.*; *see also Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 912–13 (D.C. Cir. 2015), the Judiciary Committee has submitted affidavits and exhibits to substantiate their allegations that McGahn has impeded their investigation (*see* Berke Decl; Tatelman Decl.), and DOJ does not appear to contest that the Mueller Report did, in fact, contain the findings that the Judiciary Committee alleges, or that the Committee has, in fact, undertaken an investigation to evaluate the Report's claims (*see* Def.'s Resp. to Pl.'s Stmt. of Facts, ¶¶ 6–68, 75–76).

[20] Moreover, for the purpose of determining whether the Judiciary Committee has alleged a sufficient injury in fact to generate a concrete interest in the outcome of this litigation, it is irrelevant that the Committee already has access to many, if not all, of McGahn's sworn statements on this issue (McGahn's interviews are referenced repeatedly in the text of the Mueller Report (*see* Compl. ¶¶ 34–51)), nor does it matter that the Committee might be able to find out what it seeks to get from McGahn in some other fashion (*see, e.g.*, Def.'s Mot. at 79–80). This is because, as a committee of Congress, the Judiciary Committee has the "broad power" under Article I of the Constitution to conduct its investigations however it sees fit, so long as it does not impinge upon the constitutional rights of those it undertakes to question. *Watkins*, 354 U.S. at 198–99, 77 S.Ct. 1173. And, here, the Committee avers that, among other things, it wants McGahn to appear in person to testify about the events in question so that the Committee can evaluate his credibility. (*See* Pl.'s Mem. at 27 (asserting that "McGahn's testimony is particularly important because, even as President Trump has directed McGahn to defy the Committee's subpoena, the President has waged an extensive campaign to discredit the Special Counsel's investigation, impugn McGahn's credibility, and deny McGahn's account of the facts" (citation omitted)); *see also id.* 27–28; Pl.'s Reply at 60; Hr'g Tr. at 10:21–11:17.) What matters from the standpoint of evaluating the Committee's Article III standing is that the Judiciary Committee has alleged an actual and concrete injury to its right to compel information (like any other similarly situated subpoena-issuing plaintiff), that is traceable to McGahn's defiance at the Executive branch's behest, and that this alleged violation of its interests is fully redressable by an order of this Court that requires McGahn to appear and testify.

Of course, to describe the grave injury that defiance of a congressional subpoena inflicts on a committee of Congress (and, by extension, on the People of the United States) is to demonstrate why DOJ's reliance on the *Raines* case is misplaced. (*See* Def.'s Mot. at 36–40.) In *Raines*, six members of Congress who had voted against the Line Item Veto Act filed suit seeking a declaratory judgment that the Act, which was enacted and signed into law, was unconstitutional. *Raines*, 521 U.S. at 814–17, 117 S.Ct. 2312. The plaintiffs claimed that they had been injured by the possible future "dilution of institutional legislative power[,]" *id.* at 826, 117 S.Ct. 2312, which

is a completely different type of injury than the harm to established constitutional investigatory rights at issue here. Moreover, the members of Congress in *Raines* invoked a generalized injury; in fact, they specifically declared that their injury was the "loss of a political power" that affected the entire institution of Congress "not the loss of any private right." *Id.* at 821, 117 S.Ct. 2312. And rather than pointing to a concrete harm that resulted from enactment of the legislation, the plaintiffs claimed that the Line Item Veto Act had injured them by "alter[ing] the legal and practical effect of [their] votes." *Id.* at 836, 117 S.Ct. 2312 (quotation marks and citation omitted). The Supreme Court's conclusion that there was no standing to sue under those circumstances is, thus, entirely inapposite to the claims that the Judiciary Committee brings today. *See also Mnuchin*, 379 F. Supp. 3d at 17–18 (noting that "informational injuries to Congress arise 'primarily in subpoena enforcement cases,' which hold that the legislature 'has standing to assert its investigatory power.'" (quoting *U.S. House of Representatives v. U.S. Dep't of Commerce*, 11 F. Supp. 2d 76 (D.D.C. 1998)).[22]

2. The Constitution Itself Provides A Cause Of Action For A Thwarted House Committee To Proceed In Federal Court

The next purported barrier to the Judiciary Committee's ability to enforce its subpoenas by filing a legal action in federal court is DOJ's suggestion that the Judiciary Committee lacks a cause of action to do so. It is clear that all litigants who bring their claims to federal court for review must have a right to be there. In this regard, DOJ asserts that, unlike the Federal Rule of Civil Procedure that expressly authorizes a person with a pending case to initiate a separate action in the district where compliance with a subpoena is required, *see* Fed. R. Civ. P. 45(g), there is no such provision with respect to the enforcement of legislative subpoenas. (Def.'s Mot. at 43.)

This argument is unavailing because, as Judge Bates recognized in *Miers*, Article I of the Constitution is all the cause that a committee of Congress needs to seek a judicial declaration from the court regarding the validity and enforceability of a subpoena that it has allegedly issued in furtherance of its constitutional power of inquiry. *Miers*, 558 F. Supp. 2d at 94; *see also Holder*, 979 F. Supp. 2d at 22. This is because the Supreme Court has long recognized that the Legislative branch is not only vested with the broad power to conduct investigations under Article I of the Constitution, but it also has "an implied right to compel compliance with that investigative power." *Miers*, 558 F. Supp. 2d at 90. Consistent with this Court's observations about the legal significance of subpoena power more generally (*see supra* Part III.C), *Miers* explains that "[t]he exercise of Congress'[ ] investigative 'power,'

22. DOJ's appeal to *Walker v. Cheney* is also unavailing. In *Walker*, the Comptroller General requested certain information from the Vice President on behalf of four Senators. 230 F. Supp. 2d 51, 57–58 (D.D.C. 2002). The Comptroller General sought to obtain withheld documents in order to "aid Congress in considering proposed legislation." *Id.* at 66–67. But, the district court held, the alleged injury to the House's "general interests in legislating and oversight" was "too vague and amorphous to confer standing." That was because Congress itself had "undertaken no effort to obtain the documents at issue, . . . no committee had requested the documents, and no congressional subpoena ha[d] been issued." *Id.* at 67–68. In addition, "the Comptroller General here has not been expressly authorized by Congress to represent its interests in this lawsuit." *Id.* Hence, "an injury with respect to any congressional right to information remain[ed] wholly conjectural or hypothetical." *Id.* (internal citations and quotations omitted).

which the Executive concedes that Congress has, creates rights," *Miers*, 558 F. Supp. 2d at 91, and that "by utilizing its power to issue subpoenas and proceed with an investigation via compulsory process, Congress creates a legal right to the responsive information that those subpoenas will yield[,]" *id.*

Importantly, the Supreme Court's analysis of the Legislature's Article I investigative power confirms that a committee of Congress' right to enforce its subpoenas is *intrinsic* to its constitutional authority to conduct investigations in the first place. In *McGrain v. Daugherty*, 273 U.S. 135, 47 S.Ct. 319, 71 L.Ed. 580 (1927), the Supreme Court stated unequivocally that "the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." *McGrain*, 273 U.S. at 174, 47 S.Ct. 319. Thus, it is the precedent of this district, as established in both *Miers* and in *Committee on Oversight & Government Reform v. Holder*, 979 F. Supp. 2d 1 (D.D.C. 2013), that the powers provided to Congress in Article I of the Constitution necessarily include the "right to further an investigation by issuing subpoenas and enforcing them in court[.]" *Holder*, 979 F. Supp. 2d at 22.

[21] Past precedents also dispose of DOJ's contention that, just because Article I does not expressly mention the right of a committee of Congress to enforce its subpoena power in court, the courts are now *implying* that the Constitution contains such right in a manner that contravenes what the Supreme Court has said about implied causes of action. The Constitution also does not explicitly convey to Congress the specific right to conduct investigations (i.e., what the Supreme Court calls "the power of inquiry"), and yet, the Supreme Court found that such power is intrinsic to the "legislative Power" that Article I expressly conveys to Congress. *Anderson v. Dunn*, 19 U.S. 204, 230, 6 Wheat. 204, 5 L.Ed. 242 (1821). So it is here. As explained in *Anderson v. Dunn*, "[t]here is not in the whole of [the Constitution], a grant of powers which does not draw after it others, not expressed, but vital to their exercise[.]" *id.* at 225–26. And in light of *McGrain*'s conclusion (repeated here for emphasis) that "the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function[,]" *McGrain*, 273 U.S. at 174, 47 S.Ct. 319, DOJ cannot seriously maintain that the power to enforce legislative subpoenas is not among these intrinsic rights. It also cannot be seriously debated that " 'the judiciary is clearly discernible as the primary means through which constitutional rights may be enforced' " *Miers*, 558 F. Supp. 2d at 88 (alternations omitted) (quoting *Davis v. Passman*, 442 U.S. 228, 242, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979)); *see also Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954) (finding that the district court had erred in dismissing a suit seeking equitable relief brought directly under the Fifth Amendment, based on alleged race discrimination in school admissions); *Jacobs v. United States*, 290 U.S. 13, 15, 54 S.Ct. 26, 78 L.Ed. 142 (1933) (permitting a plaintiff to bring suit directly under the Fifth Amendment based on allegations that the United States had taken his property for public use without just compensation). Thus, DOJ's strident contention that "the [Judiciary] Committee must also show that Congress has authorized a cause of action to litigate the Committee's claimed right to compel Mr. McGahn's testimony" (Def.'s Mot. at 52) is plainly meritless.[23]

23. *Reed v. County Commissioners of Delaware County, Pa.*, 277 U.S. 376, 48 S.Ct. 531, 72

[22] If Congress does somehow need a statute to authorize it to file a lawsuit to enforce its subpoenas in vindication of its thwarted constitutional rights (for the reasons explained above, it does not), then the Declaratory Judgment Act plainly serves that purpose, as both Judge Bates and Judge Amy Berman Jackson have previously found, in parallel contexts. *See Miers*, 558 F. Supp. 2d at 78–88; *Holder*, 979 F. Supp. 2d at 22. This Court, too, concludes that the Judiciary Committee has satisfied the three established elements for seeking a declaration of rights under this statute: (1) it has established "a case of actual controversy"; (2) it has invoked an "independent basis for federal jurisdiction"; and (3) it has filed an "appropriate pleading." *Miers*, 558 F. Supp. 2d at 79 (internal quotation marks and citation omitted); *see also id.* at 81–82 (holding that where the Constitution creates a right, a plaintiff can use the Declaratory Judgment Act to vindicate that right); *Holder*, 979 F. Supp. 2d at 22 (finding that the House committee "is not looking to the Declaratory Judgment Act as the source of the right it is seeking to vindicate in this Court, but rather as the source of the mechanism to achieve the vindication of a right derived elsewhere"). That is all the law requires.

3. There Is No Separation-Of-Powers Impediment To The Judiciary Committee's Seeking To Vindicate Its Rights In Federal Court

DOJ's final argument as to why a duly authorized committee of the House of Representatives cannot be permitted to file a subpoena-enforcement lawsuit in federal court, even though ordinary civil litigants generally have unfettered access to the federal courts for this purpose, relies on a reassertion of constitutional separation-of-powers principles. (*See* Def.'s Mot. at 40–43.) Judge Bates soundly rejected DOJ's separation-of-powers-based lack of standing arguments in *Miers*. *See Miers*, 558 F. Supp. 2d at 95–99. This Court further addresses most of the conceptual problems with DOJ's arguments restricting the power of the courts to review a claim brought by a House committee against the Execu-

L.Ed. 924 (1928), which DOJ cites here, is not to the contrary. DOJ characterizes that opinion as holding "that a committee's power to issue subpoenas does not itself include the power to bring suit to enforce a subpoena in federal court" (*see* Def.'s Mot. at 52), but coming just months after the Court had held in *McGrain* that legislative subpoenas are an enforceable right of Congress, and given that Reed involved individual Senators who had filed suit to compel compliance with a Senate subpoena under circumstances in which those individual plaintiffs had not been authorized to sue on behalf of Congress, it is stretch to interpret the Supreme Court's statement that the suit was not "authorized by law" to stand for the proposition that, if Congress authorizes a committee to file a subpoena-enforcement lawsuit, that committee still has no cause of action to sue. Similarly unavailing is DOJ's reliance on *Jesner v. Arab Bank, PLC*, —— U.S. ——, 138 S. Ct. 1386, 200 L.Ed.2d 612 (2018) and *Ziglar v. Abbasi*, —— U.S. ——, 137 S. Ct. 1843, 198 L.Ed.2d 290 (2017). (*See* Def.'s Mot. at 53.) Both of those cases involved inferring private rights of actions for *damages* for violations of constitutional rights under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), an area in which the Supreme Court has traditionally urged particular caution and deference to Congress, based on separation of powers concerns. *See Jesner*, 138 S. Ct. at 1402 (finding that courts must defer to Congress regarding the creation of a damages remedy "if there are sound reasons to think Congress might doubt the efficacy or necessity" of such a remedy). No such concerns are present here—indeed far from it—because the Constitution conveys (and thus necessarily endorses) the power of inquiry, and the Judiciary Committee seeks only a declaration and an injunction to vindicate its constitutional rights. *See Miers*, 558 F. Supp. 2d at 89 ("This is not a damages action. Thus, *Bivens* and its progeny are not strictly on point.").

tive branch elsewhere in this Memorandum Opinion. (*See supra* Part IV.A.2.) In this section, the Court homes in on the obvious red flag that immediately appears with respect to even the most cursory review of DOJ's arguments regarding the constitutional limits of a House committee's subpoena-enforcement authority: the lack of any reason *why* the Constitution should be construed to command, or even countenance, this result, especially when other subpoena issuers routinely enlist the aid of the federal courts with respect to enforcing their mandates. (*See* Hr'g Tr. at 57:14–59:12.)

Apparently undisturbed by the manifest inequity of treating a committee of Congress less favorably than a litigating private citizen when it comes to identifying the appropriate mechanisms for the vindication of established legal rights, DOJ's brief ignores this problem entirely. And when asked about it during the motions hearing (*see* Hr'g Tr. at 57:20–25 (Court noting that "people can issue subpoenas and they can also come to court if the person who receives the subpoena doesn't provide the information that they say they are seeking to compel," and then asking, "why is the House worse off?")), DOJ's counsel responded, first, that "the House has never bothered to pass a statute giving it the authority to do any of this" (*id.* at 58:10–11), and, second, that "the House doesn't execute the laws" (*id.* at 59:1). The first response is of no moment, since the power to investigate and to issue subpoenas is vested in the House of Representatives by the Constitution itself (*see supra* Part IV.B.2), and thus the Judiciary Committee does not *need* a statute to have the authority to act in vindication of its constitutional interests. The second point is likewise unavailing, because no one reasonably claims that a private individual who is seeking to have its subpoenas enforced in court is executing laws. *See Clinton v. Jones*, 520 U.S. 681, 701, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997) (finding that "there is no suggestion that the Federal Judiciary is being asked to perform any function that might in some way be described as 'executive.' Respondent is merely asking the courts to exercise their core Article III jurisdiction to decide cases and controversies").

DOJ does little else to address this Court's concerns about the implications of its argument that the Constitution requires the Judiciary Committee to go it alone with respect to seeking to have its subpoenas enforced, and thus, unlike other civil litigants, it cannot seek an enforcement order from the courts. Nevertheless, DOJ is undaunted, and it seems to float three arguments concerning this issue. DOJ says (1) that the Judiciary Committee is not disadvantaged because it has other non-court options for enforcing its subpoenas (*see* Def.'s Mem. at 41–42); (2) that, regardless, history establishes that the Committee does not have the right to sue in court (*see id.* at 32–36); and (3) that there is persuasive and precedential case law in this district that holds that a House committee has no standing to sue the Executive branch (*see id.* at 39.) For the following reasons, none of these arguments persuades this Court to conclude that the Judiciary Committee cannot proceed to press the legal claims it has brought in this lawsuit.

First of all, the fact that the Judiciary Committee has "several political arrows in its quiver to counter perceived threats to its sphere of power[,]" *Mnuchin*, 379 F. Supp. 3d at 22—including, apparently, the manipulation of its appropriations power to starve the Executive branch of resources as a sanction for contempt (*see* Def. Mem. at 42; *see also* Hr'g Tr. at 65:17–20)—and, therefore, "this lawsuit is not a last resort for the House[,]" *Mnuchin*, 379 F. Supp.

3d at 22, is irrelevant. The elements that courts must consider to determine whether a plaintiff has Article III standing are well established (*see supra* n.19), and they do not include a "last resort" requirement. To the extent that federal courts have exercised their equitable powers to stay their own consideration of matters that are otherwise ripe for judicial review, it appears that they have done so in the relatively unusual circumstance in which the parties are on the brink of reaching a negotiated resolution of the conflict, *see, e.g.*, *AT & T I*, 551 F.2d at 394, or in the context of evaluating the justiciability of the plaintiff's claim under the political question doctrine; the latter ordinarily involves assessing the series of factors that the Supreme Court prescribed in *Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), *see also Zivotofsky*, 132 S. Ct. at 1432 (Sotomayor, J., concurring) (explaining that "the final three *Baker* factors address circumstances in which prudence may counsel against a court's resolution of an issue presented"). DOJ has disavowed the possibility that the parties here will settle (*see* Def.'s Accommodation Resp. at 2), and a quick review of its briefs indicates that it has not engaged with the *Baker* factors at all.

What is more, DOJ's suggestion that a thwarted House committee must eschew the courts and, instead, must rely on its "power to withhold appropriations" in order "to get the information that it needs" (Hr'g Tr. at 65:18–20) is nearly a practical nullity, because an appropriations sanction for non-compliance with a legislative subpoena cannot be implemented swiftly enough to preserve the utility of a defiant witness's testimony, and it also cannot be achieved without the cooperation of the entire Congress as well as the President whom the Judiciary Committee is investigating and whose allegedly unlawful directive to his senior-level aides is the impetus for the Committee's legal claims. It is also quite clear that if the House attempts an appropriations penalty, or if it utilizes its sometimes-mentioned inherent power to send the Sergeant at Arms to arrest the contemptuous official, those "political arrows" are far more likely to raise legitimate separation-of-powers concerns than allowing the Judiciary Committee to file a civil action in federal court.

DOJ's second contention fares no better. As the Court explained above, the fact that there are few recorded instances in the history of our Nation in which Congress has filed a legal claim against the Executive branch in court to enforce its subpoena rights (*see* Def.'s Mot. at 34–35), goes to show, at most, that the Legislature has rarely needed such assistance (*see supra* Part IV. A.2.b). It says nothing about whether the Judiciary Committee can avail itself of the opportunity to file a legal action against the Executive branch to protect against alleged transgressions of its Article I power of inquiry, consistent with well-established constitutional principles. And, again, DOJ has not offered a single case in which a binding authority has embraced the proposition that, under the Constitution, the House has no standing to proceed again the Executive branch in federal court despite its satisfaction of the well-worn requirements of a cognizable injury-in-fact that is redressable in the court. (*See supra* n.19.)

The only case that DOJ has offered that appears to provide direct support for this dubious legal proposition is a recent case from this district in which the court concluded that the House lacked standing to proceed in federal court with respect to its claim that the President's declaration of a national emergency to procure funding for the border wall violated the Appropriations Clause of the Constitution and the Administrative Procedures Act. *See Mnu-*

chin, 379 F. Supp. 3d at 12; *see also id.* at 10 ("This is a case about whether one chamber of Congress has the 'constitutional means' to conscript the Judiciary in a political turf war with the President over the implementation of legislation."). Notably, the *Mnuchin* case can be, and most likely should be, read to stand for the much more modest contention that the House had failed to satisfy the well-established injury-in-fact standing requirement, because the harm that it alleged was not a cognizable injury. *See id.* at 13 ("The Administration concedes, and the Court agrees, that only the first prong of the standing analysis—injury that is concrete and particularized—is at issue here. Applying the 'especially rigorous' analysis required, the Court finds that the House has failed to allege such an injury. So the Court must deny the House's [preliminary injunction] motion." (internal citation omitted)). Furthermore, in this regard, the *Mnuchin* case helpfully and specifically distinguished "the supposed harm to Congress' Appropriations power[,]" *id.* at 16, from the harm to Congress' well founded investigatory interests, *id.* at 17, which is what the Judiciary Committee alleges in the instant case (*see* Pl's Mem. at 34–35). But if the essential holding of *Mnuchin* is that "[t]he Committee lacks standing foremost because centuries of historical practice show that the injury the Committee claims is not one traditionally deemed capable of redress through judicial process[,]" as DOJ suggests (Def.'s Mem. at 32 (citation omitted)), then this Court believes its holding is erroneous.

Here is why. The assertion that historical practice alone compels the conclusion that a dispute between the Executive branch and the Legislature is non-justiciable appears to rest on the Supreme Court's redressability reminder in *Raines* that a legally cognizable injury for standing purposes is an injury that has been "traditionally thought to be capable of resolution through the judicial process." (*See* Def.'s Mem. at 33 (quoting *Raines*, 521 U.S. at 826, 117 S.Ct. 2312).) DOJ argues (and *Mnuchin* appears to accept) that *Raines* "teaches that in evaluating whether a suit between the political Branches is justiciable, a federal court must evaluate whether such a suit is consistent with historical practice." (Def.'s Mem. at 32.) A review of Supreme Court case law in the more than two decades since *Raines* was decided casts doubt on DOJ's conclusion that *Raines*'s historical overview was the primary determinant of the Supreme Court's holding there that the patently amorphous harm that the plaintiffs had alleged was not a cognizable injury. But even if *Raines* implicitly amended the Supreme Court's traditional Article III standing criteria to include an historical-practice element when a plaintiff's injury is assessed for the purpose of determining standing, in this Court's view, that element cannot be satisfied based solely on the fact that there are few recorded cases in which that particular injury was previously claimed. As demonstrated above, a dearth of similar case law could just as easily be interpreted to mean that the political branches have typically been able to find other acceptable ways to resolve their disputes, and thus have avoided litigation. (*See* Part IV.A.2.b.) In other words, where the historical record shows that disputes between the Executive branch and the Legislature concerning the claimed injury are typically resolved through negotiation, the lack of prior cases says nothing about the *capability* of resolving those kinds of legal issues in the courts.

This Court also notes, as a general matter, that the utility of history depends on an assumption that the terms and conditions of the "battle" between the political branches *now* are the same as those that

gave rise to similar disputes *in the past*. However, we are at a point in history in which the Executive branch appears to be categorically rejecting once-accepted and standard applications of Legislative and Judicial branch authority; therefore, federal courts are being called upon to evaluate novel exercises of Executive power that allegedly threaten the prerogatives of the other branches of government in unique ways. *See, e.g.*, Def.'s Mem. in Opp'n to the Mot. for Prelim. Inj., *Make the Road N.Y. v. McAleenan*, No. 19-cv-2369 (D.D.C.), at 75 (characterizing the statutorily required remedy for a procedural violation of the Administrative Procedure Act as a "nationwide injunction" and, having done so, arguing that that courts cannot invalidate unlawful agency rules in their entirety); *El Paso Cty. v. Trump*, No. 19-cv-66, 408 F.Supp.3d 840, 2019 WL 5092396 (W.D. Tex. Oct. 11, 2019) (rejecting the Executive branch argument that transferring funds for border wall construction from congressional appropriations made for other purposes is lawful); *City of Philadelphia v. Attorney Gen. of United States*, 916 F.3d 276 (3d Cir. 2019), reh'g denied (June 24, 2019) (holding that Executive branch withholding of a congressional law enforcement grant because the City failed to comply with certain conditions that required greater coordination with federal officials on matters of immigration enforcement exceeded the authority granted to the Attorney General by Congress). This reality plainly limits the lessons that can properly be drawn from history. It also renders unpersuasive DOJ's assertion that, based on the branches' lengthy track record of negotiated resolutions, today's Judiciary Committee should be deemed to lack standing to protect its vital interests in the courts. In this Court's view, the fact that federal courts throughout history have not had occasion to address the kinds of perceived threats to constitutional and procedural norms that are being brought to federal courts' attention regularly in the present day actually says more about the unprecedented nature of the challenged actions and legal positions of the Executive branch than it does about the nature of the Judiciary Committee's claim or harm.

In any event, the federal courts have their *own* recorded history, and it consists of the precedential rulings that prior courts have rendered with respect to similar legal issues. (*See supra* Part III.B.) In this regard, the *Miers* case persuasively determined that the Judiciary Committee had Article III standing to file a subpoena-enforcement lawsuit seeking to vindicate its investigatory interests when a former White House Counsel refused to appear for testimony as directed. *See Miers*, 558 F. Supp. 2d at 68–78. And that case further noted that "the [Supreme] Court has never held that an institution, such as the House of Representatives, cannot file a suit to address an institutional harm." *Id.* at 70. No interim developments have changed the status of the law. Additionally, upon review of the Supreme Court's past jurisprudence on the matter, this Court found the following quote that renders dubious the standing and cause-of-action arguments that DOJ presses now: "Without the power to investigate—including of course the authority to compel testimony, *either through its own processes or through judicial trial*—Congress could be seriously handicapped in its efforts to exercise its constitutional function wisely and effectively." *Quinn v. United States*, 349 U.S. 155, 75 S.Ct. 668, 99 L.Ed. 964 (1955).

C. The President Does Not Have The Power To Prevent His Aides From Responding To Legislative Subpoenas On The Basis Of Absolute Testimonial Immunity

The merits legal issues that the instant dispute between the House Judiciary Com-

mittee and the Executive branch raises are straightforward. The Committee claims that it has issued a lawful subpoena to former White House Counsel Donald F. McGahn II (*see* Compl. ¶ 107); that McGahn has refused to appear before the Committee to provide testimony as required (*id.* ¶ 109); and that "[t]here is no lawful basis for McGahn's refusal to appear before the Judiciary Committee" (*id.* ¶ 110). For its part, DOJ asserts that, consistent with its understanding of the longstanding view of the Department's Office of Legal Counsel, there *is* a lawful basis for McGahn's defiance of the Committee's valid subpoena: the President has ordered him not to appear. (*See* Def.'s Mot. at 27.) DOJ asserts that current and former senior-level presidential aides have "absolute testimonial immunity" from compelled congressional process, as a matter of law; therefore, if the President invokes "executive privilege" over a current or former aides' testimony—as he has done with respect to McGahn—that aide need not accede to the lawful demands of Congress. (*Id.* at 27–28.) Thus, it is important to note at the outset, what is *not* at issue in the instant case. No one contests the lawfulness of the Judiciary Committee's subpoena, and no one maintains that, if McGahn has the legal duty to testify before the Committee, a senior-level aide in his position has no right to invoke executive privilege to withhold certain information in the course of his testimony, as appropriate.[24]

[23] For the reasons that follow, this Court finds that the President does not have (and, thus, cannot lawfully assert) the power to prevent his current and former senior-level aides from responding to congressional subpoenas. As Judge Bates explained in *Miers*, as a matter of law, such aides do not have absolute testimonial immunity. Therefore, as it relates to them, a valid legislative subpoena issued by a duly authorized committee of Congress gives rise to a legally enforceable duty to perform. The President cannot override this duty, notwithstanding OLC's ostensible recognition of such power. Accordingly, if a duly authorized committee of Congress issues a valid legislative subpoena to a current or former senior-level presidential aide, the law requires the aide to appear as directed, and assert executive privilege as appropriate. *See Miers*, 558 F. Supp. 2d at 106.

1. *Miers* Squarely Rejects The Argument Senior-Level Presidential Aides Enjoy Absolute Testimonial Immunity

Committee on the Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53 (D.D.C. 2008), is the only recorded case in our Nation's history that directly addresses the legal argument that a senior-level presidential aide is immune to a legislative subpoena seeking testimony when the President directs him to ignore that congressional mandate. The dearth of cases involving compelled congressional process issued to Executive branch officials is likely attributable to the fact that subpoena-related conflicts between Congress and the Executive branch are usually negotiated, rather than litigated, as DOJ points out. (*See* Def.'s Mot. at 33–36.) In addition, while direct subpoena-related disputes between Congress and

24. The astute reader will note that the Judiciary Committee's complaint does include an allegation that "[t]he President has waived executive privilege as to the subpoenaed testimony that relates to matters and information discussed in the [Mueller] Report." (Compl. ¶ 112.) However, by consent of the parties and with respect to the Court's consideration of the pending cross-motions for summary judgment, the question of whether and to what extent McGahn can actually invoke executive privilege during his testimony before the Committee in light of the President's alleged waiver has been put on hold.

the Executive branch do exist, it appears that such conflicts have been relatively infrequent; the Court suspects that this is attributable to the fact that, as a general matter, Congress' clear constitutional prerogative to compel information in furtherance of its legislative and oversight functions has been historically recognized and is typically widely respected. *See Watkins*, 354 U.S. at 187–88, 77 S.Ct. 1173. Regardless, *Miers* is precedential with respect to the merits of DOJ's assertion that absolute testimonial immunity shields senior-level presidential aides, because Judge Bates squarely confronted the issue of whether the law permits the legal duty that arises when a senior-level presidential aide receives a legislative subpoena to be, in essence, canceled by the President.

In *Miers*, Judge Bates begins by stating his conclusion that "the asserted absolute immunity claim here is entirely unsupported by existing case law." *Miers*, 558 F. Supp. 2d at 99. The court explained that it had reached that conclusion primarily because "there is Supreme Court authority that is all but conclusive on this question and that powerfully suggests that such advisors do not enjoy absolute immunity." *Id. Miers* then turned to that case law, beginning with *United States v. Bryan*, 339 U.S. 323, 70 S.Ct. 724, 94 L.Ed. 884 (1950), in which "[t]he Supreme Court has made it abundantly clear that compliance with a congressional subpoena is a legal requirement." *Id.* (citing *Bryan*, 339 U.S. at 331, 70 S.Ct. 724).[25] The *Miers* court next explained how, in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)—a case in which senior White House aides had been sued for civil damages—the Supreme Court had "virtually foreclosed" the argument that senior-level White House aides were entitled to absolute testimonial immunity. *Miers*, 558 F. Supp. 2d at 100–01. This was because, according to *Miers*, *Harlow* had concluded that such aides were, at best, entitled to *qualified* immunity, notwithstanding the fact that "absolute immunity [for civil damages] extended to legislators, judges, prosecutors, and the President himself[.]" *Id.* at 100; *see also id.* (noting that, in *Harlow*, "the Supreme Court rejected the analogy to legislative aides that the Executive now invokes here").[26]

Even with respect to the underlying contention that the President himself is entitled to absolute testimonial immunity, *Miers* found binding Supreme Court cases that compelled the opposite conclusion. For example, according to Judge Bates, *United States v. Nixon*, 418 U.S. at 707–08, 94 S.Ct. 3090, holds that the President "may only be entitled to a presumptive, rather than an absolute, privilege[,]" and it would be manifestly inconsistent with the Supreme Court's holding in that regard to accord presidential aides a "superior card of immunity." *Miers*, 558 F. Supp. 2d at

25. *Miers* noted, in particular, *Bryan's* classic observation that "[a] subpoena has never been treated as an invitation to a game of hare and hounds, in which the witness must testify only if cornered at the end of the chase." *Miers*, 558 F. Supp. 2d at 99 (quoting *Bryan*, 339 U.S. at 331, 70 S.Ct. 724) (internal quotation marks omitted).

26. *Harlow* addressed whether the applicability of the "alter ego" derivative immunity that the Supreme Court had determined applied to *legislative* aides in a case called *Gravel v. United States*, 408 U.S. 606, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972), applied to senior-level presidential aides who worked in the White House. 457 U.S. at 809–11, 102 S.Ct. 2727. Like DOJ in this case (and in *Miers*), the argument on the table was that senior-level presidential aides should be deemed to have the absolute immunity from civil damages that the law confers to their boss. *Id.* at 808, 102 S.Ct. 2727. As *Miers* pointed out, the *Harlow* Court rejected that argument. *Id.* at 813, 102 S.Ct. 2727.

103. Judge Bates also noted that, in *Clinton v. Jones*, 520 U.S. 681, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997), "then-Chief Justice Rehnquist joined in the holding that even the demands of the President's schedule could not relieve him of the duty to give a civil deposition." *Miers*, 558 F. Supp. 2d at 104 (citing *Clinton*, 520 U.S. at 706, 117 S.Ct. 1636). And based on this key holding, Judge Bates pointed out that "[i]f the President must find time to comply with compulsory process in a civil lawsuit, so too must his senior advisors for a congressional subpoena." *Id.* at 105.

Miers also specifically rejected DOJ's asserted separation-of-powers basis for recognizing absolute testimonial immunity by relying on the D.C. Circuit's language in *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973). There, in the context of a case involving the enforcement of a grand jury subpoena *duces tecum* served on the President, the Circuit specifically asserted that, "[i]f the claim of absolute privilege was recognized, its mere invocation by the President or his surrogates could deny access to all documents in all the Executive departments to all citizens and their representatives, *including Congress*, the courts as well as grand juries, state governments, state officials and all state subdivisions." *Sirica*, 487 F.2d at 715; *see also id.* (noting that, if absolute immunity existed, "[t]he Freedom of Information Act could become nothing more than a legislative statement of unenforceable rights[,]" and cogently concluding that "[s]upport for this kind of mischief simply cannot be spun from incantation of the doctrine of separation of powers"). And Judge Bates ably reasoned that "[t]hat passage rather plainly contemplates that executive privilege is not absolute even when Congress—rather than a grand jury—is the party requesting the information." *Miers*, 558 F. Supp. 2d at 103.

Finally, *Miers* further recognized that, "[t]ellingly, the only authority that the Executive can muster in support of its absolute immunity assertion are two OLC opinions authored by Attorney General Janet Reno and Principal Deputy Assistant Attorney General Steven Bradbury, respectively." *Id.* at 104 (citing *Assertion of Executive Privilege With Respect to Clemency Decision*, 23 Op. O.L.C. 1 (1999); *Immunity of the Former Counsel to the President From Compelled Congressional Testimony*, 31 Op. O.L.C. 191 (2007)). *Miers* explained that because "[t]hose opinions conclude that immediate advisors to the President are immune from compelled congressional testimony[,] [t]he question, then, is how much credence to give to those opinions." *Id.* Ultimately, *Miers* determined that the opinions were not persuasive, largely because "[n]either cites to a single judicial opinion recognizing the asserted absolute immunity." *Id.* Furthermore, "the three-page Bradbury OLC opinion was hastily issued on the same day that the President instructed Ms. Miers to invoke absolute immunity, and it relies almost exclusively upon the conclusory Reno OLC opinion and a statement from a memorandum written by then-Assistant Attorney General William Rehnquist in 1971." *Id.*

[24] In this Court's view, *Miers* employs sound reasoning. And with respect to the merits analysis, this Court adopts its absolute testimonial immunity analysis in full. In particular, this Court, too, reads the cited cases to support the finding that DOJ's absolute testimonial immunity argument is all but foreclosed by the binding case law *Miers* cites, coupled with the logical flaws in DOJ's legal analysis, which is laid out in the discussion below. In short, this Court finds that the *Miers* court rightly determined not only that the principle of absolute testimonial immunity for

senior-level presidential aides has no foundation in law, but also that such a proposition conflicts with key tenets of our constitutional order. And, notably, no other court has considered the absolute testimonial immunity question that *Miers* addressed since that case was decided.[27]

In the context of the instant case, DOJ responds by asserting that *Miers* was wrongly decided. (*See* Def.'s Mot. at 48.) Moreover, and in any event, DOJ has emphasized that *Miers*'s sphere of influence is exceedingly limited. (*See* Hr'g Tr. at 118:13–118:14.) The thrust of the latter contention is that *Miers* is only one opinion—no binding authority followed—and, implicitly, that the law is not established by the word of a single district court judge. *See id.* On the other hand, says DOJ, scores of OLC attorneys have considered this issue over the past five decades, and in a series of opinions, OLC has carefully concluded that senior-level presidential aides do enjoy absolute testimonial immunity. (*See* Def.'s Mot. at 60.) Moreover, by minimizing *Miers*'s reach in this way, DOJ suggests that, in the absence of a groundswell of judges rejecting the concept, this Court should not readily find that the law is what *Miers* concluded.

Setting aside the implications of DOJ's argument for *this* district court's consideration of these issues, its effort to undercut *Miers*'s holding is ineffectual, primarily because the argument inappropriately downplays both the importance of prior precedent in establishing the law as the next court understands it, and also the fact that DOJ itself controls whether more courts will have the opportunity to rule on the issue. To be sure, *Miers* is just one nonbinding opinion. But, as noted, its analysis with respect to the absolute testimonial immunity issue is directly on point; therefore, it has considerable sway in terms of this Court's conclusions. Thus, and in any event, this Court cannot ignore it and still remain consistent with traditional juridical norms.

Consequently, DOJ's best chance of persuading this Court to rule differently was to counter the various aspects of *Miers*'s holding *directly*; a skillful play-by-play of *Miers*'s alleged analytical flaws would have been most useful. Instead, in its briefing, DOJ has presented essentially the same threshold and merits arguments that *Miers*'s rejected, almost as if this was a matter of first impression, and thus, it has given the Court no reasonable basis to distinguish the circumstances of the instant case, nor any principled reason to interpret the law in a different fashion than Judge Bates did, as explained above. (*See, e.g.*, Def.'s Mot. at 48–50 (asserting, over the span of two pages, that *Miers* was wrongly decided with respect to the threshold jurisdictional and standing issues, before proceeding to draw solely from OLC opinions to support the argument that senior-level presidential aides have absolute testimonial immunity).)

The Court also observes that the lack of other cases on these issues is at least in part attributable to DOJ's prior rational decisions to enter into negotiations over the scope of testimony and records when past Executive branch officials received legislative subpoenas, rather than proceed

27. In *Committee on Oversight & Government Reform v. Holder,* District Judge Amy Berman Jackson evaluated whether, pursuant to a congressional subpoena, documents over which the Attorney General had asserted executive privilege must be turned over to the congressional committee. 979 F. Supp. 2d 1. Although the *Holder* opinion adopts *Miers*'s reasoning with respect to the threshold issues of jurisdiction, standing, and cause of action, *see id.* at 10–12, 17–26, that court had no occasion to consider the merits of the absolute testimonial immunity claim that DOJ makes here.

to court to litigate the purported scope of those officials' purported immunity. (Def.'s Mot. at 32–36.) Yet, DOJ further argues here that an Executive branch official's alleged immunity to compelled congressional process is a non-justiciable issue. (Def.'s Mot. at 31–52.) Surely, DOJ cannot both act to keep the immunity issue away from the courts and also be heard to suggest that the paucity of precedent is itself sufficient proof that the law must countenance the concept.

2. OLC's Long-Held View That Senior-Level Presidential Aides Have Absolute Testimonial Immunity Is Neither Precedential Nor Persuasive

That all said, it is certainly true that OLC has long been of the view that senior-level presidential aides have absolute testimonial immunity; indeed, as *Miers* indicates, the first recorded statement of the agency that specifically commits this view to writing was authored in 1971. *See* Mem. from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, to John D. Ehrlichman, Assistant to the President for Domestic Affairs, *Power of Congressional Committee to Compel Appearance or Testimony of "White House Staff"* (Feb. 5, 1971) ("1971 Memorandum"). In that year, then-Assistant Attorney General William Rehnquist produced a memorandum on the point that maintained (without direct citation) that "[t]he President and his immediate advisers—that is, those who customarily meet with the President on a regular or frequent basis—should be deemed absolutely immune from testimonial compulsion by a congressional committee." *Id.* at 7. This OLC memorandum further indicated that such persons "not only may not be examined with respect to their official duties, but they may not even be compelled to appear before a congressional committee." *Id.* But, of course, as definitive as this statement of law sounds, OLC serves as legal counsel to the Executive branch, and "the Executive cannot be the judge of its own privilege[.]" *Miers*, 558 F. Supp. 2d at 106. Consequently, its statement of the law is "entitled to only as much weight as the force of [its] reasoning will support." *Id.* at 104.

In this Court's view, the persuasiveness of OLC's opinion that senior-level presidential aides enjoy immunity from compelled congressional process turns on two familiar factors: the authority that is provided in support of this proposition, and the reasons that are provided for why the author reached this conclusion. With respect to the first consideration, it cannot be overstated that the 1971 Memorandum does not cite to a single case that stands for the asserted proposition, and the ten-plus subsequent publicly available statements by OLC that DOJ points to in support of this immunity simply reference back to the 1971 Memorandum without providing any court authority. It goes without saying that longevity alone does not transform an unsupported notion into law.

As for the logic behind the view, the original memorandum appears to reason by by analogy. It begins by recognizing the breadth of Congress' power of inquiry, which admittedly "carries with it the power to compel the testimony of a witness." 1971 Mem. at 1. And then as if providing the solution to a problem that it had not yet identified, the memo states that "if White House staff personnel are to be exempt from appearing or testifying before a congressional committee, it is because they have some special immunity or privilege not accorded others." *Id.* at 1. The remainder of the 8-page document devotes itself to developing potential reasons for such a privilege. It suggests, for example, "a certain analogy to judicial proceedings[,]" in which a "distinction" is

made "between a claim of absolute immunity from even being sworn in as a witness, and a right to claim privilege in answering certain questions in the course of one's testimony as a witness." *Id.* at 4.

Ultimately, the 1971 Memorandum pushes for the former, on the basis of a handful of historical examples in which former assistants to various Presidents blatantly refused to appear before Congress in response to a legislative subpoena. *See id.* at 5–6. At least one of these folks was apparently polite enough to write a letter to the committee that "grounded his refusal on the confidential nature of his relationship with the President." *Id.* at 5. But others merely sent congressional subpoenas back with the simple statement that "[i]n each instance the President directed me, in view of my duties as his Assistant, not to appear before your subcommittee." *Id.* at 5; *see also id.* at 6.

Tellingly, the 1971 Memorandum does not purport to suggest that the law already countenanced such behavior. Rather, the posture of the Memorandum appears to be a policy piece that provides its client with arguments for why it should be thus. Moreover, as *Miers* notes, Rehnquist admitted that "his conclusions [were] 'tentative and sketchy,' " *Miers*, 558 F. Supp. 2d at 104 (quoting 1971 Mem.at 7), and in his later role as a Supreme Court Justice, he "apparently recanted those views[,]" *id.* In one especially candid moment in the text of the Memorandum, Rehnquist admits that the historical precedents for refusing a congressional subpoena "are obviously quite inconclusive" but that "[i]n a strictly tactical sense, the Executive Branch has a headstart in any controversy with the Legislative Branch, since the Legislative Branch wants something the Executive Branch has, and therefore the initiative lies with the former." 1971 Mem. at 7. He continued: "[a]ll the Executive has to do is maintain the *status quo* and he prevails." *Id.* It is not surprising that, per this initial internal effort to establish the ways in which certain White House staff could prevail in any conflict with Congress over their legally enforceable duty to appear for testimony when subpoenaed, OLC subsequently developed an entire series of statements, each of which references the 1971 Memorandum, but none of which specifically acknowledges that the initial basis for this conclusion was seemingly formed out of nothing.[28]

This inauspicious start does not bode well for this Court's determination of whether OLC's persistent opinion that senior-level aides to the President are absolutely immune from having to respond to compelled congressional process should be credited. Additionally, subsequent developments in caselaw have cast doubt on the 1971 Memorandum's suggestion that the matter of the President's own absolute immunity was settled because "[e]veryone associated with the Executive Branch from [the prosecution of Aaron Burr] until now, so far as I know, has taken the position that the President himself is absolutely immune from subpoena by anyone[.]" 1971 Mem. at 3; *see also Clinton v. Jones*, 520 U.S. 681, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997); *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039

28. The Executive appears to have adopted a practice of regularly securing a new OLC opinion on the existence of testimonial immunity whenever a presidential aide faced a contested Congressional subpoena. *See, e.g., Testimonial Immunity Before Congress of the Assistant to the President and Senior Counselor to the President,* 43 Op. O.L.C. ——, at *1; *Immunity of Former Counsel to the President from Compelled Cong. Testimony,* 31 Op. O.L.C. 191 (2007).

(1974).[29] Moreover, in this first formal floating of the principle of absolute testimonial immunity for certain aides of the President, the author was also crystal clear that the "absolute immun[ity] from testimonial compulsion by a congressional committee" that he was proposing was primarily due to the fact that such "immediate advisors" are "presumptively available to the President 24 hours a day, and the necessity of either accommodating a congressional committee or persuading a court to arrange a more convenient time, could impair that availability." 1971 Mem. at 7. Of course, that analysis does not support the extension of absolute immunity to *former* senior-level aides that DOJ has pressed in recent times.

In fairness, over time, OLC's initial take on absolute testimonial immunity evolved. It appears that OLC's subsequent statements in support of this proposition were beefed up with various other reasons for why one could plausibly assert that certain aides of the President should be absolutely immune from having to testify before Congress; reasons that largely invoke constitutional separation of powers concerns, including potential harassment of the aides (and thus, the President), the risk of disclosure of information covered by executive privilege, and the appearance that the Executive branch is subordinate to the Legislature. *See, e.g.*, *Testimonial Immunity Before Congress of the Assistant to the President and Senior Counselor to the President*, 43 Op. O.L.C. ——, at *2 ("Absent immunity, congressional committees could wield their compulsory power to attempt to supervise the President's actions, or to harass those advisers in an effort to influence their conduct, retaliate for actions the committee disliked, or embarrass and weaken the President for partisan gain." (quotation marks and citation omitted)); *McGahn OLC Mem.*, 43 Op. O.L.C.——, at *5 ("The President is a separate branch of government. He may not compel congressmen to appear before him. As a matter of separation of powers, Congress may not compel him to appear before it." (quotation marks and citation omitted)); *Immunity of the Assistant to the President*, 38 Op. OLC at *4 ("The pressure of compelled live testimony about White House activities in a public congressional hearing would ... create an inherent and substantial risk of inadvertent or coerced disclosure of confidential information relating to presidential decisionmaking—thereby ultimately threatening the President's ability to receive candid and carefully considered advice from his immediate advisers."). Many of these reasons appear in the brief that DOJ has submitted to support absolute immunity in the context of this case. But, unfortunately for DOJ, its mere recitation of these aspirational assertions does not make the proposition any more persuasive, and in fact, given the history of how OLC's opinion has developed, it appears that an endorsement of the principles that OLC espouses would amount to adopting the absolute testimonial immunity for senior-level presidential

29. *Miers* suggests that the contention that the President enjoys absolute immunity from compelled congressional process was dubious as a legal proposition long before the Nixon and Clinton cases. *See Miers,* 558 F. Supp. 2d at 70. In this regard, Judge Bates points to Chief Justice Marshall's opinion in *United States v. Burr,* 25 F. Cas. 30 (C.C.D. Va. 1807). In *Burr,* Chief Justice Marshall explained that "the obligation [to comply with a subpoena] ... is general; and it would seem that *no person* could claim an exemption from [it]." *Id.* at 34 (emphasis added). Therefore, in Chief Justice Marshall's view, "[t]he guard, furnished to [the President], to protect him from being harassed by vexatious and unnecessary subpoenas, is to be looked for in the conduct of a court after those subpoenas have issued; not in any circumstance which is to precede their being issued." *Id.*

aides by *ipse dixit*. Furthermore, because there are few, if any, well-formulated justifications for categorically excusing current and former senior-level presidential aides from responding to compelled congressional process, it would be difficult to do so consistent with existing case law, traditional norms of practice under our constitutional system of government, and common sense.

3. There Is No Principled Basis For Concluding That Senior-Level Presidential Aides Should Have Absolute Testimonial Immunity

DOJ maintains that its contention that senior-level presidential aides should enjoy absolute testimonial immunity plainly follows from two related premises: (1) that the President himself has absolute testimonial immunity from compelled congressional process, and (2) that, as a derivative matter, so too must his "immediate advisors... with whom the President customarily meets on a regular or frequent basis." (Def.'s Mot. at 60; *see also* Hr'g Tr. at 107:12-14 (acknowledging that DOJ is making "purely a derivative argument[,]" and that if the Court does not "think the President has absolute immunity, then that is a serious problem").) In *Miers*, Judge Bates ably explains that both of these assumptions stand on shaky footing after *United States v. Nixon*, *Clinton v. Jones*, and *Harlow v. Fitzgerald*. *See Miers*, 558 F. Supp. 2d at 100–05. This Court agrees with *Miers*'s analysis, and it also observes that none of the differences that DOJ has highlighted between the instant case, on the one hand, and *Clinton* and *Nixon*, on the other, actually matters.[30] The following brief observations further demonstrate that the proposition that senior-level presidential aides are entitled to absolute testimonial immunity has no principled justification, which further undermines DOJ's assertion that such immunity must exist.

First of all, the concept of absolute immunity from compelled congressional process cannot be gleaned from cases that endorse absolute testimonial immunity for legislators, or those that accept absolute immunity *from civil damages* for a variety of public officials. For example, DOJ's reliance on *Gravel v. United States*, 408 U.S. 606, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972), is obviously misplaced, because legislative aides derive their absolute immunity from the Constitution's provision of absolute testimonial immunity to congresspersons through the Speech and Debate Clause. *See id.* at 615–17, 92 S.Ct. 2614. As *Miers* explained, the Supreme Court in *Harlow* specifically addressed the argument that such immunity applies to senior-level executive aides, and concluded that, in contrast to legislative aides, senior-level executive aides are only entitled to *qualified* immunity. *Harlow*, 457 U.S. at 809, 102 S.Ct. 2727.

30. DOJ attempts to distinguish the *Clinton* and *Nixon* cases on the grounds that those cases involved subpoenas issued in the context of a private, civil action for damages and in grand jury proceedings, respectively, while, here, what is at issue is a *legislative* subpoena. DOJ further contends that, in *Nixon*, live testimony by the President was not at issue. However, these distinctions are immaterial from the standpoint of the Supreme Court's conclusion that, while presumptively important, a President's confidentiality interests may sometimes be overridden over his objection. Furthermore, in this Court's view, DOJ's emphasis on the fact that what is at issue here is a *legislative* subpoena undercuts its argument, given the Supreme Court's long-held reverence for Congress' broad investigative authority. Where the law has not provided absolute immunity for Presidents who are facing significant civil damages lawsuits or who have criminal exposure (i.e., compelling claims to the need for confidentiality), it seems unlikely that a President would be declared absolutely immune from compelled congressional process.

Nor can DOJ reasonably rely on the well-established body of case law that applies to the very different circumstance of immunity from civil damages. There are *reasons* why courts have determined that judges, and legislators, and presidents cannot be held liable for civil damages for discretionary decisions that they make in the course of their duties. *See, e.g.*, *Forrester v. White*, 484 U.S. 219, 225, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988) (finding that absolute immunity from civil damages for judicial acts protects "the finality of judgments[,] discourage[s] inappropriate collateral attacks, [and] protect[s] judicial independence by insulating judges from vexatious actions prosecuted by disgruntled litigants" (citation omitted)); *Nixon v. Fitzgerald*, 457 U.S. 731, 751, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982) (holding that the President is absolutely immune from civil damages due to "the singular importance of the President's duties," and that "diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government"); *Tenney v. Brandhove*, 341 U.S. 367, 375, 71 S.Ct. 783, 95 L.Ed. 1019 (1951) (explaining that legislators "must be free to speak and act without fear of criminal and civil liability" as the reason for the absolute immunity endowed by the Speech and Debate Clause and similar provisions in "[f]orty-one of forty-eight State[ ]" constitutions); *see also Imbler v. Pachtman*, 424 U.S. 409, 424, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976) (explaining that the purpose of absolute immunity from civil damages for prosecutorial acts is to allow a prosecutor "to exercise his best judgment both in deciding which suits to bring and in conducting them in court"). And at least one of these justifications does not seem at all applicable to the reasons why one might have immunity from compelled congressional process.[31] One cannot simply assume that the same rationale that compels the conclusion that those who hold certain civil functions are absolutely immune *from civil damages* necessitates absolute immunity *from compelled congressional process*, even for those same individuals.

DOJ's conception of absolute testimonial immunity for senior-level aides also turns out to be overbroad in application, which results in its imposing unwarranted societal costs. To understand why this is so, it is helpful to reflect on a hypothetical that the Court posed during the motions hearing. The Court posed to DOJ counsel a scenario in which an authorized House committee is interested in determining whether to appropriate special funding to improve the décor and the infrastructure-related working environment inside the White House. (Hr'g Tr. 124:8–20.) The committee wishes to evaluate the need for such additional funding, and it wants to talk to everyone who works there, and to compel this witness testimony, if needed. The Court asked DOJ counsel whether, if subpoenas issue, could the President invoke absolute testimonial immunity to excuse the participation of senior-level presidential aides? (*See id.*)

31. For example, in *Mireles v. Waco*, 502 U.S. 9, 112 S.Ct. 286, 116 L.Ed.2d 9 (1991), the Supreme Court found that the district court had properly dismissed a case brought against a judge who had allegedly authorized police officers to use excessive force in seizing an individual because "a judicial officer, in exercising the authority vested in him, [must] be free to act upon his own convictions, without apprehension of personal consequences to himself." *Id.* at 10, 112 S.Ct. 286. By contrast, an executive branch official has no parallel expectation that he or she will not be called upon to testify about the operations of their offices. Indeed, Congress's long standing and widely accepted power of inquiry, makes the potential for being questioned about one's work an ever present possibility.

After engaging briefly with the Court in a humorous exchange about the Executive branch's interest in addressing certain issues that currently exist within the White House (*see id.* at 124:21–22), DOJ counsel responded that "the President would probably allow his most sensitive aides to go testify" but "if the person has testimonial immunity and the President has asserted it . . . then, yes, [the committee] wouldn't be able to compel the person." (Hr'g Tr. at 124:25–125:6.) Upon reflection, looking at it logically, one has to wonder why that is the case? Those aides' status as senior-level assistants to the President seems irrelevant—i.e., when it comes to being asked about the decor in the White House, either *no* White House worker should have to be bothered with Congress' questions, or *everyone* who is called should have to appear. Therefore, the distinction between aides with heightened knowledge, access to the President, and special responsibilities (i.e., senior-level presidential aides) makes no difference where the topic of Congress' investigation does not even conceivably implicate such distinction. Why, then, should senior-level presidential aides always get to play a special trump card with respect to such congressional requests? Judge Bates reflected on a similar concern in *Miers*, and DOJ has yet to explain why "Congress should be left with no recourse to obtain information that is plainly not subject to any colorable claim of executive privilege." *Miers*, 558 F. Supp. 2d at 106.

On the other hand, if Congress seeks to explore with certain senior-level White House aides topics of a potentially sensitive nature, it is widely accepted that the President can exert executive privilege with respect to his aides' answers, as appropriate, to protect any privileged information. *Miers*, 558 F. Supp. 2d at 106. Given this, the question becomes why, then, would such senior-level aides *need* absolute immunity? In other words, even without a total exemption from compelled congressional process, senior-level White House aides can withhold the kinds of confidential and privileged information that distinguishes them from everybody else; they can do so by asserting an appropriate privilege if needed, when legislators ask questions that probe too deeply. Thus, it appears that absolute testimonial immunity serves only the indefensible purpose of blocking testimony about *non*-protected subjects that are relevant to a congressional investigation and that such an aide would otherwise have a legal duty to disclose.[32]

Notably, this would appear to be the case even with respect to aides who, like White House Counsels, are "at the hub of all presidential activity." (Def.'s Mot. at 69 (internal quotation marks and citation omitted)). To be sure, White House Counsels and other similar aides have unfettered access to the President on a regular basis (*see id.*), and their roles within the Executive branch involve daily contact

32. DOJ suggests that there is something about Don McGahn's former proximity to national security matters that warrants his immunity nonetheless. (Def.'s Mot. at 69, 73.) But it has not explained why this is so, given that such senior-level aides would certainly have the right to withhold information on the grounds of an applicable privilege, where appropriate. Thus, the fact that McGahn was "White House Counsel" and undoubtedly had exposure to "matters affecting the military, foreign affairs, and national security" (Def.'s Mot. at 64 (quotation marks and citation omitted)) does not provide an additional justification for a grant of absolute testimonial immunity under these circumstances. If what he knows can be lawfully withheld as covered by an applicable privilege, then the law will preclude its disclosure, even if he is compelled to testify in the absence of immunity. And if he cannot properly invoke the privilege, then there is no rational basis for maintaining that he should be immune to Congress' questioning.

with copious amounts of information that is confidential in nature, including information that has been classified for our national security. (*See* Def.'s Mot. at 70 (emphasizing that "the role of the Counsel is to provide advice and assistance to the President and to carry out 'responsibilities of utmost discretion and sensitivity' on his behalf in all realms of domestic, military, and foreign affairs" (quoting *Fitzgerald*, 457 U.S. at 749–50, 102 S.Ct. 2690).) But DOJ has not persuasively explained why such access warrants absolute testimonial immunity, where such an individual would be counseled in any sworn communications with Congress, and would have ample opportunity to invoke executive privilege or any other lawful basis for withholding information, as needed to protect the legitimate interests of the Executive branch. And, of course, if such an aide cannot lawfully invoke any privilege to protect information in response to the committee's questions, then there is no rational basis for maintaining that he should be immune from responding to Congress' valid subpoena in the first place.

It is also the case that the other rationale that such senior-level presidential aides might hope to rely on—'I'm too busy'—is unavailable in the wake of the Supreme Court's conclusion that even the President himself must find the time. *See Miers*, 558 F. Supp. 2d at 104. In any event, no such excuse could possibly apply to *former* senior-level aides, who have long departed from the White House, because such individuals no longer have proximity to power. What, then, justifies *their* right to be excused from the duty to respond to a call from Congress, especially when other private citizens have no choice? At a minimum, this perplexing question raises the following conceptual conundrum: if the purpose of providing certain senior-level presidential aides with absolute testimonial immunity is that the practicalities of their special roles demand it, then what justifies allowing that entitlement to follow them when they return to private life? As a matter of pure logic, it would seem that if one's access to the Oval Office is the reason that a categorical exemption from compelled congressional process is warranted, then that trump card should, at most, be a raincheck, and not the lifetime pass that DOJ proposes.

DOJ's apparent response to the concern that absolute testimonial immunity for current and former senior-level aides serves no purpose is its suggestion in its briefs that such broad immunity serves three more systematic goals. First, it asserts that absolute testimonial immunity facilitates frank communications in the White House, and without it, the potential "public spectacle" of having to appear before a congressional committee "would surely exert influence over [senior-level aides'] conduct in office, and could adversely affect the quality and candor of the counsel" that they offer to the President. (Def.'s Mot. at 70.) DOJ provides no evidence to support this representation. And it appears to contradict the lived experience of the many government officials who have testified before Congress, seemingly without consequence, over the years. *See Miers*, 558 F. Supp. 2d at 102 (observing that "the historical record produced by the Committee reveals that senior advisors to the President have often testified before Congress subject to various subpoenas dating back to 1973").

DOJ's assertions about the chilling effect of compelled congressional process also imply that congressional questioning is needlessly intrusive and unwarranted, and that characterization drastically discounts the reasons why executive branch officials, including members of the President's staff, are called to testify. As the Supreme Court has suggested on numer-

ous occasions, Congress brings in witnesses not as punishment, but to provide the Legislature with the information that it needs to perform its critical legislative and oversight functions. *Watkins*, 354 U.S. at 187, 77 S.Ct. 1173; *McGrain*, 273 U.S. at 175, 47 S.Ct. 319. Thus, the idea that having to testify truthfully about the inner workings of government is a threat that would actually be sufficient to prevent key public servants from competently performing as assistants to the President seems anomalous. Moreover, if the institutions of our government are all, in fact, pushing in the same direction as they should be—i.e., toward developing and implementing policies that are in the best interests of the People of the United States—then the possibility that one of the public servants who work within the government might be called upon to cooperate with Congress, and thereby perform his public duty of giving authorized legislators the means of performing their own constitutional functions, provides no reasonable grounds for fear. And if it does, as DOJ here suggests, then that is all the more reason why such testimony is critical. In short, DOJ's implicit suggestion that compelled congressional process is a 'zero-sum' game in which the President's interest in confidentiality invariably outweighs the Legislature's interest in gathering truthful information, such that current and former senior-level presidential aides should be always and forever immune from answering probing questions, is manifestly inconsistent with a governmental scheme that can only function properly if its institutions work together. *See* The Federalist No. 51 (James Madison).

DOJ's second systematic concern is similarly discordant. DOJ insists that, without absolute testimonial immunity for senior-level presidential aides, the Executive branch would grind to a halt from the weight of the subpoenas that would be thrust upon it. (*See* Def.'s Mot. at 65.) This representation is plainly speculative. Furthermore, such speculation seems unreasonable, given two known facts. First of all, as DOJ itself admits, Congress has long demanded information from high-level members of the Executive branch, apparently without incident. *See Mazars*, 940 F.3d at 721 (noting that Presidents have "been the subjects of Congress'[ ] legislative investigations" as far back as 1832, and that "fewer of these have required judicial intervention"). As the Supreme Court commented in *Clinton v. Jones*, the President's "predictive judgment finds little support in either history or the relatively narrow compass of the issues raised in this particular case." *Clinton*, 520 U.S. at 702, 117 S.Ct. 1636 (citations omitted)); *see also id.* ("As we have already noted, in the more than 200–year history of the Republic, only three sitting Presidents have been subjected to suits for their private actions. If the past is any indicator, it seems unlikely that a deluge of such litigation will ever engulf the Presidency.").

In addition, as relevant here, we have a test case by which we can prove, or disprove, DOJ's theory. The second significant fact is that it has been more than a decade since Judge Bates released the *Miers* decision, which plainly announced that senior-level presidential aides lack absolute immunity from compelled congressional process. Ironically, *Miers* itself observed that "[i]t is noteworthy that in an environment where there is no judicial support whatsoever for the Executive's claim of absolute immunity, the historical record also does not reflect the wholesale compulsion by Congress of testimony from senior presidential advisors that the Executive fears." *Miers*, 558 F. Supp. 2d at 102. And the absence of such history seems even more noteworthy at present. Surely if Con-

gress was inclined to utilize its subpoena power to harass the Executive branch unjustifiably, then *Miers*'s own holding would have given it sufficient impetus to do so. Yet, even DOJ must acknowledge that no such parade of horribles has happened.

[25] DOJ's third argument for the necessity of absolute testimonial immunity for systematic reasons places it back in the familiar refuge of its constitutional separation-of-powers contentions. In this regard, DOJ maintains, that "the public spectacle of haling [current and] former advisors to a sitting President before a committee of Congress . . . promote[s] the perception of Executive subservience to the Legislature" (Def.'s Mot. at 70), which, in its view of what the Constitution permits, is improper, because "[a] committee of Congress could not, consistent with the separation of powers, hale the President before it to compel him to testify under oath, any more than the President may compel congressmen to appear before him" (Def.'s Mot. at 63). Here, once again, DOJ calls on separation-of-powers principles to do work that the Framers never intended. Indeed, *the entire point* of segregating the powers of a monarch into the three different branches of government was to give each branch certain authority that the others did not possess. Thus, while the branches might well be conceived of as co-equals (in the sense that one cannot unlawfully subvert the prerogatives of another), that does not mean that all three branches must be deemed to have the *same* powers. To the contrary, the President cannot hale members of Congress into the White House for questioning *precisely because* the power of inquiry resides with the Legislature, and also because the Constitution itself expressly prevents the Executive branch from becoming inquisitors by inflicting its own subpoena power on members of Congress for political reasons.[33]

Therefore, DOJ's argument that the House of Representatives, which unquestionably possesses the constitutionally authorized power of inquiry and also the power of impeachment, should *not* be able to issue subpoenas to Executive branch officials because the President cannot do the same to them, simultaneously appreciates traditional separation-of-powers principles *and* subverts them, and as such, truly makes no sense. *See Miers*, 558 F. Supp. 2d at 103 (explaining that the Executive branch's separation-of-powers interest in "[p]residential autonomy, such as it is, cannot mean that the Executive's actions are totally insulated from scrutiny by Congress. That would eviscerate Congress'[ ] historical oversight function").

4. Concluding That Presidential Aides Enjoy Absolute Testimonial Immunity At The President's Discretion Conflicts With Core Constitutional Norms

Finally, the Court turns to DOJ's contention that, quite apart from the accepted

33. The Speech and Debate Clause mandates that members of the House and Senate and their aides "may not be made to answer—either in terms of questions or in terms of defending himself from prosecution—for the events that occurred" as part of the legislative process. *See Gravel*, 408 U.S. at 614–16, 92 S.Ct. 2614. The Constitution, therefore, makes legislators and their aides immune to the force of subpoena with respect to protected legislative activity. The Supreme Court has explained that the Speech and Debate Clause derives from a similar provision of the English Bill of Rights of 1689, which served to address successive monarchs' use of "criminal and civil law to suppress and intimidate critical legislators." *See United States v. Johnson*, 383 U.S. 169, 179, 86 S.Ct. 749, 15 L.Ed.2d 681 (1966). Thus, the purpose of the Speech and Debate Clause is to protect legislators from intimidating and/or hostile executive and judicial inquiry, a common abuse of power in seventeenth century England. *See id.* at 181–82, 86 S.Ct. 749. And, notably, the Constitution includes nothing akin to the Speech and Debate Clause for the Executive branch.

ability of a President to invoke executive privilege to protect confidential information during the course of aides' testimony before Congress, as a matter of law, it is the President who controls whether such aide provides any testimony whatsoever. During the motions hearing, DOJ's counsel repeatedly emphasized that the power to invoke absolute testimonial immunity with respect to current and former senior-level aides *belongs to the President*. (*See, e.g.*, Hr'g Tr. at 42:15–16 ("[T]he President owns the privilege here. So he is the owner of Mr. McGahn's absolute immunity from compulsion[.]"), 43:4–6 ("[T]he President owns the privilege as to former officials with the same vigor with which he owns it to current officials."), 125:5 (maintaining that immunity is "the President's to assert").) And when asked whether this power of the Executive is limited to such aides' communications with Congress in particular, or also extends to preventing his aides from speaking to anyone else (e.g., the media) even after their departure from the White House, counsel indicated that while the Executive branch has "not taken a position on that," it was "definitely not disclaiming that." (*Id.* at 43:12–16.) This single exchange—which brings to mind an Executive with the power to oversee and direct certain subordinates' communications for the remainder of their natural lives—highlights the startling and untenable implications of DOJ's absolute testimonial immunity argument, and also amply demonstrates its incompatibility with our constitutional scheme.

Stated simply, the primary takeaway from the past 250 years of recorded American history is that Presidents are not kings. *See* The Federalist No. 51 (James Madison); The Federalist No. 69 (Alexander Hamilton); 1 Alexis de Tocqueville, *Democracy in America* 115–18 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chicago Press 2000) (1835). This means that they do not have subjects, bound by loyalty or blood, whose destiny they are entitled to control. Rather, in this land of liberty, it is indisputable that current and former employees of the White House work for the People of the United States, and that they take an oath to protect and defend the Constitution of the United States. Moreover, as citizens of the United States, current and former senior-level presidential aides have constitutional rights, including the right to free speech, and they retain these rights even after they have transitioned back into private life.

To be sure, there may well be circumstances in which certain aides of the President possess confidential, classified, or privileged information that cannot be divulged in the national interest and that such aides may be bound by statute or executive order to protect. But, in this Court's view, the withholding of such information from the public square in the national interest and at the behest of the President is a duty that the aide herself possesses. Furthermore, as previously mentioned, in the context of compelled congressional testimony, such withholding is properly and lawfully executed on a question-by-question basis through the invocation of a privilege, where appropriate.[34] As such, with the exception of the

34. With respect to such withholding, the President can certainly identify sensitive information that he deems subject to executive privilege, *United States v. Nixon*, 418 U.S. at 713, 94 S.Ct. 3090, and his doing so gives rise to a legal duty on the part of the aide to invoke the privilege on the President's behalf when, in the course of his testimony, he is asked a question that would require disclosure of that information. But the invocation of the privilege by a testifying aide is an order of magnitude different than DOJ's current claim that the President essentially owns the *entirety* of a senior-level aide's testimony such that the

recognized restrictions on the ability of current and former public officials to disclose certain protected information, such officials (including senior-level presidential aides) still enjoy the full measure of freedom that the Constitution affords. Thus, DOJ's present assertion that the absolute testimonial immunity that senior-level presidential aides possess is, ultimately, owned by the President, and can be invoked by the President to overcome the aides' own will to testify, is a proposition that cannot be squared with core constitutional values, and for this reason alone, it cannot be sustained.

* * *

To make the point as plain as possible, it is clear to this Court for the reasons explained above that, with respect to senior-level presidential aides, absolute immunity from compelled congressional process simply does not exist. Indeed, absolute testimonial immunity for senior-level White House aides appears to be a fiction that has been fastidiously maintained over time through the force of sheer repetition in OLC opinions, and through accommodations that have permitted its proponents to avoid having the proposition tested in the crucible of litigation. And because the contention that a President's top advisors cannot be subjected to compulsory congressional process simply has no basis in the law, it does not matter whether such immunity would theoretically be available to only a handful of presidential aides due to the sensitivity of their positions, or to the entire Executive branch. Nor does it make any difference whether the aides in question are privy to national security matters, or work solely on domestic issues. And, of course, if *present* frequent occupants of the West Wing or Situation Room must find time to appear for testimony as a matter of law when Congress issues a subpoena, then any such immunity most certainly stops short of covering individuals who only purport to be cloaked with this authority because, at some point in the past, they *once* were in the President's employ. This was the state of law when Judge Bates first considered the issue of whether former White House Counsel Harriet Miers had absolute testimonial immunity in 2008, and it remains the state of law today, and it goes without saying that the law applies to former White House Counsel Don McGahn, just as it does to other current and former senior-level White House officials.

Thus, for the myriad reasons laid out above as well as those that are articulated plainly in the prior precedents of the Supreme Court, the D.C. Circuit, and the U.S. District Court for the District of Columbia, this Court holds that individuals who have been subpoenaed for testimony by an authorized committee of Congress must appear for testimony in response to that subpoena—i.e., they cannot ignore or defy congressional compulsory process, by order of the President or otherwise. Notably, however, in the context of that appearance, such individuals are free to assert any legally applicable privilege in response to the questions asked of them, where appropriate.

V. CONCLUSION

The United States of America has a government of laws and not of men. The Constitution and federal law set the boundaries of what is acceptable conduct, and for this reason, as explained above, when there is a dispute between the Legislature and the Executive branch over what the law requires about the circumstances under which government officials must act, the Judiciary has the authority, and the

White House can order the individual not to appear before Congress *at all*.

responsibility, to decide the issue. Moreover, as relevant here, when the issue in dispute is whether a government official has the duty to respond to a subpoena that a duly authorized committee of the House of Representatives has issued pursuant to its Article I authority, the official's defiance unquestionably inflicts a cognizable injury on Congress, and thereby, substantially harms the national interest as well. These injuries give rise to a right of a congressional committee to seek to vindicate its constitutionally conferred investigative power in the context of a civil action filed in court.

Notably, whether or not the law requires the recalcitrant official to release the testimonial information that the congressional committee requests is a separate question, and one that will depend in large part on whether the requested information is itself subject to withholding consistent with the law on the basis of a recognized privilege. But as far as the duty to appear is concerned, this Court holds that Executive branch officials are not absolutely immune from compulsory congressional process—no matter how many times the Executive branch has asserted as much over the years—even if the President expressly directs such officials' noncompliance.

This result is unavoidable as a matter of basic constitutional law, as the *Miers* court recognized more than a decade ago. Today, this Court adds that this conclusion is inescapable precisely because compulsory appearance by dint of a subpoena is a legal construct, not a political one, and per the Constitution, no one is above the law. That is to say, however busy or essential a presidential aide might be, and whatever their proximity to sensitive domestic and national-security projects, the President does not have the power to excuse him or her from taking an action that the law requires. Fifty years of say so within the Executive branch does not change that fundamental truth. Nor is the power of the Executive unfairly or improperly diminished when the Judiciary mandates adherence to the law and thus refuses to recognize a veto-like discretionary power of the President to cancel his subordinates' legal obligations. To the contrary, when a duly authorized committee of Congress issues a valid subpoena to a current or former Executive branch official, and thereafter, a federal court determines that the subpoenaed official does, as a matter of law, have a duty to respond notwithstanding any contrary order of the President, the venerated constitutional principles that animate the structure of our government and undergird our most vital democratic institutions are preserved.

Consequently, and as set forth in the accompanying Order, Plaintiff's Motion for Expedited Partial Summary Judgment (ECF No. 22) is **GRANTED**, and Defendant's Motion for Summary Judgment (ECF No. 32) is **DENIED**.

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, et al., Plaintiffs,

v.

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, Defendant.

Civil Action No. 1:18-cv-00114 (CJN)

United States District Court, District of Columbia.

Signed November 25, 2019

Background: Records requesters brought action under Freedom of Information Act

ant, *by a clear showing,* carries the burden of persuasion." *Mazurek v. Armstrong,* 520 U.S. 968, 972, 117 S.Ct. 1865, 138 L.Ed.2d 162 (1997) (quoting 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948, at 129–130 (2d ed.1995)) (emphasis supplied and footnotes omitted by the Supreme Court in *Mazurek*). Here, two of the three plaintiffs have failed to meet their burden of proof with respect to the issue of irreparable injury. While the Court recognizes that such a showing need not be overwhelming where, as here, the other factors to be considered in deciding whether injunctive relief is appropriate favor the plaintiffs, it cannot grant them the relief that they seek at this time because none of the injuries asserted by these plaintiffs can be described as "irreparable" within the meaning of the traditional balancing test. The Court will therefore deny without prejudice the plaintiffs' motion with respect to Harris and Buxton, with the understanding that the Court may reach a very different result with respect to these plaintiffs should they file renewed motions supported by some evidence of irreparable injury (*e.g.,* evidence that Harris's removal from the Board is imminent).

SO ORDERED this 12th day of June, 2008.[16]

COMMITTEE ON the JUDICIARY, U.S. HOUSE OF REPRESENTATIVES, Plaintiff,

v.

Harriet MIERS, et al., Defendants.

Civil Action No. 08–0409 (JDB).

United States District Court, District of Columbia.

July 31, 2008.

Background: House Committee on the Judiciary sought declaratory judgment that former White House counsel was required to comply with a subpoena and appear before the Committee to testify regarding an investigation into the forced resignation of nine United States Attorneys, and that White House Chief of Staff was required to produce a privilege log in response to a congressional subpoena. The Executive branch officials moved to dismiss the action. Committee filed motion for partial summary judgment.

Holdings: The District Court, John D. Bates, J., held that:

(1) House committee had standing to bring civil action to enforce congressional subpoenas issued to senior presidential aides;

(2) declaratory judgment was available to resolve dispute without identifying a cause of action apart from the Declaratory Judgment Act (DJA); and

(3) former White House counsel was not entitled to absolute or qualified immunity.

Committee's motion granted; Executive's motion denied.

16. An order follows granting in part and denying in part the plaintiffs' motion and memorializing the briefing schedule for dispositive motions established by the Court at the conclusion of the hearing on the plaintiffs' motion.

1. Federal Courts ⚿232

Federal question jurisdiction was properly invoked in a suit by a House committee to enforce congressional subpoenas issued to senior presidential aides. 28 U.S.C.A. § 1331.

2. Federal Courts ⚿12.1

Doctrine of ripeness is a justiciability doctrine designed to prevent premature adjudication of disputes. U.S.C.A. Const. Art. 3, § 1.

3. Federal Courts ⚿12.1

Determining whether an action is ripe for judicial review requires court to consider: (1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented. U.S.C.A. Const. Art. 3, § 1 et seq.

4. Federal Courts ⚿13

Action raising issue as to whether senior presidential aides were absolutely immune from compelled congressional process was ripe for judicial review; factual record was fully developed, the issues were purely legal, there was no further administrative action that the court would interfere with, and House Committee which sought to enforce subpoenas would suffer in the event of delayed judicial review. U.S.C.A. Const. Art. 3, § 1 et seq.

5. United States ⚿23(4)

House committee had standing to bring civil action to enforce congressional subpoenas issued to senior presidential aides. U.S.C.A. Const. Art. 3, § 2, cl. 1.

6. Federal Courts ⚿13

Dispute as to whether senior presidential aides were absolutely immune from compelled congressional process was amenable to judicial resolution, and thus justiciable. U.S.C.A. Const. Art. 3, § 1 et seq.

7. Declaratory Judgment ⚿272

Declaratory Judgment Act did not impliedly repeal or modify the requirements of jurisdiction in federal court; in that sense, Declaratory Judgment Act is not an independent source of federal jurisdiction. 28 U.S.C.A. § 2201(a).

8. Declaratory Judgment ⚿274.1

Because subject matter jurisdiction was present under federal question statute, and House's constitutional rights were arguably implicated, declaratory judgment was available to resolve claim as to whether senior presidential aides were absolutely immune from compelled congressional process without identifying a cause of action apart from the Declaratory Judgment Act (DJA); by invoking the DJA to gain anticipatory review of the question, House committee could obtain judicial resolution regarding its subpoena power without the unseemly scenario of the arrest and detention of high-ranking executive branch officials, which would carry the possibility of precipitating a serious constitutional crisis. 28 U.S.C.A. §§ 1331, 2201(a).

9. Declaratory Judgment ⚿272

Where the Constitution is the source of the right allegedly violated, no other source of a right or independent cause of action need be identified in order to seek relief under Declaratory Judgment Act (DJA). 28 U.S.C.A. § 2201(a).

10. United States ⚿23(4)

Congress has a right, derived from its Article I legislative function, to issue and enforce subpoenas, and a corresponding right to the information that is the subject of such subpoenas. U.S.C.A. Const. Art. 1, § 1 et seq.

11. Declaratory Judgment ⚿203

House committee had an implied cause of action derived from Article I to seek a declaratory judgment concerning the validity of its exercise of its subpoena power. U.S.C.A. Const. Art. 1, § 1 et seq.; 28 U.S.C.A. § 2201(a).

12. Declaratory Judgment ⚿5.1

Court has the discretion under Declaratory Judgment Act (DJA) to decline to hear case. 28 U.S.C.A. § 2201(a).

13. Declaratory Judgment ⚿203

Court would not decline to exercise its discretion under Declaratory Judgment Act (DJA) to hear House committee's suit seeking to enforce subpoenas issued to senior presidential aides where there were over five months of live controversy remaining until a new Congress rendered the case moot; only judicial intervention could prevent a stalemate between the other two branches of government that could result in a particular paralysis of government operations. 28 U.S.C.A. § 2201(a).

14. United States ⚿23(8)

Former White House counsel was not entitled to absolute immunity precluding her forced compliance with a House committee subpoena requiring her to testify regarding an investigation into the forced resignation of nine United States Attorneys; furthermore, qualified immunity was also unavailable because the inquiry did not involve the sensitive topics of national security or foreign affairs.

Irvin B. Nathan, U.S. House of Representatives, Office of the General Counsel, Washington, DC, for Plaintiff.

John Russell Tyler, Helen H. Hong, Nicholas Andrew Oldham, U.S. Department of Justice, Daniel M. Flores, Committee on the Judiciary, Alan D. Strasser, Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP, Barry Coburn, Coburn & Coffman, PLLC, James Hamilton, Robert V. Zener, Bingham McCutchen LLP, Washington, DC, Sidney Samuel Rosdeitcher, Paul, Weiss, Rifkind, Wharton & Garrison, New York, NY, for Defendants.

MEMORANDUM OPINION

JOHN D. BATES, District Judge.

This dispute pits the political branches of the federal government against one another in a case all agree presents issues of extraordinary constitutional significance. The heart of the controversy is whether senior presidential aides are absolutely immune from compelled congressional process. But as is often true of lawsuits that raise important separation of powers concerns, there are many obstacles to the invocation of the jurisdiction of the federal courts that must first be addressed.

The Committee on the Judiciary ("Committee"), acting on behalf of the entire House of Representatives, asks the Court to declare that former White House Counsel Harriet Miers must comply with a subpoena and appear before the Committee to testify regarding an investigation into the forced resignation of nine United States Attorneys in late 2006, and that current White House Chief of Staff Joshua Bolten must produce a privilege log in response to a congressional subpoena. Ms. Miers and Mr. Bolten (collectively "the Executive") [1] have moved to dismiss this action in its entirety on the grounds that the Committee lacks standing and a proper cause of

1. The Court will refer to the defendants in this action, and to the executive branch and the current administration generally, as "the Executive."

action, that disputes of this kind are non-justiciable, and that the Court should exercise its discretion to decline jurisdiction. On the merits, the Executive argues that sound principles of separation of powers and presidential autonomy dictate that the President's closest advisors must be absolutely immune from compelled testimony before Congress, and that the Committee has no authority to demand a privilege log from the White House.

Notwithstanding that the opposing litigants in this case are co-equal branches of the federal government, at bottom this lawsuit involves a basic judicial task—subpoena enforcement—with which federal courts are very familiar. The executive privilege claims that form the foundation of the Executive's resistance to the Committee's subpoenas are not foreign to federal courts either. After all, from *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803) ("[i]t is emphatically the province and duty of the judicial department to say what the law is"), through *United States v. Nixon,* 418 U.S. 683, 705, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974) (the judiciary is the ultimate arbiter of claims of executive privilege), to *Boumediene v. Bush,* 553 U.S. ——, 128 S.Ct. 2229, 2259, 171 L.Ed.2d 41 (2008) (rejecting regime in which the political branches may "switch the Constitution on or off at will" and, rather than the judiciary, "say 'what the law is' "), the Supreme Court has confirmed the fundamental role of the federal courts to resolve the most sensitive issues of separation of powers. In the thirty-four years since *United States v. Nixon* was decided, the courts have routinely considered questions of executive privilege or immunity, and those issues are now "of a type that are traditionally justiciable" in federal courts, *United States v. Nixon,* 418 U.S. at 697, 94 S.Ct. 3090 (citation omitted), and certainly not unprecedented, as the Executive contends.

Indeed, the aspect of this lawsuit that is unprecedented is the notion that Ms. Miers is absolutely immune from compelled congressional process. The Supreme Court has reserved absolute immunity for very narrow circumstances, involving the President's personal exposure to suits for money damages based on his official conduct or concerning matters of national security or foreign affairs. The Executive's current claim of absolute immunity from compelled congressional process for senior presidential aides is without any support in the case law. The fallacy of that claim was presaged in *United States v. Nixon* itself (*id.* at 706, 94 S.Ct. 3090):

> 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 [or congressional] process under all circumstances.

It is important to note that the decision today is very limited. To be sure, most of this lengthy opinion addresses, and ultimately rejects, the Executive's several reasons why the Court should not entertain the Committee's lawsuit, but on the merits of the Committee's present claims the Court only resolves, and again rejects, the claim by the Executive to absolute immunity from compelled congressional process for senior presidential aides. The specific claims of executive privilege that Ms. Miers and Mr. Bolten may assert are not addressed—and the Court expresses no view on such claims. Nor should this decision discourage the process of negotiation and accommodation that most often leads to resolution of disputes between the political branches. Although standing ready to fulfill the essential judicial role to "say what the law is" on specific assertions of executive privilege that may be presented,

the Court strongly encourages the political branches to resume their discourse and negotiations in an effort to resolve their differences constructively, while recognizing each branch's essential role. To that end, the Court is reminded of Justice Jackson's observations in his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635, 72 S.Ct. 863, 96 L.Ed. 1153 (1952):

> While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.

BACKGROUND [2]

At the outset, the Court recognizes that this case is in an odd procedural posture. For purposes of the Executive's motion to dismiss, the Court must accept the Committee's factual assertions as true, but that is not so for purposes of the Committee's own motion for partial summary judgment. Fortunately, however, the operative facts are not significantly in dispute, notwithstanding each side's attempt to put its own gloss on the relevant events.

In early December 2006, the Department of Justice ("DOJ") requested and received resignations from seven U.S. Attorneys: Daniel Bogden (D.Nev.), Paul K. Charlton (D.Ariz.), Margaret Chiara (W.D.Mich.), David Iglesias (D.N.M.), Carol Lam (S.D.Cal.), John McKay (W.D.Wash.), and Kevin Ryan (N.D.Cal.). *See* Pl.'s Stmt. of Facts ¶ 7.[3] At some point earlier in the year, DOJ had also asked for and received resignations from two other U.S. Attorneys: H.E. "Bud" Cummins III (E.D.Ark.) and Todd Graves (W.D.Mo.). *Id.* The circumstances surrounding these forced resignations aroused almost immediate suspicion. Few of the U.S. Attorneys, for instance, were given any explanation for the sudden request for their resignations. Many had no reason to suspect that their superiors were dissatisfied with their professional performance; to the contrary, most had received favorable performance reviews.

Additional revelations further fueled speculation that improper criteria had motivated the dismissals. Carol Lam, for example, had successfully prosecuted Republican Congressman Randy "Duke" Cunningham for bribery following a high-

2. Several organizations and individuals have participated in this proceeding as amici curiae. The minority leadership in the House of Representatives, Representatives John Boehner, Roy Blunt, Lamar Smith, and Chris Cannon (hereinafter "House GOP amici"), filed a brief in support of the Executive. Four amici briefs were submitted in support of the Committee. Those briefs were filed by: (1) a group of former U.S. Attorneys who have served under Presidents ranging from Lyndon Johnson to George W. Bush; (2) a group of current and former Members of Congress, represented by Senator Inouye, Senator Whitehouse, former Senator Cohen, and former Representatives Edwards and Evans; (3) the Rutherford Institute, Judicial Watch, Citizens for Responsibility and Ethics in Washington, and the Brennan Center for Justice, which are organizations spanning the political spectrum that advocate for separation of powers in the federal government; and (4) Thomas Mann, Norman J. Ornstein, Mark J. Rozell, and Mitchel A. Sollenberger, hailing from the Brookings Institute, the American Enterprise Institute, George Mason University, and the University of Michigan–Dearborn, respectively. The Court thanks all of the amici for their thoughtful contributions to this proceeding.

3. The Court will cite to the Committee's statement of material facts. The Executive's responses to that statement reveal that these facts are essentially undisputed.

profile investigation and was "in the midst" of pursuing additional high-ranking Republican officials when she was terminated. *See* Pl.'s Mot. at 8; *see also* Report of the Committee on the Judiciary, House of Representatives, H.R.Rep. No. 110–423 (2007) (hereinafter "Contempt Report"), at 17. John McKay had refused requests by Republican officials to pursue accusations of voter fraud during the 2004 Washington gubernatorial race. *Id.* Similarly, David Iglesias was contacted by two Republican Members of Congress from New Mexico (Senator Pete Domenici and Representative Heather Wilson) who were disappointed to learn that Iglesias had no plans to seek indictments against members of the opposing political party in the run-up to the 2006 congressional elections. Pl.'s Mot. at 8; *see also* Contempt Report at 25.

As these events came to light, the Committee on the Judiciary—a standing Committee of the House of Representatives—commenced an investigation into the forced resignations in early 2007. *See* Pl.'s Stmt. of Facts ¶ 8. Citing its authority under House Rule X, which provides that the Judiciary Committee's oversight responsibilities extend to issues relating to judicial proceedings and criminal law enforcement, the Committee declared that it aimed to:

> (1) investigat[e] and expos[e] any possible malfeasance, abuse of authority, or violation of existing laws on the part of the Executive Branch related to these concerns, and (2) consider[ ] whether the conduct uncovered may warrant additions or modifications to existing Federal Law, such as more clearly prohibiting the kinds of improper political interference with prosecutorial decisions as have been alleged here.

Id. ¶ 10 (quoting Contempt Report at 7). The Committee heard the testimony of six of the dismissed U.S. Attorneys during the first hearing held on March 6, 2007. *Id.* ¶ 11. Shortly thereafter, Committee Chairman John Conyers, Jr., and Linda T. Sanchez, Chairwoman of the Subcommittee on Commercial and Administrative Law, wrote to officials at DOJ and the White House requesting that certain individuals, among them Ms. Miers, be made available for questioning by the Committee. *Id.* ¶¶ 12–13.

In response, the Executive, "[i]n order to accommodate the Committee's interests . . . [,] made available to Congress a very substantial number of witnesses and documents." *See* Def.'s Mot. to Dismiss & Opp'n to Summ. J. (hereinafter "Def.'s Mot. & Opp'n") at 11. Thus, the Executive made "then-Principal Associate Deputy Attorney General William Moschella available to Congress as a witness, and subsequently made available thirteen additional Executive Branch witnesses for testimony or interviews, including the Attorney General, the Chief of Staff to the Attorney General, incumbent and former Deputy Attorneys General, and serving U.S. Attorneys." *Id.* Mr. Moschella testified that "the forced resignations were all performance related and that any White House involvement was minimal and occurred only at the end of the process." Pl.'s Mot. at 9 (citing Contempt Report at 19). Similarly, then-Attorney General Alberto Gonzales initially indicated that he was not involved in the process at all but later testified that he had very little recollection of the entire matter.[4]

On May 23, 2007, Monica Goodling, former Senior Counsel to Attorney General Gonzales and DOJ's White House Liaison,

4. Indeed, by one count Mr. Gonzales testified no fewer than sixty-four times that he could not recall particular details concerning the events in question. *See* Eric Lichtblau, *Bush's Law* 295–96 (2008); *see also* Pl.'s Mot. at 9 n. 7.

testified before the Committee pursuant to limited use immunity. *See* Pl.'s Stmt. of Facts ¶ 24. Similarly, on July 11, 2007, former White House Political Director Sara M. Taylor testified before the Senate Committee on the Judiciary pursuant to a duly issued subpoena. *Id.* ¶ 42. Ms. Taylor invoked executive privilege as necessary on a question-by-question basis. *Id.* Moreover, in addition to the live testimony provided, DOJ produced to Congress "over 7,850 pages of documents, including more than 2,200 pages from the Office of the Attorney General and 2,800 pages from the Office of the Deputy Attorney General." *See* Def.'s Mot. & Opp'n at 12. DOJ made available another 3,750 pages of documents, bringing the total number of pages produced to Congress to "nearly 12,000." *Id.*

According to the Committee, however, "[s]ubsequent testimony and documents provided by Department officials . . . suggested that the Gonzales and Moschella statements were false and misleading, thus still leaving unresolved precisely what the reasons were for the terminations and what role the White House played in them." *See* Pl.'s Mot. at 9–10. Most importantly, none of the DOJ officials who testified before the Committee could identify *who* at DOJ had recommended the dismissal of the majority of the terminated U.S. Attorneys. *Id.* at 10 (citing Contempt Report at 43). Former Deputy Attorney General James B. Comey, who had supervised the dismissed U.S. Attorneys, had not recommended their removal—with the apparent exception of Kevin Ryan—and "could not credit the reasons offered for the terminations of the others." *Id.* (citing Contempt Report at 45–46). The Committee concluded that it is "well established that, in the opening days of President Bush's second term, then Senior Presidential Advisor Karl Rove raised the idea with officials in the White House Counsel's office of replacing some or all U.S. Attorneys." *See* Contempt Report at 43. The Committee has not been able to determine, however, "why Mr. Rove was interested in this issue." *Id.* Similarly, the Committee determined that "[n]ewly installed White House Counsel Harriet Miers apparently took up Mr. Rove's idea, and over the next two years received repeated drafts of the firing list." *Id.* at 43–44. But likewise, "the Committee has learned very little as to why Ms. Miers believed that an effort to replace sitting U.S. Attorneys should be launched." *Id.* at 44.

After deciding that Ms. Miers had played a significant personal role in the termination decision-making, the Committee intensified its efforts to obtain her testimony. Ms. Miers, however, had not responded to the initial letter from the Committee requesting a voluntary interview. *See* Pl.'s Stmt. of Facts ¶¶ 13–14. Hence, on March 9, 2007, Chairman Conyers and Chairwoman Sanchez wrote to Fred F. Fielding, Counsel to the President, requesting that the administration produce documents relating to the investigation and "make certain White House officials available for interviews and questioning." *Id.* ¶ 15.

Mr. Fielding responded by letter dated March 20, 2007. He indicated that the White House was willing to "make available for interviews the President's former Counsel; current Deputy Chief of Staff and Senior Advisor; Deputy Counsel; and Special Assistant in the Office of Political Affairs." *Id.* ¶ 16 (quoting Pl.'s Mot. Ex. 5). That offer was conditioned, however, upon several terms and restrictions. To begin with, the interviews were to be limited to "the subject of (a) communications between the White House and persons outside the White House concerning the request for resignations of the U.S. Attorneys in question; and (b) communications

between the White House and Members of Congress concerning those reports." Pl.'s Mot. Ex. 5. Moreover, the Executive indicated that the interviews were to be "private and conducted without the need for an oath, transcript, subsequent testimony, or the subsequent issuance of subpoenas." *Id.* The White House also offered to provide to the Committee two categories of documents: "(a) communications between the White House and the Department of Justice concerning the request for resignations for the U.S. Attorneys in question; and (b) communications on the same subject between White House staff and third parties, including Members of Congress or their staffs on the subject." *Id.*

The Committee did not receive Mr. Fielding's offer warmly. In particular, the Committee viewed the proposal as "unreasonably restrictive" in part because "no matter what was revealed [through the document production or interviews], no other testimony or documents could be requested from the White House." *See* Contempt Report at 61. Moreover, the documents the White House offered to produce "excluded all *internal* White House communications regarding the firing of the U.S. Attorneys, even though some documents reflecting such internal communications had already been provided by the Justice Department." *Id.* (emphasis in original). Thus, pursuant to House rules, on March 21, 2007, the Subcommittee voted to authorize Chairman Conyers to "issue subpoenas for the testimony of former White House Counsel Harriet Miers ... and other specified White House officials." *Id.* at 61–62. In addition, the Subcommittee also authorized Chairman Conyers to issue "subpoenas for documents in the custody or control of ... White House Chief of Staff Joshua Bolten." *Id.* at 62.

Chairman Conyers and Chairwoman Sanchez wrote to Mr. Fielding on March 22, 2007 to inform him that the Committee could not "accept your proposal for a number of reasons." *Id.* Specifically, the letter stated that:

> [T]he failure to permit any transcript of our interviews with White House officials is an invitation to confusion and will not permit us to obtain a straightforward and clear record. Also, limiting the questioning (and document production) to discussions by and between outside parties will further prevent our Members from learning the full picture concerning the reasons for the firings and related issues. As we are sure you are aware, limitations of this nature are completely unsupported by precedents applied to prior Administrations—both Democratic and Republican.

Id. Nevertheless, the Committee indicated that it remained "committed to seeking a cooperative resolution to this matter on a voluntary basis." Pl.'s Mot. Ex. 6. For that reason, Chairman Conyers refrained from immediately issuing subpoenas in the hope that a negotiated solution would obviate the need to rely upon compulsory process. *Id.*

Chairman Conyers and Senator Leahy, Chairman of the Senate Committee on the Judiciary, wrote to Mr. Fielding again on March 28, 2007 in an effort to reach an agreeable accommodation. The Chairmen requested that the White House abandon its "all or nothing" approach and instead produce the documents that it had already offered to make available. Pl.'s Mot. Ex. 7. They also suggested that the parties narrow the dispute to "internal" White House documents and then focus on developing a process to deal with production. *Id.* Mr. Fielding responded by letter dated April 12, 2007. He asked the Committees to "reconsider [their] rejection of the Pres-

ident's proposal." Pl.'s Mot. Ex. 9. Mr. Fielding also "respectfully decline[d] [the Chairmen's] suggestion to immediately produce the documents that we are prepared to release." *Id.* In conclusion, he indicated that the Executive "continue[d] to believe that the accommodation we offered on March 20 ... will satisfy the Committees' interests." *Id.*

Finally, Chairman Conyers and Chairwoman Sanchez wrote to Mr. Fielding on May 21, 2007 to "make one last appeal for ... voluntary cooperation." Pl.'s Mot. Ex. 10. They indicated that the Committee had been "willing and able to meet to consider other means of resolving our dispute, but we have received no response to our letters or proposals to you." *Id.* Explaining that "it is becoming increasingly clear that we will not be able to complete our investigation absent full and complete cooperation from the White House," they emphasized the Committee's willingness to work out a voluntary resolution to the dispute but noted that it would "be constitutionally irresponsible to accept your 'all or nothing' limitations that would completely preclude any access to on-the-record statements by current and former White House personnel or access to internal White House communications." *Id.* Thus, they stated that absent an effort by the White House to accommodate the Committee's request, "we will have no alternative but to begin to resort to compulsory process to carry out our oversight responsibilities." *Id.*

Mr. Fielding responded to Chairman Leahy, Chairman Conyers, and Chairwoman Sanchez on June 7, 2007. He noted that the Executive had "made efforts to resolve our differences on this issue in a mutually acceptable fashion" by meeting with members from both Committees to discuss proposals. Pl.'s Mot. Ex. 12. Moreover, he cited to various disclosures made by DOJ without objection from the White House. In addition, Mr. Fielding expressed his aspiration to "avoid the prospect of 'subpoenas' and 'compulsory process' referred to in your recent letters and statement." *Id.* He concluded by reiterating, once again, the terms of the Executive's initial proposal, explaining that "[i]t is difficult to see how this proposal will not provide your Committees with all information necessary to evaluate the White House's connection to the Department's request for U.S. Attorney resignations." *Id.*

Apparently viewing Mr. Fielding's June 7, 2007 letter as evidence of the Executive's intransigence, the Committee issued subpoenas to Mr. Bolten and Ms. Miers on June 13, 2007. Pl.'s Stmt. of Facts ¶¶ 26–27. Mr. Bolten was directed to produce responsive documents to the Committee by June 28, 2007 and to deliver a privilege log with respect to any documents withheld on the grounds of privilege. *Id.* ¶ 26. Ms. Miers was directed to appear to testify before the Committee on July 12, 2007 and to produce relevant documents in her possession; she, too, was advised to supply a privilege log for any documents withheld as privileged. *Id.* ¶ 27.

On June 27, 2007, Solicitor General and then-Acting Attorney General Paul Clement wrote to the President indicating that "[i]t is my considered legal judgment that you may assert executive privilege over the subpoenaed documents and testimony." Pl.'s Mot. Ex. 15. Mr. Clement explained that the "Office of Legal Counsel of the Department of Justice ... reviewed the documents identified by the Counsel to the President as responsive to subpoenas." *Id.* Those responsive documents fell into "three broad categories": "(1) internal White House communications; (2) communications by White House officials with individuals outside the Executive Branch,

including with individuals in the Legislative Branch; and (3) communications between White House officials and Department of Justice officials." *Id.* Mr. Clement concurred with the conclusion of the Office of Legal Counsel ("OLC") that the documents "fall within the scope of executive privilege ... [and] that Congress's interests in the documents and related testimony would not be sufficient to override an executive privilege claim." *Id.*

Based upon Mr. Clement's letter and OLC's analysis, Mr. Fielding wrote to Chairmen Leahy and Conyers on June 28, 2007 advising them that the "President has decided to assert Executive Privilege and therefore the White House will not be making any production in response to these subpoenas for documents." Pl.'s Stmt. of Facts ¶ 30. In addition, Mr. Fielding indicated that the President had also directed Ms. Miers not to produce any responsive documents to the Committee; George Manning, counsel for Ms. Miers, confirmed that instruction by letter dated June 28, 2007. *Id.* ¶¶ 30–31.

Mr. Bolten did not provide any documents to the Committee when his response date came due on June 28, 2007. The next day, Chairmen Leahy and Conyers wrote to Mr. Fielding seeking to obtain the specific bases for the Executive's assertion of privilege. *Id.* ¶ 33. They also requested that the White House provide a personal signed statement by the President confirming that he had decided to invoke executive privilege. *Id.* Mr. Fielding denied both requests on July 9, 2007. *Id.* ¶ 34. On that same day, Mr. Fielding wrote to counsel for Ms. Miers informing him that the President had decided to assert executive privilege over the substance of Ms. Miers's testimony, and hence she was instructed not to provide any testimony before the Committee. Pl.'s Mot. Ex. 20. In a July 10, 2007 letter to Mr. Manning, Mr. Fielding explained that OLC had concluded that Ms. Miers was absolutely immune from compelled congressional testimony. Pl.'s Mot. Ex. 23. He again directed Mr. Manning to ensure that Ms. Miers did not appear to testify before the Committee on July 12, 2007, and attached a copy of OLC's opinion—also dated July 10, 2007—to his letter. *Id.*

Mr. Manning promptly informed the Committee that Ms. Miers had been instructed not to provide any testimony in response to her subpoena. Chairman Conyers and Chairwoman Sanchez objected to this development, urging Mr. Manning that "[w]e are aware of absolutely no court decision that supports the notion that a former White House official has the option of refusing to even appear in response to a Congressional subpoena." Pl.'s Mot. Ex. 25. They warned that Ms. Miers ran the risk of being held in contempt of Congress if she declined to appear. *Id.* By letter dated July 11, 2007, Mr. Manning confirmed that Ms. Miers would not appear to testify before the Committee on July 12, 2007. Pl.'s Mot. Ex. 26.

When Ms. Miers failed to appear on July 12th, Chairwoman Sanchez decided to reject "Ms. Miers's privilege and immunity claims." Pl.'s Stmt. of Facts ¶ 44. The Subcommittee sustained that determination by a vote of 7–5. Chairman Conyers then delivered a copy of that ruling to Mr. Manning, along with a letter again warning that Ms. Miers could face contempt of Congress charges if she did not comply with the substance of the subpoena. *Id.* ¶ 45. In response, Mr. Manning restated that Ms. Miers would not appear to testify before the Committee or produce any responsive documents. *Id.* ¶ 46. On July 19, 2007, Chairman Sanchez again rejected Mr. Bolten's claims of executive privilege and his refusal to produce a privilege log. *Id.* ¶ 48. That decision was also sustained

by the Subcommittee. Chairman Conyers then provided Mr. Fielding with a copy of that ruling and inquired as to whether the White House would comply with the subpoena. *Id.* ¶ 49. On July 23, 2007, Mr. Fielding informed Chairman Conyers that "the President's position remains unchanged." Pl.'s Mot. Ex. 31.

Frustrated by the Executive's actions, the full Committee met on July 25, 2007 and adopted a resolution "recommending that the House of Representatives find that former White House Counsel Harriet Miers and White House Chief of Staff Joshua Bolten be cited for contempt of Congress for refusal to comply with subpoenas issued by the Committee." *See* 153 Cong. Rec. D1051–01 (2007). Chairman Conyers provided Mr. Fielding with a copy of the Committee's report in the hope that it might prompt the White House voluntarily to change its position. *See* Pl.'s Stmt. of Facts ¶ 52. He received no response. So, on November 5, 2007, the Committee filed its report with the full House of Representatives. *Id.* ¶ 54. Once again, Chairman Conyers wrote to Mr. Fielding to inform him of that development and to reiterate that the Committee still hoped "to resolve the issue on a cooperative basis"; Chairman Conyers even included "a proposal for resolving the dispute." *Id.* ¶ 55. This time, Mr. Fielding responded by rejecting Chairman Conyers's offer, explicitly noting that "[w]e are therefore at a most regrettable impasse." Pl.'s Mot. Ex. 34. He urged the Committee to "reconsider its proposed actions" and to accept the President's initial proposal. *Id.*

With no negotiated solution in sight, the full House of Representatives voted to hold Ms. Miers and Mr. Bolten in contempt of Congress on February 14, 2008 by a vote of 223–32. Pl.'s Stmt. of Facts ¶ 57.[5] The House also passed three accompanying resolutions—H.Res. 979, 980, and 982—that were meant to guide the next steps in the process. Resolution 979, for instance, provided that the Speaker of the House shall certify a copy of the Contempt Report "to the U.S. Attorney for the District of Columbia, 'to the end that Ms. Miers be proceeded against in the manner and form provided by law.' " Pl.'s Stmt. of Facts ¶ 58 (quoting H. Res. 979, 110th Cong. (Feb. 14, 2008)). It also provided analogous treatment for Mr. Bolten. Resolution 980 authorized Chairman Conyers to initiate a civil action in federal court to seek declaratory and injunctive relief "affirming the duty of any individual to comply with any subpoena." *Id.* ¶ 59 (quoting H. Res. 980, 110th Cong. (Feb. 14, 2008)).[6]

On February 28, 2008, Speaker of the House Nancy Pelosi certified the Contempt Report to Jeffrey A. Taylor, U.S. Attorney for the District of Columbia. *Id.* ¶ 60. Pursuant to the terms of 2 U.S.C. §§ 192 and 194, Mr. Taylor was directed to present the contempt charges against Ms. Miers and Mr. Bolten to a grand jury. *See* 2 U.S.C. § 194. On that same day, Speaker Pelosi wrote to Attorney General Michael B. Mukasey. Pl.'s Stmt. of Facts ¶ 62. The Attorney General had previously indicated that he would not permit Mr. Taylor to bring the contempt citations before a grand jury, and Speaker Pelosi "urged him to reconsider his position." *Id.* The next day, however, the Attorney General responded that because Ms. Miers and Mr. Bolten were acting pursuant to the direct orders of the President, "the Department has determined that noncompliance ... with the Judiciary Committee

5. The Republican Members boycotted the vote.

6. Resolution 982 adopted the terms of H. Res. 979 and 980. *See* H. Res. 982, 110th Cong. (Feb. 14, 2008).

subpoenas did not constitute a crime, and therefore the Department will not bring the congressional contempt citations before a grand jury or take any other action to prosecute Mr. Bolten or Ms. Miers." Pl.'s Mot. Ex. 40. With criminal enforcement of its subpoenas foreclosed, the Committee—invoking Resolution 980—filed this action seeking a declaratory judgment and other injunctive relief. *See* Pl.'s Mot. at 14.

The undisputed factual record, then, establishes the following. Notwithstanding a prolonged period of negotiation,[7] the parties reached a self-declared impasse with respect to the document production and testimony at issue here. Faced with that reality, the full House of Representatives voted to hold Ms. Miers and Mr. Bolten in contempt of Congress and certified the Contempt Report to the U.S. Attorney for the District of Columbia to pursue criminal enforcement of the contempt citations. The Attorney General then directed the U.S. Attorney not to proceed against Ms. Miers and Mr. Bolten. The Committee, then, filed this suit seeking civil enforcement of its subpoena authority by way of declaratory and injunctive relief.

The only real factual "dispute" here is which party is responsible for the impasse. Unsurprisingly, each side blames the other. The Committee contends that the Executive proposed an untenable "take it or leave it" offer that would have significantly curtailed the Committee's capacity to perform its oversight duties, and then would not budge from its initial position. The Executive insists that the Committee's proposals "have been substantially the same and one-sided: they propose accommodations on the part of the White House without signaling any willingness on the part of the Committee to accommodate itself to the Presidential interests at stake." Pl.'s Mot. Ex. 34. Hence, it is the Committee (in the Executive's view) that has stonewalled the accommodation process by pressing unreasonable demands that, if accepted, would amount to "incremental Executive Branch abandonment of [the President's] constitutional obligations." *Id.* Although it is relevant that the political branches have reached an impasse, it is not important to assign blame for purposes of the motions now before the Court.

DISCUSSION

[1] Because the Executive's motion to dismiss raises threshold issues that may preclude the need to reach the merits of the Committee's claims, the Court will address its motion first. There is one preliminary matter to discuss briefly however. Both sides concede, and the Court agrees, that 28 U.S.C. § 1331 provides subject matter jurisdiction over this lawsuit.[8] Because this dispute concerns an allegation that Ms. Miers and Mr. Bolten failed to comply with duly issued congressional subpoenas, and such subpoena power derives implicitly from Article I of the Constitution, this case arises under the Constitution for purposes of § 1331. In *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 366 F.Supp. 51 (D.D.C.1973) ("*Senate Select Comm. I*"), the court indicated that federal question jurisdiction was properly invoked in a suit by a Senate committee to enforce a subpoena issued to President Nixon provided that the then-existing statutory amount in

7. Mr. Fielding's final letter to Chairman Conyers reveals that the Chairmen had "written 'on eight previous occasions,' three of which letters contain or incorporate specific proposals involving terms for a possible agreement." *See* Pl.'s Mot. Ex. 34.

8. *See, e.g.,* Def.'s Mot. & Opp'n at 38 ("Defendants do not dispute that the Court has statutory subject-matter jurisdiction under 28 U.S.C. § 1331.").

controversy requirement was satisfied. *Id.* at 59–61. Although the court ultimately dismissed the case for failure to meet the monetary threshold, that requirement no longer exists and there is no other impediment to invoking § 1331 subject matter jurisdiction here.[9] Indeed, in *United States v. AT & T,* 551 F.2d 384 (D.C.Cir.1976) ("*AT & T I* "), a case similar to this one, the D.C. Circuit found subject matter jurisdiction pursuant to § 1331 owing to the "fundamental constitutional rights involved." *Id.* at 388–89.

I. The Executive's Motion to Dismiss

[2–4] The Executive launches three distinct attacks in its motion to dismiss, raising considerations of standing, cause of action, and equitable discretion. The Court will address each contention in turn, but none provides a basis to dismiss this action.[10]

A. Standing

Standing is " 'an essential and unchanging' predicate to any exercise of jurisdiction" by an Article III federal court. *See Am. Chemistry Council v. Dep't of Transp.,* 468 F.3d 810, 814 (D.C.Cir.2006) (quoting *Florida Audubon Soc. v. Bentsen,* 94 F.3d 658, 663 (D.C.Cir.1996)). "[T]he irreducible constitutional minimum of standing contains three elements." *Lujan*

9. The Committee also suggests that the Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1345 because this lawsuit qualifies as one ''commenced by the United States.'' It is not necessary to decide that question, however, due to the parties' apparent agreement—and the Court's independent determination—that § 1331 provides subject matter jurisdiction here.

10. Although the Executive does not press the argument, the House GOP amici urge the Court to dismiss this case on the ground of ripeness. According to the House GOP, this case is not ripe because the Committee has failed to exhaust alternative avenues that may conceivably be available to obtain the same information it seeks from Ms. Miers and Mr. Bolten. Moreover, forthcoming reports to be issued by the Inspector General and the Office of Professional Responsibility at DOJ, as well as the Senate Ethics Committee, may alleviate the Committee's asserted injuries or otherwise moot them by revealing that no impropriety occurred concerning the dismissals. Thus, the Court should refrain from entertaining the case at this time.

The Court disagrees. The doctrine of ripeness is a ''justiciability doctrine designed'' to prevent premature adjudication of disputes. *See Nat'l Park Hospitality Ass'n v. Dep't of Interior,* 538 U.S. 803, 807, 123 S.Ct. 2026, 155 L.Ed.2d 1017 (2003). It has both Article III and prudential dimensions. *Id.* ''Determining whether . . . action is ripe for judicial review requires us to evaluate (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration.'' *Id.* at 808, 123 S.Ct. 2026. Put another way, a court ''must consider: (1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented.'' *Ohio Forestry Ass'n, Inc. v. Sierra Club,* 523 U.S. 726, 733, 118 S.Ct. 1665, 140 L.Ed.2d 921 (1998).

This case is ripe for adjudication. The factual record is fully developed—there are no gaps that the Court would be required to ''fill-in''—the issues are purely legal, there is no further administrative action that the Court would interfere with, and the Committee would most certainly suffer in the event of delayed judicial review. One issue that the House GOP highlights—that the Committee has not demonstrated a sufficient need to overcome the invocation of executive privilege—goes solely to the merits of the privilege assertion and has no bearing on the ripeness inquiry. The upshot of the House GOP's remaining arguments is that the Committee has not sufficiently exhausted its negotiating options. Putting aside the fact that the Executive itself declared an impasse, the Committee is correct that it is not required to run down every conceivable, but highly speculative, lead. *See* Pl.'s Opp'n & Reply at 33.

v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). "First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized ... and (b) actual or imminent, not conjectural or hypothetical." *Id.* (internal quotations and citations omitted). "Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court." *Id.* (internal quotations and alterations omitted). "Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* (internal quotations omitted). Significantly, the Supreme Court has stressed that the standing inquiry is "especially rigorous" where—as here—important separation of powers concerns are implicated by a dispute. *See Raines v. Byrd,* 521 U.S. 811, 819–20, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997). In this context, a plaintiff must demonstrate that "the dispute is 'traditionally thought to be capable of resolution through the judicial process.' " *Id.* at 819, 117 S.Ct. 2312 (quoting *Flast v. Cohen,* 392 U.S. 83, 97, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968)).

[5] Here, the principal debate concerns the injury-in-fact prong of the standing analysis.[11] The Executive's argument has two constituent parts: first, that the Committee has not suffered a cognizable *personal* injury that is required for Article III standing; and second, that this is not the type of dispute traditionally capable of resolution before an Article III court.

"[T]he Committee lacks the traditional type of 'personal injury' required under Article III," the Executive insists, *id.* at 29, and this Court held just that in *Walker v. Cheney,* 230 F.Supp.2d 51 (D.D.C.2002). Here, the Committee's injury is "governmental" rather than "personal," the argument goes. The fact that the Committee speaks for the entire House of Representatives, rather than for only some Members in their individual capacity, does not transform the underlying nature of the Committee's asserted injury into the appropriate "individual rights" action. That, the Executive says, is the upshot of the Supreme Court's decision in *Raines,* which jettisoned the concept of so-called "legislative" standing. *Raines,* 521 U.S. at 820, 829, 117 S.Ct. 2312. Like the plaintiffs in *Raines,* the Committee's "institutional injury ... is wholly abstract and widely dispersed ... [and its] attempt to litigate this dispute at this time and in this form is contrary to historical experience." *Id.* at 829, 117 S.Ct. 2312.

Nor can the Committee rely upon the notion of "informational injury" espoused in *FEC v. Akins,* 524 U.S. 11, 118 S.Ct. 1777, 141 L.Ed.2d 10 (1998), and *Public Citizen v. U.S. Dep't of Justice,* 491 U.S. 440, 109 S.Ct. 2558, 105 L.Ed.2d 377 (1989).

> In those cases Congress had enacted statutes providing private plaintiffs with unqualified legal rights to information—regardless of the need or the purpose for which information was sought—and 'the invasion' of those statutory rights was held to inflict a concrete and particular injury supportive of the plaintiffs' standing.

See Def.'s Mot. & Opp'n at 33. There is no such statutory grounding for the Committee's informational injury here. And

11. At oral argument the Executive conceded that the Committee can satisfy the causation and redressability elements. *See* Transcript of Oral Argument at 69 (''Our argument is focused only on injury.'').

Article I supplies no "freestanding right to information" but rather merely establishes the general power to perform Congress's legislative function. *Id.* Once again, the Executive maintains that this Court deemed precisely this asserted injury—impairment of Congress's ability to legislate due to inability to access documents and testimony—as inadequate in *Walker.* The Executive urges the same result here.

The Executive also steadfastly maintains that this dispute is not one traditionally thought to be amenable to judicial resolution. Instead, historical experience demonstrates that the Article III judiciary has been concerned primarily with adjudication concerning individual rights rather than " 'some amorphous general supervision of the operations of government.' " *See* Def.'s Mot. & Opp'n at 26 (quoting *United States v. Richardson,* 418 U.S. 166, 192, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974) (Powell, J., concurring)). The type of direct judicial intervention in a dispute between the two political branches requested by the Committee in this case, the Executive argues, "has been virtually unknown in American jurisprudence." *Id.* As the Executive would have it, this controversy is "perhaps the paradigmatic example of [a] dispute that ha[s] been resolved without resort to judicial process." *Id.* at 27. The political branches have instead traditionally resolved their differences by the process of negotiation and accommodation. To the Executive, this "200–plus years of constitutional tradition," *id.* at 28, strongly suggests that the Committee's case is not the type normally amenable to judicial resolution, which in turn implies that the Committee lacks standing to bring the action.

In response, the Committee argues that binding authority establishes that it has standing to enforce congressional subpoenas. In *AT & T I*, the Committee notes, the D.C. Circuit held that "[i]t is clear that the House as a whole has standing to assert its investigatory power, and can designate a member to act on its behalf." 551 F.2d at 391. That holding conclusively resolves the issue of standing, in the Committee's view. More recently, a three-judge court reiterated that basic principle in *U.S. House of Representatives v. U.S. Dep't of Commerce:*

> [I]t [is] well established that a legislative body suffers a redressable injury when that body cannot receive information necessary to carry out its constitutional responsibilities. This right to receive information arises primarily in subpoena enforcement cases, where a house of Congress or a congressional committee seeks to compel information in aid of its legislative function.

11 F.Supp.2d 76, 86 (D.D.C.1998).

Raines and *Walker* are not to the contrary, the Committee contends, because both are distinguishable. In *Raines,* the Supreme Court was reluctant to intervene in an intra-branch dispute, but the plaintiffs there were *individual* Members of Congress who were not authorized to sue on behalf of either House—indeed, both Houses opposed the lawsuit. *Raines,* 521 U.S. at 829, 117 S.Ct. 2312 ("We attach some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose their suit."). There is no such concern here, the Committee points out. The same goes for *Walker.* There, the Comptroller General sought information on behalf of certain individual Members of Congress; as in *Raines,* neither House of Congress had authorized the Comptroller General to file a lawsuit. *Walker,* 230 F.Supp.2d at 68 ("[I]t is of some importance that, like the plaintiffs in *Raines,* the Comptroller General here has not

been expressly authorized by Congress to represent its interests in this lawsuit.") (internal citations omitted). Here, the argument goes, the asserted injury—"being denied access to information" that is the subject of a subpoena, *see* Pl.'s Reply at 26—runs to the Committee and it, authorized by the full House, is suing to vindicate an injury that is concrete and personalized to the Committee. *Id.*

The Court concludes that the Committee has standing. The Committee and several supporting amici are correct that *AT & T I* is on point and establishes that the Committee has standing to enforce its duly issued subpoena through a civil suit. Moreover, *Raines* and subsequent cases have not undercut either the precedential value of *AT & T I* or the force of its reasoning. Finally, *United States v. Nixon* and *Senate Select Comm. on Presidential Campaign Activities v. Nixon,* 498 F.2d 725 (D.C.Cir.1974) ("*Senate Select Comm. III* "), illustrate that this sort of dispute is traditionally amenable to judicial resolution and consequently justiciable.

The starting point for this analysis is *AT & T I*. A House subcommittee issued a subpoena to AT & T demanding documents concerning warrantless wiretapping that had been undertaken by the company at the request of the FBI. *See* 551 F.2d at 385. The executive branch then interceded and engaged the subcommittee in a series of negotiations designed to obviate the need for compulsory process. *Id.* at 386–87. When negotiations ultimately failed, President Ford directed AT & T—"as an agent of the United States"—to ignore the congressional subpoena, but the company indicated that it would comply because it believed that it was legally obligated to do so. *Id.* at 385–87. "The Justice Department therefore brought an action in the name of the United States . . . and obtained a temporary restraining order prohibiting AT & T from complying with the Subcommittee subpoena." *Id.* at 387. Thereafter, the chairman of the subcommittee intervened as a defendant. *Id.* The district court issued a permanent injunction against compliance with the subpoena, deferring to the President's determination that execution of the subpoena would pose unacceptable risks of the disclosure of extremely sensitive intelligence information and would be detrimental to the national security. *Id.* at 387–88.

On appeal, the D.C. Circuit found jurisdiction pursuant to § 1331, noting that "[a]lthough this suit was brought in the name of the United States against AT & T, AT & T has no interest in this case, except to determine its legal duty." *Id.* at 388–89. Instead, the lawsuit was more properly viewed "as a clash of the powers of the legislative and executive branches of the United States." *Id.* at 389. On the question of justiciability, the court reasoned that *Senate Select Comm.* and *United States v. Nixon* established that "the mere fact that there is a conflict between the legislative and executive branches over a congressional subpoena does not preclude judicial resolution of the conflict." *Id.* at 390. Because the court remanded the case for further negotiations between the branches, however, it had no occasion to "balance the constitutional interests raised by the parties, including such factors as the strength of Congress's need for the information in the request letters . . . and the seriousness of the harm to national security" from the potential leak of that information. *Id.* at 391.[12] The court did

12. The mere fact that the D.C. Circuit contemplated exercising jurisdiction over the merits of the dispute in *AT & T I* significantly undermines the Executive's argument here. There, both parties conceded that important questions of national security were potentially

conclude, however, that "[i]t is clear that the House as a whole has standing to assert its investigatory power, and can designate a member to act on its behalf." *Id.*

In the face of that clear statement, the Executive attempts both to distinguish *AT & T I* from this case and to argue that subsequent decisions have eviscerated its precedential weight. Neither attempt is persuasive. To begin with, the Executive argues that *AT & T I* is inapposite because it did not involve compelling executive branch officials to testify before Congress in response to a subpoena. That is technically true, but the Executive overlooks the court's express conclusion that—in a contest between the executive and legislative branches over compliance with a duly issued congressional subpoena—the House has standing to invoke the federal judicial power to aid its investigative function. There is no suggestion whatsoever in *AT & T I* that the House's standing in that capacity is limited to situations where the ultimate subpoena respondent is a private party. Moreover, the Executive ignores the fact that President Ford explicitly referred to AT & T as "an agent of the United States" in *AT & T I*. *Id.* at 387. That may not be precisely the same as a senior presidential aide, but AT & T was at the very least regarded as a constructive member of the executive branch for purposes of the D.C. Circuit's analysis.

The Executive next argues that *Raines* undermines the holding of *AT & T I* and that this Court's decision in *Walker* confirms as much. Contrary to the Executive's contentions, however, *Raines* did not overrule or otherwise undermine *AT & T I*, and neither *Raines* nor *Walker* is inconsistent with *AT & T I*. The issue in *Raines* was whether the doctrine of "legislative standing" passed Article III muster. 521 U.S. at 820–21, 117 S.Ct. 2312. Six disgruntled Members of Congress who had voted against the Line Item Veto Act, which was enacted and signed into law, filed suit seeking a declaratory judgment that the Act was unconstitutional. *Id.* at 814–17, 117 S.Ct. 2312. Following the D.C. Circuit's legislative standing doctrine, the district court concluded that the Members had "standing to challenge measures that affect their constitutionally prescribed lawmaking powers." *Id.* at 816, 117 S.Ct. 2312 (internal citations omitted). The Members' claim that the Act "dilute[d] their Article I voting power was sufficient to confer Article III standing." *Id.* at 817, 117 S.Ct. 2312.

On direct appeal, the Supreme Court reversed. The Members had declared that their injury was "a loss of a political power, not the loss of any private right." *Id.* at 821, 117 S.Ct. 2312. Thus, the asserted injury actually ran to the *institution* of Congress, not to the individual Members who brought suit. *Id.* at 829, 117 S.Ct. 2312. Put another way, the Members had suffered no injury that granted them *individual* standing because the actual injury was incurred by the *institution.* Significantly, the Supreme Court noted that it "attach[ed] some importance to the fact that [plaintiffs] have not been authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose their suits." *Id.*

Raines and *AT & T I* are consistent. In *AT & T I*, the House intervened to defend its institutional interest in compliance with duly issued congressional subpoenas.

raised with respect to the warrantless wiretapping at issue. *AT & T I,* 551 F.2d at 391. In this case, no such grave concern is identified by the Executive. Instead, as discussed more fully below, the Executive's asserted interests here are in confidentiality and presidential "autonomy," which do not rise to the same level as national security.

Thus, the intervenor in *AT & T I*—the chairman of the subcommittee that had issued the subpoena—was authorized to act on behalf of the House to vindicate the House's institutional right that had been challenged by the executive branch. The chairman, then, represented the *institution* and sought to remedy a potential *institutional* injury. That was not the case in *Raines*. There, *individual* Members sought to ameliorate Congress's *institutional* injury without the consent of the institution itself—and the approach was rejected by the Supreme Court.[13] But the Court has never held that an institution, such as the House of Representatives, cannot file suit to address an institutional harm. Because the issues presented by *Raines* and *AT & T I* were not the same, one cannot conclude that *Raines* overruled or undermined *AT & T I*. *See U.S. House of Representatives,* 11 F.Supp.2d at 86 (citing *AT & T I* with approval post-*Raines*).

Other factors also distinguish *Raines* from *AT & T I*. In *Raines,* the asserted injury was to Congress's vaguely defined "political power." The harm was not tied to a specific instance of diffused voting power; rather, the injury was conceived of only in abstract, future terms. By contrast, in *AT & T I*, a House subcommittee had issued a valid subpoena in connection with a specific investigation and DOJ was attempting to invalidate it. The injury to the House was evident: the validity and efficacy of that particular subpoena was in jeopardy, as was the utility of the subcommittee's investigation. So, too, in this case. Moreover, the fact that the House in *AT & T I* was engaged in a specific investigation of warrantless wiretapping made its asserted interest more concrete than the situation in *Raines,* where the purported injury was wholly hypothetical. Likewise here.

Walker and *AT & T I* are also consistent with one another. In *Walker,* the Comptroller General requested certain information from the Vice President at the prompting of four Senators. 230 F.Supp.2d at 57–58. The Comptroller General sought to enforce his right to acquire information to conduct an appropriate investigation in order to "aid Congress in considering proposed legislation." *Id.* at 66–67. Relying on *Raines,* this Court indicated that the "general interests in legislating and oversight that are allegedly impaired by defendant's failure to produce the requested records ... [are] too vague and amorphous to confer standing." *Id.* at 67. The Court noted that "there is some authority in this Circuit indicating that a House of Congress or a committee of Congress would have standing to sue to retrieve information to which it is entitled." *Id.* at 68. But Congress had "undertaken no effort to obtain the documents at issue, ... no committee had requested the documents, and no congressional subpoena ha[d] been issued." *Id.* Hence, "an injury with respect to any congressional right to information remain[ed] wholly conjectural or hypothetical." *Id.* (internal citations and quotations omitted).

This case stands in marked contrast to *Walker*. Indeed, all of the missing factors identified in *Walker* are present here: the Committee has plainly undertaken efforts to obtain the documents and testimony at issue pursuant to an official investigation, a congressional subpoena has been issued seeking precisely that information, and the full House has specifically authorized filing suit. Just as in *Raines,* this Court in *Walker* attached significance to the fact

13. Indeed, the now-defunct doctrine of "legislative standing" is more accurately described as "legislator standing."

that "the Comptroller General has not been expressly authorized by Congress to represent its interests in this lawsuit." *Id.* at 68. Although Congress may have suffered some form of institutional injury in *Walker,* it had not designated the Comptroller General to vindicate that interest on Congress's behalf. Because he was not authorized to proceed on the part of Congress, the Comptroller General was left with no personal injury to confer standing. In this case, of course, the Committee (through Chairman Conyers) has been expressly authorized by House Resolution to proceed on behalf of the House of Representatives *as an institution.* That is precisely the scenario that—in *AT & T I*—the D.C. Circuit stated would satisfy the standing requirement.

Contrary to the Executive's suggestion, the fact that the House has issued a subpoena and explicitly authorized this suit does more than simply "remove[ ] any doubt that [the House] considers itself aggrieved." *See* Defs.' Reply at 15. It is the key factor that moves this case from the impermissible category of an individual plaintiff asserting an institutional injury (*Raines, Walker)* to the permissible category of an institutional plaintiff asserting an institutional injury (*AT & T I, Senate Select Comm.*). Simply put, the Executive's position that the "Committee cannot predicate its standing on *United States v. AT & T* or other pre-*Raines* precedents," *see* Defs.' Reply at 16, is mistaken. The precedential value and force of *AT & T I* survive *Raines.* A House committee has issued a subpoena to certain members of the executive branch who have refused to comply with it, and the House has authorized the Committee to proceed to court. The injury incurred by the Committee, for Article III purposes, is both the loss of information to which it is entitled and the institutional diminution of its subpoena power. As one amicus aptly put it, that is "precisely the injury on which the standing of *any* governmental body rests when it seeks judicial enforcement of a subpoena it issued." *See Brief of Senator Inouye, et al.* at 7.

[6] The Executive also maintains that this dispute is not the sort that is traditionally amenable to judicial resolution. The Court disagrees for two primary reasons: (1) in essence, this lawsuit merely seeks enforcement of a subpoena, which is a routine and quintessential judicial task; and (2) the Supreme Court has held that the judiciary is the final arbiter of executive privilege, and the grounds asserted for the Executive's refusal to comply with the subpoena are ultimately rooted in executive privilege. Whatever merit there once was to the contention that questions of executive privilege are inherently non-justiciable, it can no longer be maintained in light of *United States v. Nixon* and its progeny.

Courts, as the Committee points out, routinely enforce subpoenas, whether they are grand jury subpoenas, deposition or trial subpoenas to compel testimony or produce documents pursuant to Fed. R.Civ.P. 45, or subpoenas issued by administrative agencies of the United States pursuant to Fed.R.Civ.P. 81(a)(5). That enforcement authority is deeply rooted in the common law tradition, as first explained by Chief Justice Marshall in *United States v. Burr,* 25 F. Cas. 30 (C.C.D.Va.1807). Moreover, courts have entertained subpoena enforcement actions (or motions to quash subpoenas) where the political branches have clashed over congressional subpoenas: *AT & T I* and *Senate Select Comm. III* are the prime examples.[14]

14. In a related context, courts have also entertained cases involving the propriety of

The mere fact that the President himself—let alone his advisors, as here—is the subject of the subpoena in question has not been viewed historically as an insurmountable obstacle to judicial resolution. *See United States v. Nixon*, 418 U.S. at 686, 94 S.Ct. 3090; *Burr*, 25 F. Cas. at 32. Indeed, in *Burr*, Chief Justice Marshall explained that "the obligation [to comply with a subpoena] ... is general; and it would seem that no person could claim an exemption from [it]." *Id.* at 34. "The guard" that protects the Executive from "vexatious and unnecessary subpoenas," in Chief Justice Marshall's view, "is ... the conduct of a court *after* those subpoenas have issued; not in any circumstance which is to precede their being issued." *Id.* (emphasis added). Any claim that compliance with a subpoena would jeopardize national security or privileged presidential information "will have its due consideration on the return of the subpoena," Chief Justice Marshall noted. *Id.* at 37. Thus, federal precedent dating back as far as 1807 contemplates that even the Executive is bound to comply with duly issued subpoenas. The Supreme Court emphatically reaffirmed that proposition in *United States v. Nixon* in 1974. *See Clinton v. Jones*, 520 U.S. 681, 696 n. 23, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997) ("[T]he prerogative [President] Jefferson claimed [in *Burr*] was denied him by the Chief Justice in the very decision Jefferson was protesting, and this Court has subsequently reaffirmed that holding.").

The Committee correctly points out that "courts have decided countless cases that involve the allocation of power *between* the political branches (not to mention between the political branches and the judiciary)." Pl.'s Opp'n & Reply at 31. The Committee cites a litany of cases in support of that proposition, all of which deal with important separation of powers concerns in their own right. *See, e.g., Morrison v. Olson*, 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988) (removal); *Bowsher v. Synar*, 478 U.S. 714, 106 S.Ct. 3181, 92 L.Ed.2d 583 (1986) (execution of laws); *INS v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983) (legislative veto); *Humphrey's Executor v. United States*, 295 U.S. 602, 55 S.Ct. 869, 79 L.Ed. 1611 (1935) (removal); *Myers v. United States*, 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160 (1926) (removal). Hence, in the Committee's view, federal courts have a long history of resolving cases that involve significant (and often contentious) separation of powers disputes between the branches of the federal government, thus refuting the Executive's assertion that this dispute is non-justiciable because it is not amenable to judicial resolution.

The Executive makes two arguments to rebut these points, neither of which is convincing. First, the Executive contends, *United States v. Nixon* is limited to the context of grand jury subpoenas and thus does not inform the present case. Grand jury proceedings, the argument goes, fall well within the traditional scope of an Article III court whereas this dispute does not. The Court disagrees. To be sure, the Supreme Court in *United States v. Nixon* explicitly cabined its opinion to the criminal arena. *See* 418 U.S. at 711 n. 19, 94 S.Ct. 3090 ("We address only the conflict between the President's assertion of a generalized privilege of confidentiality and the constitutional need for relevant evidence in criminal trials."). But in identifying "the

search warrants issued by the executive branch against Members of Congress that implicate issues concerning Speech or Debate Clause immunity. *See United States v. Rayburn House Office Bldg., Room 2113, Washington, D.C. 20515,* 497 F.3d 654 (D.C.Cir. 2007).

kind of controversy courts traditionally resolve," *id.* at 696, 94 S.Ct. 3090, the Court focused on the issue of the production of specific evidence deemed to be relevant, and the resolution of a claim of executive privilege raised to resist production—noting that "these issues are 'of a type which are traditionally justiciable.' " *Id.* at 697, 94 S.Ct. 3090 (quoting *United States v. ICC,* 337 U.S. 426, 430, 69 S.Ct. 1410, 93 L.Ed. 1451 (1949)). Although the setting here is a civil subpoena enforcement proceeding, the issues parallel those in *Nixon* and the setting is sufficient to ensure sharp presentation of the issues. *Id.* (citing *Baker v. Carr,* 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)). To paraphrase the Court in *United States v. Nixon,* "since the matter is one arising in the regular course of a federal [subpoena enforcement proceeding], it is within the traditional scope of Art. III power." *Id.* A privilege claim raised to resist a subpoena is certainly "the kind of controversy courts traditionally resolve," and the fact that the litigants are the political branches of our government is not a barrier to the Committee's standing and a justiciable controversy. *Id.*

Moreover, as the D.C. Circuit has observed, "the remaining *Nixon* cases ... address the scope of the presidential communications privilege in other contexts" beyond the grand jury. *In re Sealed Case,* 121 F.3d 729, 743 (D.C.Cir.1997). Thus, the Court of Claims found that "the presidential communications privilege could be overcome by the evidentiary demands of a civil trial." *Id.* at 744 (citing *Sun Oil Co. v. United States,* 206 Ct.Cl. 742, 514 F.2d 1020, 1024 (1975)). The D.C. Circuit reached the same conclusion in *Dellums v. Powell,* 561 F.2d 242 (D.C.Cir.1977), where it held that "a formal claim of privilege based on the generalized interest of presidential confidentiality, without more" does not "work[ ] an absolute bar to discovery of presidential conversations in civil litigation." *Id.* at 246. Instead, there can often be "strong constitutional value in the need for disclosure in order to provide the kind of enforcement of constitutional rights" often implicated by civil litigation. *Id.* at 247; *see also In re Sealed Case,* 121 F.3d at 744 (noting that *Dellums* stands for the proposition that "an adequate showing of need in a civil trial would also defeat the privilege"). And in *Nixon v. Adm'r of Gen. Services,* 433 U.S. 425, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977), the Supreme Court addressed a clash between enacted congressional legislation and claims of presidential privilege. There, "substantial public interests ... led Congress to seek to preserve [President Nixon's] materials ... to restore public confidence in our political processes by preserving the materials as a source for facilitating a full airing of the events leading to [his] resignation." *Id.* at 453, 97 S.Ct. 2777. Congress also had a "need to understand how ... political processes had in fact operated in order to gauge the necessity for remedial legislation." *Id.* "Thus by preserving [the President's] materials," Congress acted consistently with its "broad investigative power." *Id.* Therefore, the Court held that "the claims of Presidential privilege clearly must yield to the important congressional purposes of preserving the materials and maintaining access to them for lawful governmental and historical purposes." *Id.* at 454, 97 S.Ct. 2777.

It is readily apparent, then, that the justiciability principles underlying the Supreme Court's decision in *United States v. Nixon* have been extended beyond the limited realm of grand jury subpoenas. Most significantly, of course, the D.C. Circuit has confronted this issue in *precisely* the context presented by the instant case. In *Senate Select Comm. III,* a Senate committee brought a civil action to enforce

subpoenas that it had issued to President Nixon to produce certain taped recordings of conversations between President Nixon and his White House counsel. 498 F.2d at 727. President Nixon declined to comply with the subpoena, asserting absolute executive privilege. *Id.* Relying heavily upon *Nixon v. Sirica*, 487 F.2d 700 (D.C.Cir. 1973),[15] the court rejected President Nixon's claim of absolute privilege and instead held that he was entitled only to a presumptive privilege. 498 F.2d at 729–31. The court ultimately concluded that the Select Committee had not satisfied the "demonstrably critical" showing required to overcome the presumptive privilege because: (1) the House Judiciary Committee, which had "begun an inquiry into presidential impeachment," had already received copies of the tapes, thus rendering the Select Committee's oversight investigation "merely cumulative"; and (2) the Select Committee had already received written transcripts of the recordings and its asserted interest in ensuring the accuracy of the transcripts was not powerful enough to overcome the President's interest in confidentiality. *Id.* at 732–33.

Putting the outcome aside, the D.C. Circuit's reasoning in *Senate Select Comm. III* is of relevance here. The court's analysis addressed the *merits* of the Committee's showing of need with respect to the presumptive privilege, which confirms that the D.C. Circuit viewed the dispute between the Committee and the President to be justiciable because the court would have had no occasion (or authority) to discuss the particulars of the Committee's need for the subpoenaed recordings if the case was non-justiciable at the outset. Indeed, the district court expressly found that "[t]he reasoning of [*Nixon v. Sirica*] involving a grand jury subpoena is equally applicable to the subpoena of a congressional committee ... [and there is] no doubt that the issues presented in the instant controversy are justiciable." *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 370 F.Supp. 521, 522 (D.D.C.1974) ("*Senate Select Comm. II* "). The D.C. Circuit evidently agreed because it proceeded directly to the merits of the controversy. Indeed, both this Court in *Walker* and the three-judge court in *U.S. House of Representatives*, 11 F.Supp.2d at 86, cited to *Senate Select Comm. III* for the proposition that "a House of Congress or a committee of Congress would have standing to sue to retrieve information to which it is entitled." *Walker*, 230 F.Supp.2d at 68. The Executive has no ready way to distinguish *Senate Select Comm. III*.

The Executive also takes issue with the Committee's assertion that the Executive's standing to seek or challenge the enforcement of subpoenas is identical to the Committee's standing here. That argument is mistaken, the Executive says, because the Constitution entrusts to the Executive alone the responsibility to "take Care that the Laws be faithfully executed," U.S. Const., Art. II, § 3, a charge that implies that the Executive must be permitted to invoke the aid of the judicial process in order to carry out its constitutional mandate. *See* Defs.' Reply at 10.

Although most certainly correct, this argument is beside the point. The salient fact here is that in *AT & T I* the Executive was *not* undertaking *enforcement* action. Instead, the executive branch filed a civil lawsuit in an effort to convince a federal

15. The D.C. Circuit's opinion in *Nixon v. Sirica* pre-dates the Supreme Court's decision in *United States v. Nixon*. The Supreme Court, however, adopted the D.C. Circuit's general approach. *See* 418 U.S. at 708, 94 S.Ct. 3090; *see also In re Sealed Case*, 121 F.3d at 743–44 (referring to *Nixon v. Sirica* as one of the cases that established the contours of justiciability relating to presidential privilege claims).

court to declare that a congressional subpoena was invalid.[16] That suit was not brought pursuant to the Executive's duty to execute the laws. The Executive's posture in that case, then, mirrors that of the Committee here in asking the Court to declare its subpoena valid.[17] There may well be instances where "different rules," so to speak, apply to enforcement actions brought before a federal court by the Executive than govern civil actions initiated by Congress. But this is not such a case.

In any event, although Congress does not have the authority to enforce the laws of the nation, it does have the "power of inquiry." *See McGrain v. Daugherty,* 273 U.S. 135, 174, 47 S.Ct. 319, 71 L.Ed. 580 (1927). And according to the Supreme Court, "the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." *Id.* Indeed, the Court has indicated that the "issuance of a subpoena pursuant to an authorized investigation is ... an indispensable ingredient of lawmaking." *See Eastland v. United States Servicemen's Fund,* 421 U.S. 491, 505, 95 S.Ct. 1813, 44 L.Ed.2d 324 (1975). "Just as the power to issue subpoenas is a necessary part of the Executive Branch's authority to execute federal laws," *see Brief of Senator Inouye, et al.,* at 7, so too is Congress's need to enforce its subpoenas a necessary part of its power of inquiry.

Two significant OLC opinions issued during the Reagan administration warrant examination at this point. In 1984, an opinion by Acting Assistant Attorney General Theodore Olson confirmed the viability of a federal civil suit brought by a House of Congress to enforce subpoenas issued to executive officials. *See Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege,* 8 U.S. Op. Off. Legal Counsel 101, 137 (1984) (hereinafter "Olson OLC Opinion"). As OLC opined, Congress has three options available to enforce a subpoena against a recalcitrant respondent: (1) referral to the U.S. Attorney for prosecution of a criminal contempt of Congress charge; (2) detention and prosecution pursuant to Congress's inherent contempt authority; or (3) a civil action to enforce the subpoena in a federal district court. When the respondent is a member of the executive branch who refuses to comply on the basis of executive privilege, however, OLC stated that the "contempt of Congress statute does not require and *could not constitutionally* require a prosecution of that official, or even,

16. The same is true of *United States v. U.S. House of Representatives,* 556 F.Supp. 150 (D.D.C.1983). There, the executive branch sought a declaratory judgment that EPA Administrator Anne Gorsuch had lawfully refused to comply with a congressional subpoena on the grounds of executive privilege. *Id.* at 150–51. The court exercised its discretion to decline jurisdiction pursuant to the Declaratory Judgment Act because Congress "indicated a preference for established criminal procedures" under 2 U.S.C. §§ 192 & 194 to run their course first. *Id.* at 152. Noting that "[c]ourts have been extremely reluctant to interfere with ... statutory scheme[s] by considering cases brought by recalcitrant witnesses seeking declaratory or injunctive relief," *id.,* the court dismissed the Executive's complaint. But the court noted that "[j]udicial resolution of this constitutional claim [of executive privilege] ... will never become necessary unless Administrator Gorsuch becomes a defendant in either a criminal contempt proceeding or *other legal action taken by Congress,*" *id.* at 153 (emphasis added), thereby implying that Congress would have the ability to proceed by "other legal action," such as the civil suit here.

17. At oral argument, counsel for the Executive suggested that even the Executive might be precluded from bringing such a suit in light of *Raines. See* Tr. at 71. As explained above, however, this Court is not persuaded that *Raines* undermined *AT & T I.*

we believe, a referral to a grand jury of the facts relating to the alleged contempt." *Id.* at 142 (emphasis added). That conclusion is rooted in concerns over both the Executive's traditional prosecutorial discretion, *see id.* at 140, as well as the "concomitant chilling effect" that might impair presidential advice if the possibility of criminal prosecution loomed over the President's close advisors, *see id.* at 142. Significantly, OLC also determined that "the same reasoning that suggests that the statute could not constitutionally be applied against a Presidential assertion of privilege applies to Congress' inherent contempt powers as well." *Id.* at n. 42. Thus, neither criminal prosecution nor inherent contempt could be employed against a recalcitrant executive branch official, as OLC saw it.

Instead, "Congress [can] obtain a judicial resolution of the underlying privilege claim and vindicate its asserted right to obtain any documents by a civil action for enforcement of a congressional subpoena." *Id.* at 137. As OLC put it, a civil action would be superior because:

> Congress has a legitimate and powerful interest in obtaining any unprivileged documents necessary to assist it in its lawmaking function ... [and][a] civil suit to enforce the subpoena would be aimed at the congressional objective of obtaining the documents, not at inflicting punishment on an individual who failed to produce them. Thus, even if criminal sanctions were not available against an executive official who asserted the President's claim of privilege, Congress would be able to vindicate its legitimate desire to obtain documents if it could establish that its need for the records outweighed the Executive's interest in preserving confidentiality.

Id. In fact, after examining *Senate Select Comm. III,* OLC concluded that "there is little doubt that, at the very least, Congress may authorize civil enforcement of its subpoenas and grant jurisdiction to the courts to entertain such cases." *Id.* at 137 n. 36. There is no suggestion whatsoever in the Olson OLC Opinion that such a civil suit would encounter any Article III obstacles because Congress (or a committee) would lack standing or because the dispute would not be considered traditionally amenable to judicial resolution. To the contrary, OLC rather emphatically concluded that a civil action would be the *least* controversial way for Congress to vindicate its investigative authority.

A 1986 OLC opinion authored by Assistant Attorney General Charles Cooper reached the same conclusion. *See Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act,* 10 U.S. Op. Off. Legal Counsel 68 (1986) (hereinafter "Cooper OLC Opinion"). In that opinion, OLC restated its position that Congress may institute "a civil suit seeking declaratory enforcement of [a] subpoena." *Id.* at 83. Likewise, OLC indicated that although inherent contempt is theoretically available to Congress and could ultimately be challenged by the executive branch through a writ of habeas corpus brought by the detained official, "it seems most unlikely that Congress could dispatch the Sergeant at-Arms to arrest and imprison an Executive Branch official who claimed executive privilege." *Id.* at 86.

Ultimately, OLC concluded that "although the civil enforcement route has not been tried by the House, it would appear to be a viable option." *Id.* at 88; *see also id.* at 88 n. 33 ("Any notion that the courts may not or should not review [subpoena enforcement disputes between the political branches] is dispelled by *United States v. Nixon* ... in which the Court clearly asserted its role as ultimate arbiter of execu-

tive privilege questions."). In fact, the Cooper OLC Opinion stated that the "rationale used by the Department [in *AT & T I*] would appear to *apply equally to suits filed by a House of Congress* seeking enforcement of its subpoena against executive privilege claims." *Id.* at 88 (emphasis added). There can be no doubt, then, that at least one prior administration regarded a civil suit by Congress to enforce a subpoena as presenting a justiciable controversy—and, indeed, to be the preferred method for resolving such inter-branch disputes. *See id.* at 88 n. 33 ("[O]nly judicial intervention can prevent a stalemate between the other two branches that could result in a particular paralysis of government operations.").

The Executive also insists that the Committee cannot rely on "informational standing" to satisfy the Article III threshold because informational standing can only arise where Congress has passed a law that specifically provides an unqualified right to receive certain information. There is no such law in this case. Moreover, the Executive argues, the Committee cannot rest on an implied right to investigate derived from Article I because the underlying subject matter here—removal of executive officials—is an issue on which Congress has no authority to legislate and thus no corresponding right to investigate. *See McGrain*, 273 U.S. at 173–75, 47 S.Ct. 319 (noting that the power of inquiry is limited to investigation "in aid of [the] legislative function").

Once again, the Court disagrees. In *McGrain*, the Supreme Court explained that the "power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." *Id.* at 174, 47 S.Ct. 319. Indeed, in *Eastland* the Supreme Court further noted that the "[i]ssuance of subpoenas ... has long been held to be a legitimate use by Congress of its power to investigate.... The issuance of a subpoena pursuant to an authorized investigation is similarly an indispensable ingredient of lawmaking." 421 U.S. at 504–05, 95 S.Ct. 1813. "The scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution." *Barenblatt v. United States*, 360 U.S. 109, 111, 79 S.Ct. 1081, 3 L.Ed.2d 1115 (1959). So long as the Committee is investigating a matter on which Congress can ultimately propose and enact legislation, the Committee may issue subpoenas in furtherance of its power of inquiry.

Turning to the legitimacy of this investigation, *McGrain* itself is enlightening. There, the investigation at issue involved:

> [T]the administration of the Department of Justice—whether its functions were being properly discharged or were being neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings to punish crimes and enforce appropriate remedies against the wrongdoers.

Id. at 177, 47 S.Ct. 319. The Court held that such a "subject [is] one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit." *Id.* So, too, here—in fact, it is nearly the identical subject matter that the Committee is investigating. Simply put, the Executive characterizes the Committee's investigation far too narrowly. It is not merely an investigation into the Executive's use of his removal power but rather a broader inquiry into whether improper partisan considerations have influenced prosecutorial discretion. Similarly, in *Nixon v. Adm'r Gen. Services*, the Supreme Court indicated that Congress's "need to understand

how ... political processes had in fact operated in order to gauge the necessity for remedial legislation" was a legitimate topic for investigation. 433 U.S. at 453, 97 S.Ct. 2777. Once again, the same can be said of the Committee's investigation. It defies both reason and precedent to say that the Committee, which is charged with oversight of DOJ generally, cannot permissibly employ its investigative resources on this subject. Indeed, given its "unique ability to address improper partisan influence in the prosecutorial process ... [n]o other institution will fill the vacuum if Congress is unable to investigate and respond to this evil." *Brief of Former United States Attorneys* at 10–11. With the legitimacy of its investigation established, there is no need to belabor the argument concerning informational standing—noncompliance with a duly issued subpoena is a quintessential informational injury.

To recap, the Committee has issued subpoenas to two high-ranking executive branch officials who have refused to comply, citing executive privilege. The Committee's attempt to pursue criminal prosecution of its contempt of Congress citation was thwarted by the Executive. Exercise of Congress's inherent contempt power through arrest and confinement of a senior executive official would provoke an unseemly constitutional confrontation that should be avoided. *Cf. United States v. Nixon*, 418 U.S. at 691–92, 94 S.Ct. 3090 (concluding that forcing the President to disobey a court order to obtain appellate review would create an unseemly, unnecessary constitutional confrontation between the branches). Thus, the Committee filed this suit to vindicate both its right to the information that is the subject of the subpoena and its institutional prerogative to compel compliance with its subpoenas. A harm to either interest satisfies the injury-in-fact standing requirement. Clear judicial precedent, along with persuasive reasoning in OLC opinions, establishes that the Committee has standing to pursue this action and, moreover, that this type of dispute is justiciable in federal court. Consequently, the Executive's motion to dismiss for lack of standing will be denied.

B. Cause of Action

Even if the Committee can satisfy the Article III prerequisites to bringing a case in federal court, the Executive argues, the complaint must nonetheless be dismissed because there is no cause of action that authorizes this lawsuit. Although the complaint identifies the Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202 ("DJA" or "Act"), as the basis for the Committee's requested relief, *see* Compl. ¶ 18, the Executive insists that the Act "does not create a cause of action." Def.'s Mot. & Opp'n at 38. Moreover, the Executive urges, this Court should decline to recognize an implied cause of action in favor of the Committee derived from the Constitution.

(1) Declaratory Judgment Act

[7] Relying on a series of cases that stand for the proposition that the Declaratory Judgment Act is merely procedural and does not create a free-standing cause of action, the Executive maintains that the Act cannot supply a basis to support the Committee's requested relief. In relevant part, the Declaratory Judgment Act provides:

> In a case of actual controversy within its jurisdiction, ... any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.

See 28 U.S.C. § 2201(a). To begin with, the Executive points out that the Supreme

Court has explained that the Act is " 'procedural only.' " *Skelly Oil Co. v. Phillips Petroleum Co.,* 339 U.S. 667, 671, 70 S.Ct. 876, 94 L.Ed. 1194 (1950) (quoting *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth,* 300 U.S. 227, 240, 57 S.Ct. 461, 81 L.Ed. 617 (1937)). The term "jurisdiction" used in the Act, according to the Supreme Court, "means the kinds of issues which give right of entrance to federal courts . . . in the sense of a federal right or diversity." *Id.* The Act did not "impliedly repeal[ ] or modify[ ] . . . the requirements of jurisdiction" in federal court. *Id.* at 671–72, 70 S.Ct. 876. In that sense, "the Declaratory Judgment Act 'is not an independent source of federal jurisdiction.' " *C&E Servs., Inc. of Washington v. D.C. Water & Sewer Autho.,* 310 F.3d 197, 201 (D.C.Cir. 2002). Instead, "the availability of [Declaratory Judgment Act] relief presupposes the existence of a judicially remediable right." *Schilling v. Rogers,* 363 U.S. 666, 677, 80 S.Ct. 1288, 4 L.Ed.2d 1478 (1960).

[8] Against that backdrop, the Executive's argument on this point breaks down into two parts. First, the Executive contends, the DJA does not itself create an independent cause of action. Instead, it merely enables anticipatory review for existing causes of action. Second, even assuming that the DJA can be utilized as an independent cause of action, the Committee here has identified no "judicially remediable right" that entitles it to invoke the DJA—there is no statutory basis for such a right, nor can Article I fairly be said to create a judicially enforceable right accruing to Congress.

For its part, the Committee responds that the "plain language of the statute" reveals that "the Committee's right to be in court is evident." Pl.'s Opp'n & Reply at 34. Under that text, only three elements are required to satisfy the statutory threshold: (1) "a case of actual controversy"; (2) an independent basis for federal jurisdiction; and (3) an "appropriate pleading." *Id.* at 34 (quoting 28 U.S.C. § 2201(a)). Once those three conditions are met, the Committee contends, a party "may have [its] 'legal relations' declared 'whether or not further relief is available.' " *Id.* (quoting 28 U.S.C. § 2201(a)). And the Committee argues that it has established all three elements here. First, this is a "case of actual controversy" for the same reasons that the Committee has Article III standing to bring this suit. Second, both parties agree that federal jurisdiction exists pursuant to 28 U.S.C. § 1331. Finally, the Committee's complaint in this case is the requisite "appropriate pleading." "Under the terms of the statute, *nothing else is necessary,*" *id.* at 36–37 (emphasis in original), and the Committee is now entitled to have its "legal relations" defined by this Court; and "[i]n this case, [those] 'legal relations' stem from the right granted to Congress under the Constitution, as definitively interpreted by the Supreme Court," *id.* at 34. Hence, the Court should decide whether Ms. Miers and Mr. Bolten are legally required to respond to Congress's duly issued subpoenas or whether, as the Executive contends, they are absolutely immune from such process.

As the Committee would have it, the "Supreme Court, which has *never* held that the DJA does not create a right of action—and, in fact, has proceeded for more than sixty years under the basic premise that it does—has expressed only two limitations upon the DJA." *Id.* at 34–35. According to the Committee, those two limitations, which do not apply here, are: (1) the DJA cannot supply an independent basis for federal jurisdiction; and (2) it cannot be used as a vehicle to secure an advisory opinion. *Id.* at 35.

There is some force to the Committee's textual argument on this point. After all, the wording of the statute does not indicate that any independent cause of action is required to invoke the DJA. Instead, the statute is framed in terms of declaring "rights" and "legal relations" in a justiciable case within federal jurisdiction. *See* 28 U.S.C. § 2201(a). Moreover, there is some support for the Committee's position found in early case law analyzing the DJA in terms of "remediable rights." In *Coffman v. Breeze Corp.*, 323 U.S. 316, 65 S.Ct. 298, 89 L.Ed. 264 (1945), the Supreme Court held that declaratory judgments are available in federal court: (1) in disputes involving an actual case or controversy; (2) where the issue is actual and adversarial; and (3) when the action is not merely a medium for securing an advisory opinion. *Id.* at 324, 65 S.Ct. 298. Those requirements are satisfied here.[18] In addition, in *Skelly* (and subsequent decisions), the Supreme Court emphasized that the DJA is not a substitute for proper federal jurisdiction. *See* 339 U.S. at 671–72, 70 S.Ct. 876. Here, because jurisdiction exists pursuant to 28 U.S.C. § 1331, there is no concern that the Committee is seeking to utilize the DJA to circumvent normal requirements of federal jurisdiction.

On the other hand, the Executive identifies authority that casts some doubt upon the Committee's contentions. In *Buck v. Am. Airlines, Inc.*, 476 F.3d 29 (1st Cir. 2007), the First Circuit observed that the DJA "creates a remedy, not a cause of action." *Id.* at 33 n. 3. For that proposition, the court in *Buck* cited to *Muirhead v. Mecham*, 427 F.3d 14 (1st Cir.2005). But that case indicated only that the DJA does not provide a "'*jurisdictional* basis for actions under federal law, but merely defines the scope of available declaratory relief.'" *Muirhead*, 427 F.3d at 17 n. 1 (quoting *Progressive Consumers Fed. Credit Union v. United States*, 79 F.3d 1228, 1230 (1st Cir.1996)) (emphasis added). The use of the term "jurisdictional" in *Muirhead*, and its omission in *Buck*, may suggest that the *Buck* court misread *Muirhead*. The focus in *Muirhead* is on the jurisdictional requirement of the DJA, not any cause of action requirement.

Similarly, in *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir.2001), a case also cited by the Executive, the Fifth Circuit stated that the "law makes clear that ... [the DJA] provides a *remedy* different from an injunction ... [but] it does not provide an additional cause of action with respect to the underlying claim." *Id.* at 423 n. 31 (emphasis in original). The Fifth Circuit cited to *Earnest v. Lowentritt*, 690 F.2d 1198 (5th Cir.1982), in support of that assertion. But *Earnest* merely held that the DJA "does not provide an independent cause of action for determination of the constitutionality of a statute, but rather is only an avenue for relief in a 'case of actual controversy within (the court's) jurisdiction.'" *Id.* at 1203 (citing 28 U.S.C. § 2201). Because "federal jurisdiction [was] lacking," the only remaining issue in *Earnest* involved the application of a Louisiana statute. *Id.* That presented "an issue of state rather than federal law," and there was thus no *federal* case or controversy with which to invoke federal jurisdiction and correspondingly the DJA. As in *Buck*, then, the broad language in *Okpalobi* rests upon a somewhat more ambiguous statement from a prior case. Nevertheless, both *Buck* and *Okpalobi* do lend some support to the Executive's proposed reading of the DJA.

18. Indeed, apart from its standing argument, the Executive wisely does not appear to contest that this dispute presents an actual and adversarial case that would not result in an advisory opinion.

So, too, does a recent opinion by Magistrate Judge Kay. In *Seized Property Recovery Corp. v. U.S. Customs & Border Protection,* 502 F.Supp.2d 50 (D.D.C.2007), the court held that the plaintiff's DJA action failed because the complaint did "not specify any cause of action *through which* the Court may exercise subject matter jurisdiction and grant declaratory relief." *Id.* at 64 (emphasis in original). To reach that conclusion, Magistrate Judge Kay relied (in part) upon *C & E Servs.,* which held that the DJA is not an independent source of jurisdiction but rather "presuppose[s] the existence of a judicially remediable right." 310 F.3d at 201 (citations omitted). In *Seized Property,* however, the plaintiff failed to identify any right to the requested relief—a declaration that United States Customs and Border Protection was required "by statute to include names and addresses ... when publishing forfeiture notices pursuant to ... 19 U.S.C. § 1607." 502 F.Supp.2d at 64. Significantly, the plaintiff made "no reference to arguable sources of jurisdiction such as the Administrative Procedure Act ... or the Due Process Clause of the Fifth Amendment." *Id.* Therefore, because the plaintiff had proffered neither any right to the relief it requested nor any source of jurisdiction, the DJA claim was deficient.

In this case, however, the Committee does not claim that the DJA is the basis for its asserted substantive *right.* It is the Constitution, according to the Committee, that is the source of that right. The question, then, is whether an independent *cause of action* must supply the underlying right for DJA purposes or whether, as the Committee contends, the Constitution may be that source. At oral argument, counsel for the Committee stated that courts have "misspoke[n]" when they have stated that the DJA does not create a separate cause of action. *See* Tr. at 42 ("I think they misspoke. I don't think that's an accurate statement of the law."). What those courts actually meant instead, the Committee suggests, is that the DJA does not itself provide the underlying substantive right to be adjudicated. *Id.* at 43 ("[T]hat's what I think they're meaning when they say it doesn't create a cause of action. It doesn't give you a substantive right that you have against a defendant that you name."). Moreover, the Committee contends, the "cause of action" references from those opinions can also be interpreted as statements that the DJA cannot confer subject matter jurisdiction. There is some force to this position. It is conceivable that courts may at times employ the terms "cause of action" and "jurisdiction" interchangeably;[19] after all, the Supreme Court has stated that historically " '[j]urisdiction ... is a word of many, too many, meanings.' " *Arbaugh v. Y & H Corp.,* 546 U.S. 500, 510, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006) ("This Court, no less than other courts, has sometimes been profligate in its use of the term [jurisdiction].").

[9] To be sure, in most cases a plaintiff would *need* to identify a statutory (or a common law) cause of action to proceed in federal court, as otherwise there would be no basis for the plaintiff's asserted right to relief. The Constitution itself does not confer in most settings the sort of affirmative right that the Committee is claiming exists here; instead, the asserted right arises from some other source of law. But where the Constitution is the source of the right allegedly violated, no other source of a right—or independent cause of action—need be identified. The parties point to no case—and the Court is aware of none—in

19. The statements from the First and Fifth Circuits are contained in footnotes and cannot be interpreted as critical passages in either *Buck* or *Okpalobi.*

which a court declined to hear a case requesting declaratory relief where subject matter jurisdiction was present and a plaintiff's constitutional rights were arguably implicated simply because the plaintiff did not have an independent cause of action apart from the DJA. By contrast, there is at least one case where a court applied the DJA in circumstances nearly identical to those present here. *See United States v. House of Representatives*, 556 F.Supp. at 153.

The Court is satisfied that the Committee's case can proceed pursuant to the DJA, particularly in light of case law indicating that the Act "should be liberally construed to achieve the objectives of the declaratory remedy." *See McDougald v. Jenson*, 786 F.2d 1465, 1481 (11th Cir. 1986); *see also* 10B Wright, Miller & Kane, *Federal Practice & Procedure* § 2754 (3d ed. 1998) ("The Declaratory Judgment Act and Rule 57 must be liberally construed to attain the objectives of the declaratory remedy."). Given the ambiguity surrounding the applicable case law, the Court finds the plain text of the statute instructive. As explained above, the Committee has satisfied the conditions set out in the text of the Act itself: this is a "case of actual controversy within [the Court's] jurisdiction" and the Committee has filed the "appropriate pleading" seeking a declaration relating to its "rights and other legal relations." *See* 28 U.S.C. § 2201. Moreover, there is no reason to conclude that the Committee is seeking an advisory opinion here—indeed, the Committee seeks actual compliance with the subpoenas. Thus, the Committee's claim also satisfies the criteria identified by the Supreme Court in *Coffman.* In the end, two key facts distinguish this case: there is an independent basis for federal subject matter jurisdiction and there is a constitutional right at stake. These factors alleviate most, if not all, of the concerns that some courts have identified with respect to utilizing the DJA.

Employing the DJA in this case would also further one of the Act's primary purposes: enabling anticipatory review in order to eliminate the necessity of litigation in the defensive posture. As one commentator put it, an important goal of the DJA was to "sanction[ ] the trial of controversies before a conventional cause of action has accrued and another remedy has become available." *Developments in the Law: Declaratory Judgments—1941–49*, 62 Harv. L.Rev. 787, 808 (1949). That view was confirmed by Members of Congress in floor statements during the debates over the Act. *See* Pl.'s Opp'n & Reply at 37 (quoting 69 Cong. Rec. 1638 (1928) (noting that the DJA would enable a federal court to hear a case "even though ... there is no existing cause of action upon which a hearing could be had at the time; but there is a substantial controversy as to the [legal rights involved]")). Indeed, the Executive apparently agrees with that assessment: in "anticipatory cases, [the Act] merely switches the posture of the parties in adjudicating a reasonably anticipated cause of action," *see* Defs.' Reply at 20. The Supreme Court has also endorsed this view of the Act. *See, e.g., Franchise Tax Bd. of State of Cal. v. Const. Laborers Vac. Trust for S. Cal.*, 463 U.S. 1, 19 n. 19, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983) (noting that "the nature of the declaratory remedy itself ... was designed to permit adjudication of either party's claims of right") (citing E. Borchard, *Declaratory Judgments* 15–18, 23–25 (1934)).

A frequent setting in which the DJA is put to use is potential patent infringement cases. *See, e.g., id.* ("For instance, federal courts have consistently adjudicated suits by alleged patent infringers to declare a patent invalid, on the theory that

an infringement suit by the declaratory judgment defendant would raise a federal question over which the federal courts have exclusive jurisdiction."). When a party looks to engage in a course of conduct that may conceivably incur patent infringement liability, there are two common paths to obtain judicial resolution of the patent's validity. The traditional defensive option is to await an infringement suit and then defend that suit on the basis that the patent is invalid. But another option is made available by the DJA: a party may sue preemptively to test the validity of the patent in federal court. *See, e.g., Hanes Corp. v. Millard,* 531 F.2d 585, 592 (D.C.Cir.1976), *superseded by statute on other grounds* ("Certainly one of the most common and indisputably appropriate uses of the declaratory judgment procedure is to enable one who has been charged with patent infringement to secure a binding determination of whether proposed conduct will infringe a patent in question without waiting until he becomes the defendant in an actual infringement suit. The purpose of granting declaratory relief to one potentially liable for infringement is to allow him to know in advance whether he may legally pursue a particular course of conduct.").

This case is somewhat analogous to an anticipatory patent infringement case. As noted above, one power that Congress has at its disposal is inherent contempt. Following a citation for congressional contempt, Congress could dispatch the Sergeant–at–Arms to detain Ms. Miers and Mr. Bolten in preparation for a trial before Congress. *See* Morton Rosenberg, *Cong. Research Serv., Congress's Contempt Power: Law, History, Practice, and Procedure,* No. 34–097, at 15 (2008), *available at* http://www.au.af.mil/au/awv/awcgate/crs/rl34097.pdf. In response to such action, both sides here appear to agree (*see* Tr. at 85) that Ms. Miers and Mr. Bolten would likely file a writ of habeas corpus with this Court to challenge the legality of their detention, raising the central issue of the scope and nature of Congress's subpoena power—precisely the issue presented by the instant action.[20] By invoking the DJA to gain anticipatory review of that same question, the Committee can obtain judicial resolution regarding its subpoena power without the unseemly scenario of the arrest and detention of high-ranking executive branch officials, which would carry the possibility of precipitating a serious constitutional crisis. That would seem to be just the sort of process sanctioned by the DJA.[21]

[10] Although the Court concludes that the Committee need not identify a cause of

20. The Executive is certainly correct that there would also be a host of other issues raised by the habeas corpus petition, such as "the scope of Congress's asserted inherent contempt power and whether it would even countenance the arrest of the President or his closest aides for refusing to testify or provide privileged documents at the President's direction." *See* Defs.' Reply at 21–22. But it is also true that the contours of Congress's subpoena power would be implicated, just as here. The fact that the habeas corpus action might present additional issues does not suggest that the Committee cannot receive "anticipatory" adjudication on the question of its subpoena power through the DJA.

21. Indeed, the defendants in this case—Ms. Miers and Mr. Bolten—would be the petitioners in the habeas corpus proceeding, a posture somewhat analogous to the situation where "the defendant in the declaratory-judgment action could have brought a coercive action in the federal courts." *See* 10B Wright, Miller & Kane, *Federal Practice & Procedure* § 2767; *see also Const. Laborers,* 463 U.S. at 19, 103 S.Ct. 2841 ("Federal courts have regularly taken original jurisdiction over declaratory judgment suits in which, if the declaratory judgment defendant brought a coercive action to enforce its rights, that suit would necessarily present a federal question.").

action apart from the DJA, that does not end the matter. The Committee must still identify a judicially remediable right that may be enforced through the DJA. Fortunately, the Supreme Court has already spoken to whether Article I provides Congress with an implied right to issue subpoenas and enforce them judicially. To be sure, "there is no [constitutional] provision expressly investing either house with power to make investigations and exact testimony, to the end that it may exercise its legislative function advisedly and effectively." *McGrain*, 273 U.S. at 161, 47 S.Ct. 319. The question, then, is "whether this power is so far incidental to the legislative function as to be implied." *Id.* In *McGrain*, the Supreme Court answered that question in the affirmative, noting that the power of inquiry was well-established at the time of the founding:

> We are of the opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. It was so regarded and employed in American Legislatures before the Constitution was framed and ratified. Both houses of Congress took this view of it early in their history.

Id. at 174, 47 S.Ct. 319. Indeed, the Necessary and Proper Clause gives rise to Congress's implied right to issue and enforce subpoenas found in Article I: Congress must have "auxiliary powers as are necessary and appropriate to [the legislative] end." *Id.* at 175, 47 S.Ct. 319. "A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information ... recourse must be had to others who do possess it." *Id.* Moreover, when "mere requests for such information ... are unavailing ... some means of compulsion are essential to obtain what is needed." *Id.*

In short, there can be no question that Congress has a right—derived from its Article I legislative function—to issue and enforce subpoenas, and a corresponding right to the information that is the subject of such subpoenas.[22] Several Supreme Court decisions have confirmed that fact. *See, e.g., Eastland*, 421 U.S. at 504–05, 95 S.Ct. 1813 ("The power to investigate and to do so through compulsory process plainly falls within [the] definition [of Congress's legislative function]."); *Barenblatt*, 360 U.S. at 111, 79 S.Ct. 1081 ("The scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."); *Watkins v. United States*, 354 U.S. 178, 187–88, 77 S.Ct. 1173, 1 L.Ed.2d 1273 (1957) ("It is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action. It is their unremitting obligation to respond to subpoenas, to respect the dignity of the Congress and its committees, and to testify fully with respect to matters within the province of proper investigations."); *McGrain*, 273 U.S. at 175, 47 S.Ct. 319 ("[T]he constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised.").

The Court can identify no reason why that right cannot be vindicated by recourse to the federal courts through the DJA. After all, courts routinely enforce subpoe-

22. As discussed above, this power is of course limited to a *legitimate* legislative purpose, which is plainly present here.

nas in favor of parties with rights to information. The mere fact that this case involves a dispute between the political branches—or that such disputes are normally settled through negotiation and accommodation—is not sufficient to render the Committee's right non-judicially remedial. That argument is foreclosed by precedent dating back to *United States v. Nixon* including case law involving subpoena disputes between the two political branches.

For example, *United States v. House of Representatives* stands for the proposition that the DJA provides a ground for the Committee's requested relief before this Court. There, the Administrator of the EPA brought a civil action pursuant to the DJA seeking a declaration that she lawfully refused to comply with a subpoena issued by a House subcommittee on the ground of executive privilege. *See* 556 F.Supp. at 151. There is no additional cause of action mentioned in the opinion, and the court plainly contemplated that the DJA *could* supply the basis for hearing the claim notwithstanding the absence of an independent cause of action and the fact that the dispute concerned "the scope of the congressional investigatory power." *Id.* at 152. Nevertheless, because the court concluded that the parties had not yet exhausted all "possibilities for settlement," *id.*, it determined that "entertain[ing] this declaratory judgment action would be an improper exercise of the discretion granted by the Declaratory Judgment Act," *id.* at 153. The difference between that case and this one is that the parties are reversed; here, the House stands in the position of the plaintiff and the Executive is the defendant. This Court fails to see why that fact should alter the DJA analysis in any material respect.[23]

The Executive presents a litany of contrary arguments, all of which are unavailing. Some relate to the scope and nature of any rights emanating from Article I, which are addressed in the implied cause of action section below. For present purposes, the Court will focus on two arguments raised specifically against the application of the DJA.

The Executive has asserted that the Committee's interpretation of the DJA would circumvent the Supreme Court's implied cause of action doctrine represented by cases such as *Alexander v. Sandoval,* 532 U.S. 275, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001). The Court does not agree. *Sandoval* involved implying a cause of action from a statute rather than directly from the Constitution. There are important differences between those two contexts, most notably the fact that the former inquiry turns primarily on congressional intent whereas the latter does not. Furthermore, in *Sandoval* the Supreme Court held that the pertinent portion of Title VI relied upon by the plaintiffs did not contain any "rights-creating" language and thus did not " 'confer rights on a particular class of persons.' " *Id.* at 288–89, 121 S.Ct. 1511 (quoting *California v. Sierra Club,* 451 U.S. 287, 294, 101 S.Ct. 1775, 68 L.Ed.2d 101 (1981)). Thus, even if the *Sandoval* plaintiffs had attempted to invoke the DJA—which they did not—their effort would have failed due to the lack of an underlying substantive right accruing to them. In this case, by contrast, the Committee has identified a substantive

23. Similarly, there is no suggestion whatsoever in *AT & T I,* the Olson OLC Opinion, or the Cooper OLC opinion that the lack of any independent cause of action would be an impediment to a suit by Congress under the DJA to enforce its subpoena. Indeed, it is not clear what cause of action the *executive branch* utilized in *AT & T I* in seeking to enjoin the subcommittee's subpoena.

right that it has and that has been previously recognized by the Supreme Court. And at a higher level of generality, concluding that Congress may utilize the DJA to test the validity of its subpoena power suggests nothing whatsoever about whether private plaintiffs may imply a federal cause of action for damages or injunctive relief from various federal statutes.

The Executive also contends that 2 U.S.C. § 288d negates the notion that the DJA is a sufficient cause of action. That provision states that the Senate Counsel

> [w]hen directed to do so . . . shall bring a civil action under any statute conferring jurisdiction on any court of the United States . . . to enforce, to secure a declaratory judgment concerning the validity of, or to prevent a threatened failure or refusal to comply with, any subpena or order issued by the Senate or a committee or a subcommittee of the Senate authorized to issue a subpena or order.

2 U.S.C. § 288d(a). The relevant committee must issue a report concerning "the comparative effectiveness of bringing a civil action under this section, certification of a criminal action for contempt of Congress, and initiating a contempt proceeding before the Senate." *Id.* § 288d(c)(2)(D). Those passages, according to the Executive, create a civil action by which the Senate may enforce or confirm the validity of issued subpoenas. Because the Senate saw fit to pass this statute to enable that civil action, the Executive argues, it must be the case that the DJA did not already provide an avenue to pursue a civil action on the basis of some other cause of action. Significantly, the House has no analog to § 288d.

For its part, the Committee contends that § 288d was passed specifically to respond to the district court's decision in *Senate Select Comm. I,* which found that the Select Committee's suit failed for lack of subject matter jurisdiction because it did not satisfy the then-existing amount in controversy requirement.[24] Thus, § 288d was enacted to confer such jurisdiction on the federal courts. Moreover, the Committee maintains, before § 288d became law, the Senate (unlike the House) did not have an Office of Legal Counsel. Consequently, the Committee urges the Court to read this provision as part of a larger statutory scheme that established the Office of Senate Legal Counsel and then merely specified when the Senate Counsel could bring suit.

The Court is not persuaded that § 288d suggests that the DJA is not a sufficient cause of action in this case. The Committee is correct that § 288d is one component of a larger statutory structure that establishes and outlines the responsibilities of the Office of Senate Legal Counsel. *See* 2 U.S.C. § 288a-n. Although § 288d appears to create a cause of action to proceed in federal court, it does so in the context of instructing the Senate Counsel on the necessary conditions that must be satisfied prior to bringing suit. *See* 2 U.S.C. § 288d(a). In any event, the fact that § 288d may create an independent cause of action for the Senate does not establish that the Senate (or the House) could not proceed under the DJA. Section 288d can simply be viewed as a more specific application of the general relief made available by the DJA. Moreover, the use of the term "enforce" suggests that § 288d(a) may authorize coercive relief beyond the declaratory measures provided by the DJA. Additionally, 28 U.S.C. § 1365 provides jurisdiction for actions that also

24. Indeed, the initial provision enacted in 1973 applied only to the Senate Select Committee on Presidential Campaign Activities. *See* Pub.L. No. 93–190 (1973).

likely fall within the scope of 28 U.S.C. § 1331—hence, the Senate can likely proceed on either basis where appropriate. Thus, to the extent that they overlap, the possible presence of redundancy between § 288d and the DJA does not imply that the latter cannot be used by the Committee here. That conclusion is consistent with statements found in a contemporaneous Senate Report indicating that "the statute 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 subpena against an officer or employee of the federal government." *See* S.Rep. No. 95–170, at 91–92 *reprinted in* 1978 U.S.C.C.A.N. 4216, 4307–08.[25]

That brings us to the interesting matter of the Senate Select Committee disputes. After the district court dismissed the Senate's claim in *Senate Select Comm. I* for lack of subject matter jurisdiction, Congress enacted Pub.L. No. 93–190. That provision conferred subject matter jurisdiction in this district court over "any civil action heretofore or hereafter brought by the Senate Select Committee on Presidential Campaign Activities ... to enforce or secure a declaration concerning the validity of any subpoena ... issued by said Committee to the President or the Vice President or any other officer of the United States." Pub.L. No. 93–190. The phrasing of the statute is admittedly somewhat vague, but it is apparent that the Senate's main concern was addressing a lack of jurisdiction rather than any cause of action defect. It is not clear, then, that the provision was meant to create an independent cause of action along with the special jurisdictional designation. Indeed, the fact that Pub.L. No. 93–190 applied to "any civil action *heretofore* or hereafter brought by the Senate Select Committee" suggests that Congress believed that the Select Committee had already utilized an appropriate cause of action.

In *Senate Select Comm. I,* the cause of action identified by the court was the DJA. *See* 366 F.Supp. at 54–55 ("The case presents a battery of issues including ... invocation of the declaratory judgment statute."). The court did not address the application of the DJA due to its jurisdictional holding. And in *Senate Select Comm. II,* the court noted that the jurisdictional defect had been cured by the "statute placing special jurisdiction in this Court," and stated that the Committee "seeks a declaratory judgment clarifying its rights and an affirmative injunction directing compliance with the subpoena." 370 F.Supp. at 522. There is no further cause of action discussion in *Senate Select Comm. II.* However, the court ultimately exercised its equitable discretion to decline to hear the case, which is consistent with application of the DJA. *Id.* at 524 ("[W]hen its equitable jurisdiction is invoked, [the Court] can and should exercise its discretion not to enforce a subpoena

25. Indeed, that Report confirms that 28 U.S.C. § 1365 was designed 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 subpenas." S.Rep. No. 95–170, at 91, 1978 U.S.C.C.A.N. at 4307. Moreover, although (as the Executive points out) the Report also states that "[p]resently, Congress can seek to enforce a subpena only by use of criminal proceedings or by the impractical procedure of conducting its own trial before the bar of the House of Representatives or the Senate," S.Rep. No. 95–170, at 16, 1978 U.S.C.C.A.N. at 4232, the Committee is correct that the rationale underlying that statement was lack of *jurisdiction* rather than the absence of a cause of action. *See* S.Rep. No. 95–170 at 20, 1978 U.S.C.C.A.N. at 4236 (explaining that the Senate's standing order authorizing all Senate committees to bring suit "has ... been held not to confer jurisdiction on the courts to hear a subpena enforcement action").

which would exacerbate the pretrial publicity in areas that are specifically identified with pending criminal charges."). That fact, coupled with the court's explicit reference to the DJA in *Senate Select Comm. I,* supports the conclusion that the cause of action was the DJA. It is worth noting, then, that neither the district court nor the D.C. Circuit took issue with the sufficiency of that cause of action.

In any event, this Court concludes that the Committee may invoke the DJA because it has identified a sufficient right that is judicially remediable through the DJA. It is the Constitution, and not any independent cause of action, that supplies the basis for Congress's right to invoke the DJA here. The Court therefore rejects the Executive's argument that the DJA does not permit the Committee to have its day in court.

(2) Implied Cause of Action

[11] In the alternative, the Committee also contends that it has an implied cause of action derived from Article I to seek a judicial declaration concerning the validity of its subpoena power. The Executive objects to that proposition on several grounds. To begin with, the Executive argues, Article I does not contain the sort of explicit "rights creating" language required to imply a cause of action from the Constitution. Instead, Article I deals primarily with "powers" of Congress rather than "rights" enforceable by the judiciary. Moreover, even assuming that Article I confers upon Congress a sufficient right, the Executive urges that special factors concerning the separation of powers counsel against fashioning a judicial remedy. As explained below, the Court is not persuaded by the Executive's assertions.

A few preliminary points are in order before addressing the Executive's contentions. Numerous Supreme Court decisions, such as *Alexander v. Sandoval,* establish that plaintiffs seeking to imply a cause of action from a federal statute bear the heavy burden of proving that Congress clearly meant for the statute to provide a private *right* to a class of individuals and that Congress also intended the statute to create a private federal *remedy. See* 532 U.S. at 288–90, 121 S.Ct. 1511. The inquiry involved in implying a cause of action from the Constitution itself, however, is much different. In *Davis v. Passman,* 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979), the Supreme Court noted that "the question of who may enforce a *statutory* right is fundamentally different from the question of who may enforce a right that is protected by the Constitution." *Id.* at 241, 99 S.Ct. 2264 (emphasis in original). Whereas the question in the statutory arena revolves around determining Congress's intent with respect to a specific legislative act, the Constitution "speaks . . . in great outlines . . . with majestic simplicity." *Id.* (quotations omitted). It is the judiciary, rather than Congress, that is traditionally regarded as the arbiter of constitutional rights and it is self-evident why courts do not look to congressional intent when construing the Constitution. Thus, "the judiciary is clearly discernible as the primary means through which [constitutional] rights may be enforced," and consequently "[a]t least in the absence of a 'textually demonstrable constitutional commitment of [an] issue to a coordinate political department,' . . . we presume that justiciable constitutional rights are to be enforced through the courts." [26] *Id.* at 242, 99 S.Ct. 2264 (citing

26. The Executive seizes on this passage to argue that "the authority to invoke the power of the courts to 'take care that the laws be faithfully executed' " is textually committed to the Executive. *See* Defs.' Reply at 31. As explained above, however, this is not an en-

Baker v. Carr, 369 U.S. at 217, 82 S.Ct. 691). The Court went on to indicate that:

> Traditionally, therefore, "it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution and to restrain individual state officers from doing what the 14th Amendment forbids the State to do." . . . Indeed, this Court has already settled that a *cause of action may be implied* directly under the equal protection component of the Due Process Clause of the Fifth Amendment in favor of those who seek to enforce this constitutional right.

Id. at 242, 99 S.Ct. 2264 (emphasis added) (quoting *Bell v. Hood*, 327 U.S. 678, 684, 66 S.Ct. 773, 90 L.Ed. 939 (1946)).

In the context of implying a private cause of action for *damages* from the Constitution, *Bivens v. Six Unkown Fed. Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), provides the starting point. As in the statutory context, a plaintiff must first identify a protected right that is violated by the defendant's conduct. Once that is established, the Supreme Court has clarified that "on the assumption that a constitutionally recognized interest is adversely affected by the actions of federal employees, the decision whether to recognize a *Bivens* remedy may require two steps," *Wilkie v. Robbins*, —— U.S. ——, 127 S.Ct. 2588, 2598, 168 L.Ed.2d 389 (2007):

> In the first place, there is the question whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages. . . . But even in the absence of an alternative, a *Bivens* remedy is a subject of judgment: the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation.

Id. (internal citations and quotations omitted).

This is not a damages action. Thus, *Bivens* and its progeny are not strictly on point. There is some direction to be gleaned from those cases, but they are not a close fit for the current controversy. The parties have not directed the Court to any significant case law pertaining to implied constitutional causes of action for injunctive or declaratory relief against federal officials, and the Court has not identified much authority on that subject.

Against that backdrop, the Committee's argument is straightforward. Article I, the Committee asserts, provides Congress with an implied right to investigate in furtherance of its legislative function. That right has been recognized by the Supreme Court, which has also held that it carries with it a necessary corollary that Congress may rely upon compulsory process to enforce its investigative authority. Indeed, according to the Committee the Supreme Court has already "establishe[d] a framework for implying remedies pursuant to Congress's powers under Article I." *See* Pl.'s Opp'n & Reply at 39. In *Marshall v. Gordon*, 243 U.S. 521, 37 S.Ct. 448, 61 L.Ed. 881 (1917), the Court explained that Congress's implied inherent contempt au-

forcement action taken by the government against a private citizen. While that task is surely vested in the Executive, *see Buckley v. Valeo*, 424 U.S. 1, 138, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), there is no corresponding constitutional provision that precludes the Committee from bringing a lawsuit to resolve a dispute between two co-equal branches of the federal government.

thority "rests solely upon the right of self-preservation to enable the public powers given to be exerted." *Id.* at 541, 37 S.Ct. 448. This implied power derives "from the right to prevent acts which, in and of themselves, inherently obstruct or prevent the discharge of legislative duty." *Id.* at 542, 37 S.Ct. 448. For the same reasons that the Supreme Court implied a power of inherent contempt in *Marshall*, the Committee argues, this Court should imply a cause of action to vindicate the right of Congress to carry out its legislative duty.[27]

In response, the Executive insists that the Supreme Court "has made clear that implied causes of action under the Constitution arise only where there is a constitutionally-explicit *right* to be vindicated." *See* Defs.' Reply at 26 (emphasis in original). Article I, the Executive says, creates no such explicit right. True enough, but the Executive overlooks the fact that the Supreme Court has already construed Article I in *McGrain*, *Eastland*, and other cases to find an implied right of investigation, and indeed an implied right to compel compliance with that investigative power, accruing to Congress. *See, e.g., Eastland*, 421 U.S. at 504–05, 95 S.Ct. 1813 ("The power to investigate and to do so through compulsory process plainly falls within [the] definition [of Congress's legislative function]."). This Court is equally bound by constitutional constructions issued by the Supreme Court as it is by the text of Article I itself.

That Congress's right may be implied rather than explicit under the Constitution does not defeat the Committee's action. With respect to 42 U.S.C. § 1983, the Supreme Court has observed that the fact "[t]hat the right at issue ... is an implied right under the Commerce Clause does not diminish its status as a 'right, privilege, or immunity' under § 1983." *Dennis v. Higgins*, 498 U.S. 439, 448 n. 7, 111 S.Ct. 865, 112 L.Ed.2d 969 (1991) ("Indeed, we have already rejected a distinction between express and implied rights under § 1983 in the statutory context."). And the Court has also indicated that "[a] court's role in discerning whether personal rights exist in the § 1983 context should ... not differ from its role in discerning whether personal rights exist in the implied right of action context." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002). If an implied constitutional right suffices for purposes of § 1983, there is no reason it should not suffice here.

After undertaking an analogous examination of Article I, the Supreme Court has held that there is a judicially enforceable right implied in the Commerce Clause notwithstanding that there is no explicit textual basis for that right. In *Dennis*, the Court rejected the argument that "the Commerce Clause merely allocates power between the Federal and State Governments and does not confer 'rights.'" 498 U.S. at 447, 111 S.Ct. 865. Indeed, "[t]he Court has often described the Commerce Clause as conferring a 'right' to engage in interstate trade free from restrictive state regulation." *Id.* at 448, 111 S.Ct. 865. No less is true of Congress's right and power to investigate as part of its legislative function; indeed, in *Marshall* the Supreme Court pointed to Congress's "*right* to ... discharge [its] legislative duty" as the source of its inherent contempt authority. 243 U.S. at 542, 37 S.Ct. 448. The existence of a judicially remediable right derived from the Commerce Clause, then,

27. Indeed, as the Committee would have it, the Supreme Court's implied remedy in *Marshall*—inherent contempt—is more drastic than the civil cause of action that the Committee pursues here, and hence this Court should take comfort in the fact that the Supreme Court has already crafted a more severe remedy.

provides strong support for a similarly cognizable investigation right in Congress. Moreover, the Court has also indicated that "individuals injured by state action that violates ... the Commerce Clause may sue and obtain injunctive and declaratory relief." *Dennis,* 498 U.S. at 447, 111 S.Ct. 865 (citing *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, Dep't of Bus. Regulation of Florida,* 496 U.S. 18, 31, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990)). So, too, can the Committee sue for declaratory relief concerning its right to issue and enforce subpoenas to obtain testimony and documents.

The Executive next makes the related argument that "Article I is fundamentally the stuff of government *structure,* not 'rights.' " *See* Defs.' Reply at 27. That, however, is exactly the argument rejected by the Supreme Court in *Dennis* and the Court finds that decision instructive here as well. Undeterred, the Executive notes that Article I itself refers to the "powers" of Congress rather than to the "rights" of Congress. And to the extent that the Supreme Court has made various statements concerning Congress's investigatory role, it has indicated that there is a "congressional *power* of inquiry (which itself is not expressly identified in the Constitution, but must be implied as appurtenant to the legislative function)." *Id.* at 28. "The Court did not, however, hold (or otherwise suggest) that Article I vests Congress with justiciable *rights* to validate in courts." *Id.* at 28–29.

The Executive makes far too much of the difference between rights and powers, apparently attempting to draw on the well-established concept that, for implied cause of action or § 1983 purposes, only "rights"—as distinct from "benefits or interests"—are judicially enforceable. *See, e.g., Gonzaga Univ.,* 536 U.S. at 283, 122 S.Ct. 2268. The "rights versus powers" assessment, however, does not fit into that dichotomy. Instead, rights and powers are inherently related concepts. The exercise of Congress's investigative "power," which the Executive concedes that Congress has, *creates* rights. For instance, by utilizing its power to issue subpoenas and proceed with an investigation via compulsory process, Congress creates a *legal right* to the responsive information that those subpoenas will yield. To hold that Congress's ability to enforce its subpoenas in federal court turns on whether its investigative function and accompanying authority to utilize subpoenas are properly labeled as "powers" or "rights" would elevate form over substance. The Court declines to do so.[28]

Even assuming that Congress has an implied constitutionally-recognized interest, the Executive nonetheless contends that " 'alternative, existing process[es] for protecting [that] interest amount[ ] to a convincing reason for the Judicial Branch to refrain from providing a new and free-standing remedy' here," particularly where the Committee has failed to exhaust those remedies. *See* Defs.' Reply at 32 (quoting *Wilkie,* 127 S.Ct. at 2598). Of course, the Committee's attempt to proceed with a criminal contempt prosecution was thwarted by the executive branch. That option, which was one of the three available routes to achieve enforcement of a congressional subpoena, has now been foreclosed.

Still, the Executive takes the Committee to task for failing to utilize its inherent contempt authority. But there are serious problems presented by the prospect of inherent contempt, not the least of which is that the Executive is attempting to have it

28. Not all rights or privileges are express in the Constitution. Of note here, the Constitution makes no reference to executive privilege or absolute immunity either.

both ways on this point. To begin with, prosecution pursuant to inherent contempt is a method of "inflicting punishment on an individual who failed" to comply with a subpoena. *See* Olson OLC Opinion at 137. As OLC has recognized, a civil action, by contrast, is directed towards "obtaining any unprivileged documents necessary to assist [Congress's] lawmaking function." *Id.* Put another way, the two remedies serve different purposes, although it is true that threatening prosecution under inherent contempt may lead to the production of documents. But unlike a civil action for subpoena enforcement, that is not the primary goal of inherent contempt. Second, imprisoning current (and even former) senior presidential advisors and prosecuting them before the House would only exacerbate the acrimony between the two branches and would present a grave risk of precipitating a constitutional crisis. Indeed, one can easily imagine a stand-off between the Sergeant–at–Arms and executive branch law enforcement officials concerning taking Mr. Bolten into custody and detaining him. *See* Cooper OLC Opinion at 86 ("[I]t seems most unlikely that Congress could dispatch the Sergeant at-Arms to arrest and imprison an Executive Branch official who claimed executive privilege."). Such unseemly, provocative clashes should be avoided, and there is no need to run the risk of such mischief when a civil action can resolve the same issues in an orderly fashion. Third, even if the Committee did exercise inherent contempt, the disputed issue would in all likelihood end up before this Court, just by a different vehicle—a writ of habeas corpus brought by Ms. Miers and Mr. Bolten. In either event there would be judicial resolution of the underlying issue.

Indeed this administration, along with previous executive administrations, has observed that inherent contempt is *not* available for use against senior executive branch officials who claim executive privilege. In this very case, the Executive has questioned "whether [inherent contempt] would even countenance the arrest of the President or his closest aides for refusing to testify or provide privileged documents . . . at the President's direction." *See* Defs.' Reply at 22. The Executive has described that possibility as a "dubious proposition." *Id.* Previous administrations have gone even further. The Olson OLC Opinion explained that "the same reasoning that suggests that the [criminal contempt] statute could not constitutionally be applied against a Presidential assertion of privilege applies to Congress' inherent contempt powers as well." *See* Olson OLC Opinion at 140 n. 42. The Cooper OLC Opinion concurred: the inherent contempt alternative "may well be foreclosed by advice previously rendered by this Office." *See* Cooper OLC Opinion at 83. Thus, there are strong reasons to doubt the viability of Congress's inherent contempt authority vis-a-vis senior executive officials. To be sure, the executive branch's opinion is not dispositive on this question, and the Court need not decide the issue. At the very least, however, the Executive cannot simultaneously question the sufficiency and availability of an alternative remedy but nevertheless insist that the Committee must attempt to "exhaust" it before a civil cause of action is available.

The remaining alternative suggested by the Executive branch—the process of accommodation and negotiation, including the exercise of other political tools such as withholding appropriations—is not sufficient to remedy the injury to Congress's investigative power. Whether or not these types of disputes are traditionally settled by negotiation and accommodation—and the Court will assume that they are—it is evident that those processes have failed in this case. Indeed, both parties agree that

the political branches have reached a stalemate. And both sides invested much effort in that process over a lengthy period. When faced with a similar situation in *AT & T I*, the executive branch did not hesitate to repair to federal court in order to protect its institutional interests. The Court can identify no reason why the Committee should not be able to do the same here. Moreover, the appropriations process is too far removed, and the prospect of successful compulsion too attenuated, from this dispute to remedy the Committee's injury to its investigative function in a manner similar to a civil action for declaratory relief.[29]

Finally, noting that "the [Supreme] Court has been particularly reluctant to permit the fashioning of remedies under the Constitution where doing so raises separation of powers concerns," the Executive contends that special factors counseling hesitation "demonstrate[ ] that the Committee cannot rely on Article I, § 1 to establish an entitlement to relief." *See* Defs.' Reply at 31. The Executive's primary point is that "the Constitution's express provision of the 'take care' power to the Executive with no corresponding assignment to Congress, is yet another special factor counseling hesitation." *Id.* at 34.[30] But it is difficult to see how unique separation of powers issues are raised by implying a congressional cause of action from Article I in this context. First off, the Senate already has a statutory right to proceed with such an action that presents no apparent separation of powers concern. It is not clear why the mere act of implying a constitutional cause of action for the House runs afoul of separation of powers principles when the Senate already has an analogous statutory right of action. Moreover, permitting the Committee to proceed with an implied cause of action in this case would have virtually no impact on the Executive's general authority and discretion to take care that the laws are faithfully executed. The proposed implied action

29. The Executive suggests that the power over the confirmation process is an alternative at Congress's disposal, but must concede that it is not one available to the Committee in this case because "the Senate, rather than the House, has the power of advice and consent over presidential appointments." *See* Defs.' Reply at 32–33. With respect to appropriations, the Executive points out that the "power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure." The Federalist No. 58 (James Madison). Indeed, at oral argument the Executive suggested that the House could decline "to appropriate money for the Justice Department this year unless" the White House agreed to permit Ms. Miers to testify. *See* Tr. at 92. The Committee derides that suggestion, stating that "an effort to extort cooperation is an invitation to permanent political warfare between the branches." *See* Pl.'s Opp'n & Reply at 52 n. 15. Ultimately, the Executive's argument sweeps too broadly. Short of withholding *all* appropriations entirely and shutting down the federal government, the Executive could always claim that the House has alternative remedies that it has failed to explore. The notion that the Framers contemplated that Congress would be required to shut down the operations of government before an Article III court could exercise its traditional role of resolving legal disputes is an odd one. Moreover, as federal appropriations occur far in advance, the House would potentially be forced to wait before it could even credibly threaten to withhold funding for any particular executive branch function, which further underscores the inability of the appropriations process to serve as an expedient means to vindicate Congress's right to information.

30. In addition to the separation of powers contention, the Executive argues that the Committee's failure to exhaust alternative remedies is another factor counseling hesitation here. For the reasons explained earlier, the Court disagrees.

would *only* permit the House to enter federal court in order to vindicate its institutional right to information in settings where the Executive has refused to comply with a House subpoena. It would not otherwise authorize the House to take enforcement action or bring suit in any other situation.

Indeed, there are few reasons for hesitation in the context of implying a cause of action for declaratory relief on the part of *Congress* as compared to the typical *Bivens* damages suit. In the latter context, recognizing an implied cause of action does two things: (1) it opens the gates of federal courts to an entire *class* of plaintiffs; and (2) it permits that class to pursue monetary damages against executive branch officials. The proposed cause of action for the Committee does neither. This cause of action for the House would not open the door to federal court for any plaintiffs except the House or its authorized committees. Thus, this is not the sort of scenario where one could imagine a new *Bivens* remedy leading to a deluge of additional litigation. Moreover, the relief authorized by this implied cause of action would not authorize monetary damages from executive branch officials but would simply permit the Committee to seek enforcement of information subpoenas. Hence, there is little risk of any negative impact on the conduct of government employees or operations. These distinctions from ordinary *Bivens* cases suggest that the Court should have less hesitation in recognizing an implied cause of action here.

The Court concludes that the Committee has an implied cause of action derived from Article I to seek a declaratory judgment concerning the exercise of its subpoena power. The Court is cognizant of the fact that the Supreme Court has exhibited a general reluctance to imply new causes of action in instances that might implicate separation of powers issues. *See, e.g., United States v. Stanley,* 483 U.S. 669, 683–84, 107 S.Ct. 3054, 97 L.Ed.2d 550 (1987) (declining to extend a *Bivens* remedy for "injuries that arise out of or are in the course of activity incident to [military] service") (internal quotations omitted). Hence, the Court will proceed with caution. But ultimately the cause of action recognized here is exceedingly narrow. Indeed, it effectively applies only in this precise circumstance. The Court is therefore convinced that acknowledging an implied cause of action in this very limited scenario does not present the same set of concerns that are ordinarily presented by *Bivens* damages actions.

C. Equitable Discretion

[12] That leaves the Executive's final basis for dismissal. Even if the Committee has either the requisite right pursuant to the DJA or an implied cause of action, the Executive contends that this Court nevertheless has the discretion to decline to hear the case, and should do so here. The Executive is correct that the Court has such discretion. The DJA provides that a court "*may* declare the rights and other legal relations of any party seeking such declaration." *See* 28 U.S.C. § 2201(a) (emphasis added). The Supreme Court has held that the Act's textual commitment to discretion indicates that "district courts possess discretion in determining whether and when to entertain an action under the Declaratory Judgment Act, even when the suit satisfies subject matter jurisdictional prerequisites." *Wilton v. Seven Falls,* 515 U.S. 277, 283, 115 S.Ct. 2137, 132 L.Ed.2d 214 (1995); *see also Hanes Corp.,* 531 F.2d at 591 ("There is no absolute right to a declaratory judgment in the federal courts.... [Whether one is granted] in a particular case is a matter of judicial discretion."). Similarly, the Court has discre-

tion with respect to any implied cause of action that arises from equitable powers and the Supreme Court's instruction that a "remedy for a claimed constitutional violation has to represent a judgment about the best way to implement a constitutional guarantee." *Wilkie,* 127 S.Ct. at 2597. The Committee does not dispute that, but urges instead that adjudicating this dispute would be an appropriate exercise of discretion. Thus, the question here is not whether the Court *can* entertain this suit, but whether it *should* do so.

[13] There are no dispositive factors to consider in this analysis. Instead, there are several factors that help to guide the Court's determination:

> Among the factors relevant to the propriety of granting a declaratory judgment are the following: whether it would finally settle the controversy between the parties; whether other remedies are available or other proceedings pending; the convenience of the parties; the equity of the conduct of the declaratory judgment plaintiff; prevention of "procedural fencing"; the state of the record; the degree of adverseness between the parties; and the public importance of the question to be decided.

Hanes Corp., 531 F.2d at 591 n. 4. The D.C. Circuit "has placed some emphasis on the likelihood that a controversy—particularly one of questionable vitality—will recur." *Id.* at 592.

The Executive presents a litany of reasons why the Court should decline to decide this case.[31] But the crux of the Executive's position is that the federal judiciary should not enter into this dispute between the political branches. "[F]or more than 200 years," the Executive asserts, "the political branches have resolved their disputes over congressional requests for information without Congress invoking the aid of the federal judiciary to adjudicate Congress's claims." *See* Defs.' Reply at 34. And if this Court were to reach the merits of the case, a decision "would inexorably alter the separation of powers and forever change how the political branches deal with each other and the nature of accommodation, if any, between them." *Id.* at 35. Moreover, a "definitive judicial resolution of these issues would invite further judicial involvement in an area where it is settled that courts should tread lightly, if at all." *Id.* In short, according to the Executive, this Court should leave this dispute to resolution by the political process, which is what the Framers intended.

There is some force to the Executive's position, but the Court is not persuaded. To begin with, whatever way this Court decides the issues before it may impact the balance between the political branches in this and future settings, as the Court has already noted. *See* Tr. at 87–88 ("This is one of the difficulties I have, because both sides have that same point, whatever I do, whether I rule for the executive branch . . . or rule for the legislative branch, that somehow I am going to disrupt the balance that has existed."). Hence, a decision to foreclose access to the courts, as the Executive urges, would tilt the balance in favor of the Executive here, the very mischief the Executive purports to fear. Moreover, the Executive is mistaken in the contention that judicial intervention in this arena at

31. One of those reasons can quickly be rejected. As noted in *Hanes Corp.,* one relevant factor to consider is the availability of alternative remedies. 531 F.2d at 591 n. 4. This Court has already assessed whether the Committee has adequate alternative remedies. Suffice it to say that the Court does not believe that any other remedies conceivably available to the Committee, such as they are, dictate that the Court should decline to adjudicate this case.

the request of Congress would be unprecedented in the nation's history. The 1974 decision by the Supreme Court in *United States v. Nixon* adjusted this balance by clarifying that the judiciary must be available to resolve executive privilege claims. Thereafter, the D.C. Circuit issued a judicial resolution on the merits of the executive's presumptive privilege claim at the Senate's prompting. And it was the executive branch that invoked the aid of the federal judiciary in *United States v. House of Representatives;* so, too, in *AT & T I*, where the executive branch filed a lawsuit that challenged the validity of a congressional subpoena after negotiations with Congress designed to avoid the subpoena had failed. The Court does not understand why separation of powers principles are more offended when the Article I branch sues the Article II branch than when the Article II branch sues the Article I branch.[32]

OLC itself has noted that the Supreme Court confirmed in *United States v. Nixon* that the judiciary is the ultimate arbiter of claims of executive privilege. Ever since then, it has been apparent that issues relating to claims of executive privilege are subject to at least some judicial oversight. Moreover, the judiciary has a long history of deciding cases that involve various separation of powers issues and, indeed, cases such as *AT & T I, United States v. House of Representatives*, and *Senate Select Comm. III* mark judicial involvement in congressional subpoena disputes between the executive and legislative branches. The status quo in the light of which the political branches have operated—at least since *United States v. Nixon*—is the availability of ultimate judicial intervention in exactly this sort of controversy. That fact was made abundantly clear in both the Olson and Cooper OLC opinions, and things have not changed since then. Put another way, the historical record dating back to *United States v. Nixon* suggests that the political branches have negotiated with one another against the backdrop of presumptive judicial review, mindful of that very real possibility. Thus, contrary to the Executive's contention, *declining* to decide this case would be the action most likely to "alter" the accommodations process between the political branches.

Nor would hearing this case open the floodgates for similar litigation that would overwhelm the federal courts and paralyze the accommodations process between the political branches. Prior cases, particularly *United States v. Nixon, AT & T I*, and *Senate Select Comm. III,* have already paved the way for claims of this type. Notwithstanding that fact, there have been very few lawsuits brought in federal court raising this issue—certainly no rush to the courthouse by either political branch is evident. The process of negotiation between the executive and legislative branches has functioned as always. Indeed, there are powerful reasons to believe that most disputes of this nature will continue to be resolved through the informal processes of negotiation and accommodation. Resort to the judicial process is, after all, not a particularly expedient way to obtain prompt access to sought-after information, especially if a full House or Senate resolution is a necessary part of the process. The lengthy delays in the history of this case are a testament to the inefficiency of resort to the judicial process. Finally, the prospect of ultimate judicial resolution will

32. Although it is true that the court's ruling in *United States v. House of Representatives* was motivated in part by the gravity of a suit between the political branches, the basis for the decision to decline to hear the case was that the issue was not yet ripe. *See* 586 F.Supp. at 153.

help to ensure that the parties continue to negotiate in good faith rather than rewarding intransigence.

Citing to the *Hanes Corp.* criteria, the Committee presents persuasive reasons why the Court should exercise its discretion to decide the issues raised in its motion for partial summary judgment. First, judicial resolution would settle this dispute between the parties as to whether Ms. Miers is absolutely immune from congressional process and whether Mr. Bolten must respond further. Resolution of the immunity issue will determine the next steps (if any) the parties must take in this matter. Second, contrary to the Executive's suggestion that the Committee did not make any serious counter-offers, *see* Defs.' Reply at 38, the record reflects that it was the Executive and not the Committee that refused to budge from its initial bargaining position. Mr. Fielding himself stated that the Committee had written to him "on eight previous occasions, three of which letters contain or incorporate specific proposals involving terms for a possible agreement." *See* Pl.'s Mot. Ex. 34. The Executive, by contrast, apparently continued to adhere to its original proposal without modification. Thus, the "equity of the conduct of the declaratory judgment plaintiff," *Hanes Corp.*, 531 F.2d at 591 n. 4, supports the exercise of the Court's discretion in favor of the Committee.[33] Third, the record is fully developed for purposes of the issues presented by these motions. Significantly, immunity is strictly a legal issue, and it is the judiciary that must "say what the law is" with respect to that matter. *Marbury v. Madison*, 5 U.S. (1 Cranch) at 177–78; *see also Nixon v. Sirica*, 487 F.2d at 714–715 ("Whenever a privilege is asserted, even one expressed in the Constitution, such as the Speech and [sic] Debate privilege, it is the courts that determine the validity of the assertion and the scope of the privilege. . . . To leave the proper scope and application of Executive privilege to the President's sole discretion would represent a mixing, rather than a separation, of Executive and Judicial functions."). Fourth, the parties are most surely sufficiently adverse. Fifth, both sides agree that this case raises issues of enormous "public importance." *Hanes Corp.*, 531 F.2d at 591 n. 4. Finally, there is a strong possibility that this sort of dispute could routinely "recur." *Id.* at 592. Indeed, it already has: on July 10, 2008, former White House advisor Karl Rove asserted absolute immunity in response to a congressional subpoena and on July 30, 2008 the Committee voted to hold him in contempt. *See* Beth Sussman, *Rove Defies Subpoena, Skips House Hearing,* The Hill, July 10, 2008, http://thehill.com/leading-the–news/rove–defies–subpoena–skips–house–hearing2008–07–10.html; David Stout, *Democrats Call for Contempt Charges Against Rove,* N.Y. Times, July 31, 2008, http://www.nytimes.com/2008/07/31/washington/31justice.html?hp.

Still, the timing of this dispute gives the Court some pause. The 110th Congress expires on January 3, 2009. Unlike the Senate, the House is not a continuing body. *See AT & T I,* 551 F.2d at 390. Thus, this House ends on January 3, 2009. Significantly, the subpoenas issued by this House will also expire on that date. *Id.* Moreover, a new executive administration will take office in January 2009 following

33. The Court does not pass judgment on the propriety of either party's negotiating position, and does not suggest that there was anything improper about the Executive's staunch position in this matter. For present purposes, however, there is nothing in the Committee's course of conduct that is a cause for concern regarding exercising the Court's discretion here.

the presidential elections that will be held in November.

There is, therefore, the question of mootness possibly looming on the horizon that threatens both parties here. On the Committee's side, the entire House—and thus any outstanding subpoenas—will lapse on January 3, 2009, and the basis of this lawsuit will cease to exist. To be sure, the incoming House of Representatives may elect to re-issue similar subpoenas, but that remains speculative at this juncture. Similarly, the incoming executive administration may decline to pursue the assertions of immunity and executive privilege that form the foundation of this dispute. A former President may still assert executive privilege, but the claim necessarily has less force, particularly when the sitting President does not support the claim of privilege. *See Nixon v. Adm'r Gen. Servs.*, 433 U.S. at 449, 97 S.Ct. 2777. As with the incoming Congress, there is no way to predict whether the new administration will support the assertions of privilege made in this case. There is also the likelihood of appeal of this decision and, given the significance of the issues involved, a stay pending appeal is at least possible. Thus, although proceedings before this Court could be concluded prior to January 2009, any appeals process may not run its course before that date. At that point, the case would arguably become moot.

Nevertheless, the Court concludes that this concern does not counsel against entertaining this case. As was the case in *AT & T I*, in which only a few days remained before the new Congress, this "case is not now technically moot." 551 F.2d at 390. Indeed, unlike in *AT & T I*, this case is not about to become moot either; there are over five months of live controversy remaining. Furthermore, this mootness concern is likely to be present in nearly every controversy of this nature. Because the Congress expires every two years, and a subpoena issued by the House remains valid only for the duration of that Congress, it would be difficult for *any* House subpoena dispute to fit into that two-year window once the time for appeal is factored into the equation. The process contemplates a long period of negotiation with resort to the judiciary, if at all, only in the case of a legitimate impasse. The combination of the congressional process and litigation time (including appeal) means that every subpoena dispute of this nature would likely run up against the two-year window. That may present a problem that is capable of repetition yet evading review, a well-recognized exception to mootness. But in any event, it is not necessary to decide that question now because this case is not presently moot and, significantly, neither side has asked the Court to stay its hand due to mootness considerations.

The Court re-emphasizes its limited involvement at this point. The Court has addressed only traditional legal issues—standing, causes of action, equitable discretion—and has not yet been asked to rule on any particular assertion of executive privilege. In litigation terms, this proceeding has not yet even progressed to the point that the D.C. Circuit reached in *Senate Select Comm. III*. Indeed, the ultimate disposition that the Court reaches today—that Ms. Miers is not absolutely immune from congressional process and that Mr. Bolten must produce more detailed documentation concerning privilege claims—still does not address the merits of any particular assertion of presidential privilege. Hence, this Court's intervention is strikingly minimal, and it is the Court's sincere desire that it stays that way. The Court strongly encourages the parties to reach a negotiated solution to this dispute. Quite frankly, this decision does not fore-

close the accommodations process; if anything, it should provide the impetus to revisit negotiations.

As the Cooper OLC Opinion put it, "only judicial intervention can prevent a stalemate between the other two branches that could result in a particular paralysis of government operations." *See* Cooper OLC Opinion at 88 n. 33. Although the identity of the litigants in this case necessitates that the Court proceed with caution, that is not a convincing reason to decline to decide a case that presents important legal questions. Rather than running roughshod over separation of powers principles, the Court believes that entertaining this case will reinforce them. Two parties cannot negotiate in good faith when one side asserts legal privileges but insists that they cannot be tested in court in the traditional manner. That is true whether the negotiating partners are private firms or the political branches of the federal government. Accordingly, the Court will deny the Executive's motion to dismiss.

II. The Committee's Motion for Partial Summary Judgment

The Executive cannot identify a single judicial opinion that recognizes absolute immunity for senior presidential advisors in this or any other context. That simple yet critical fact bears repeating: the asserted absolute immunity claim here is entirely unsupported by existing case law. In fact, there is Supreme Court authority that is all but conclusive on this question and that powerfully suggests that such advisors do not enjoy absolute immunity. The Court therefore rejects the Executive's claim of absolute immunity for senior presidential aides.

A. Absolute Immunity

[14] The Committee's primary argument on this point is incredibly straightforward. Ms. Miers was the recipient of a duly issued congressional subpoena. Hence, she was legally obligated to appear to testify before the Committee on this matter, at which time she could assert legitimate privilege claims to specific questions or subjects. The Supreme Court has made it abundantly clear that compliance with a congressional subpoena is a legal requirement. *United States v. Bryan*, 339 U.S. 323, 331, 70 S.Ct. 724, 94 L.Ed. 884 (1950). Indeed, the Court noted:

> A subpoena has never been treated as an invitation to a game of hare and hounds, in which the witness must testify only if cornered at the end of the chase. If that were the case, then, indeed, the great power of testimonial compulsion, *so necessary to the effective functioning of courts and legislatures*, would be a nullity. We have often iterated the importance of this public duty, which every person within the jurisdiction of the Government is bound to perform when properly summoned.

Id. (emphasis added). With her duty to appear thus established, the Committee asserts that the burden rests with Ms. Miers to explain why compliance was excused in this instance.[34]

34. At the motions hearing in this case, counsel for the Executive stated that the absolute immunity contention applies only to the oral testimony of Ms. Miers and not to the document subpoena issued to Mr. Bolten. *See* Tr. at 101 ("We are not arguing today that we are immune from document subpoenas. The immunity we're talking about relates only to oral testimony compelled by subpoena."). In a similar vein, the Executive takes issue with the Committee's reliance on existing case law concerning document subpoenas. Those cases, the Executive says, are not instructive on issues relating to live testimony. The Court disagrees. There is no suggestion in any of the cases in this area that claims of presidential privilege should be evaluated differently in the context of compelled oral testi-

The Executive maintains that absolute immunity shields Ms. Miers from compelled testimony before Congress. Although the exact reach of this proposed doctrine is not clear, the Executive insists that it applies only to "a very small cadre of senior advisors." *See* Tr. at 96. The argument starts with the assertion that the President himself is absolutely immune from compelled congressional testimony. There is no case that stands for that exact proposition, but the Executive maintains that the conclusion flows logically from *Nixon v. Fitzgerald*, 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982), where the Supreme Court held that the President "is entitled to absolute immunity from damages liability predicated on his official acts." *Id.* at 749, 102 S.Ct. 2690. "Any such [congressional] power of compulsion over the President," the Executive asserts, "would obviously threaten his independence and autonomy from Congress in violation of separation of powers principles." *See* Defs.' Reply at 40. The Executive then contends that "[those] same principles apply just as clearly to the President's closest advisers." *Id.* Because senior White House advisers "have no operational authority over government agencies ... [t]heir sole function is to advise and assist the President in the exercise of his duties." *Id.* at 41. Therefore, they must be regarded as the President's "alter ego." In a similar context, the Supreme Court has extended Speech or Debate Clause immunity to legislative aides who work closely with Members of Congress. *See Gravel v. United States*, 408 U.S. 606, 616–17, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972). Accordingly, forcing close presidential advisors to testify before Congress would be tantamount to compelling the President himself to do so, a plainly untenable result in the Executive's view. Indeed, as the Executive would have it, "[w]ere the President's closest advisers subject to compelled testimony there would be no end to the demands that effectively could be placed upon the President himself." *See* Defs.' Reply at 43.

Unfortunately for the Executive, this line of argument has been virtually foreclosed by the Supreme Court. In *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), the plaintiff sued "senior White House aides" for civil damages arising out of the defendants' official actions. *Id.* at 802, 102 S.Ct. 2727. The defendants argued that they were "entitled to a blanket protection of absolute immunity as an incident of their offices as Presidential aides." *Id.* at 808, 102 S.Ct. 2727. The Supreme Court rejected that position. Notwithstanding the absolute immunity extended to legislators, judges, prosecutors, and the President himself, the Court emphasized that "[f]or executive officials in general, however, our cases make plain that qualified immunity represents the norm." *Id.* at 807, 102 S.Ct. 2727. Although there can be no doubt regarding "the importance to the President of loyal and efficient subordinates in executing his duties of office, ... these factors, alone, [are] insufficient to justify absolute immunity." *Id.* at 808–09, 102 S.Ct. 2727 (discussing *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978)).

In *Harlow* the Supreme Court rejected the analogy to legislative aides that the Executive now invokes here. There, the defendants "contend[ed] that the rationale of *Gravel* mandates a similar 'derivative' immunity for the chief aides of the President of the United States." *Id.* at 810, 102

mony as opposed to responses to document subpoenas, and the Court cannot identify any reason to do so.

S.Ct. 2727. The Court brushed that argument aside, explaining that it "sweeps too far." *Id.* Even Members of the Cabinet, the Court reasoned, "whose essential roles are acknowledged by the Constitution itself," are not entitled to absolute immunity. *Id.* There is no reason to extend greater protection to senior aides based solely on their proximity to the President, the Court concluded.

The defendants in *Harlow* also attempted to rely upon the "special functions" of White House aides, as distinct from the formality of their title. The Court explained that such an inquiry "accords with the analytical approach of our cases" but then indicated that the "burden of justifying absolute immunity rests on the official asserting the claim." *Id.* at 811–12, 102 S.Ct. 2727. Sensitive matters of "discretionary authority" such as "national security or foreign policy" may warrant absolute immunity in certain circumstances, but they do not justify a "blanket recognition of absolute immunity for all Presidential aides in the performance of all of their duties." *Id.* at 812, 102 S.Ct. 2727.

> In order to establish entitlement to absolute immunity a Presidential aide first must show that the responsibilities of his office embraced a function so sensitive as to require a total shield from liability. He then must demonstrate that he was discharging the protected function when performing the act for which liability is asserted.

Id. at 812–13, 102 S.Ct. 2727. If both of those conditions are not satisfied, the official in question is only entitled to the lesser protection of qualified immunity. *Id.* at 813, 102 S.Ct. 2727.

There is nothing left to the Executive's primary argument in light of *Harlow.* This case, of course, does not involve national security or foreign policy, and the Executive does not invoke that mantra. The derivative, "alter ego" immunity that the Executive requests here due to Ms. Miers's and Mr. Bolten's close proximity to and association with the President has been explicitly and definitively rejected, and there is no basis for reaching a different conclusion here. Indeed, the Executive asks this Court to recognize precisely the type of blanket derivative absolute immunity that the Supreme Court declined to acknowledge in *Harlow.*

The Executive makes one wholly unavailing attempt to reckon with *Harlow.* That case, the argument goes, did not entirely dispense with the concept of absolute immunity. Instead, it held open the possibility of such protection in limited circumstances. That is correct, but this case does not implicate the very narrow window left open by *Harlow.* Again, there is no suggestion whatsoever that the decisions in question here involve national security or other particularly sensitive function that *Harlow* indicates may warrant absolute immunity. Instead, the Executive simply states that the President "must rely on his close advisers to assist in the performance of his Article II functions in much the same way that members of Congress rely on their aides." *See* Defs.' Reply at 46. But that was equally true in *Harlow,* 457 U.S. at 808–09, 102 S.Ct. 2727, and the Supreme Court rejected that contention as a basis for absolute immunity from money damages for presidential advisors. The same holds true here.

The fact that *Harlow* was an action for civil damages does not help the Executive either. To the contrary, it provides greater support for this Court's conclusion. One of the Executive's primary justifications for absolute immunity is that the President will not be able to receive candid advice from his close advisors if they can be compelled to testify before Congress regarding their actions. But civil suits for

money damages present a greater potential for such a chilling effect; after all, the risk of financial ruin involved in defending a civil suit is a significant consideration that can understandably shape behavior. *Harlow,* however, held that such suits are not precluded by absolute immunity with respect to senior presidential aides. On the other hand, the prospect of being hauled in front of Congress—daunting as it may be—would not necessarily trigger the chilling effect that the Executive predicts. Senior executive officials often testify before Congress as a normal part of their jobs, and forced testimony before Congress does not implicate the same concern regarding *personal* financial exposure as does a damages suit. Significantly, the Committee concedes that an executive branch official may assert executive privilege on a question-by-question basis as appropriate. That should serve as an effective check against public disclosure of truly privileged communications, thereby mitigating any adverse impact on the quality of advice that the President receives.

The Executive's concern that "[a]bsent immunity . . . there would be no effective brake on Congress's discretion to compel the testimony of the President's advisers at the highest level of government" is also unfounded. *See* Defs.' Reply at 45. To begin with, the process of negotiation and accommodation will ensure that most disputes over information and testimony are settled informally. Moreover, political considerations—including situations where Congress or one House of Congress is controlled by the same political party that holds the Presidency—will surely factor into Congress's decision whether to deploy its compulsory process over the President's objection. In any event, the historical record produced by the Committee reveals that senior advisors to the President have often testified before Congress subject to various subpoenas dating back to 1973. *See* Auerbach Decl. ¶¶ 2–3. Thus, it would hardly be unprecedented for Ms. Miers to appear before Congress to testify and assert executive privilege where appropriate. Still, it is noteworthy that in an environment where there is *no* judicial support whatsoever for the Executive's claim of absolute immunity, the historical record also does not reflect the wholesale compulsion by Congress of testimony from senior presidential advisors that the Executive fears.

Significantly, although the Supreme Court has established that the President is absolutely immune from civil suits arising out of his official actions, even the President may not be absolutely immune from compulsory process more generally. In *United States v. Nixon,* the Supreme Court held that the President is entitled only to a presumptive privilege that can be overcome by the requisite demonstration of need. 418 U.S. at 707–08, 94 S.Ct. 3090. There, the Supreme Court indicated that "an absolute, unqualified privilege would place [an impediment] in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions . . . [and] would plainly conflict with the function of the courts under Art. III." *Id.* at 707, 94 S.Ct. 3090. Seizing on that passage, the Executive insists that this case is distinguishable because it does not involve a core function of another constituent branch but rather a peripheral exercise of Congress's power. That is mistaken. As discussed above, Congress's power of inquiry is as broad as its power to legislate and lies at the very heart of Congress's constitutional role. Indeed, the former is necessary to the proper exercise of the latter: according to the Supreme Court, the ability to compel testimony is "*necessary to the effective functioning of courts and legislatures.*" *Bryan,* 339 U.S. at 331, 70 S.Ct. 724 (emphasis added).

Thus, Congress's use of (and need for vindication of) its subpoena power in this case is no less legitimate or important than was the grand jury's in *United States v. Nixon.* Both involve core functions of a co-equal branch of the federal government, and for the reasons identified in *Nixon,* the President may only be entitled to a presumptive, rather than an absolute, privilege here.[35] And it is certainly the case that if the President is entitled only to a presumptive privilege, his close advisors cannot hold the superior card of absolute immunity.

The interest in presidential autonomy proffered by the Executive does not support the assertion of absolute immunity here. In *Nixon v. Sirica,* the D.C. Circuit explained:

> If the claim of absolute privilege was recognized, its mere invocation by the President or his surrogates could deny access to all documents in all the Executive departments to all citizens and their representatives, *including Congress,* the courts as well as grand juries, state governments, state officials and all state subdivisions. The Freedom of Information Act could become nothing more than a legislative statement of unenforceable rights. Support for this kind of mischief simply cannot be spun from incantation of the doctrine of separation of powers.

487 F.2d at 715 (emphasis added). That passage rather plainly contemplates that executive privilege is not absolute even when Congress—rather than a grand jury—is the party requesting the information. And a claim of absolute *immunity* from compulsory process cannot be erected by the Executive as a surrogate for the claim of absolute executive privilege already firmly rejected by the courts. Presidential autonomy, such as it is, cannot mean that the Executive's actions are totally insulated from scrutiny by Congress. That would eviscerate Congress's historical oversight function.

To be sure, the D.C. Circuit acknowledged that "wholesale public access to Executive deliberations and documents would cripple the Executive as a co-equal branch." *Id.* That, however, is merely "an argument for recognizing Executive privilege and for according it great weight, not for making the Executive the judge of its own privilege." *Id.* But that is exactly what the Executive requests here: to be the judge of its own privilege through the assertion of absolute immunity. At bottom, the Executive's interest in "autonomy" rests upon a discredited notion of executive power and privilege. As the D.C. Circuit and the Supreme Court have made abundantly clear, it is the judiciary (and not the executive branch itself) that is the ultimate arbiter of executive privilege. Permitting the Executive to determine the limits of its own privilege would impermissibly transform the presumptive privilege into an absolute one, yet that is what the Executive seeks through its assertion of Ms. Miers's absolute immunity from compulsory process. That proposition is un-

35. The Executive also contends that *United States v. Nixon* has no force outside of the criminal context. For the reasons set forth above, the Court disagrees—indeed, the D.C. Circuit has rejected that view. *See In re Sealed Case,* 121 F.3d at 743–45 ("It fell to the remaining *Nixon* cases to address the scope of the presidential communications privilege in other contexts.... [Those] cases established the contours of the presidential communications privilege. The President can invoke the privilege when asked to produce documents or other materials that reflect presidential decisionmaking and deliberations and that the President believes should remain confidential. If the President does so, the documents become presumptively privileged. However, the privilege is qualified, not absolute, and can be overcome by an adequate showing of need.").

tenable and cannot be justified by appeals to Presidential autonomy.

Tellingly, the only authority that the Executive can muster in support of its absolute immunity assertion are two OLC opinions authored by Attorney General Janet Reno and Principal Deputy Assistant Attorney General Steven Bradbury, respectively. *See Assertion of Executive Privilege With Respect to Clemency Decision,* 1999 WL 33490208 (O.L.C.1999); *Immunity of Former Counsel to the President From Compelled Congressional Testimony,* 2007 WL 5038035 (O.L.C.2007). Those opinions conclude that immediate advisors to the President are immune from compelled congressional testimony. The question, then, is how much credence to give to those opinions. Like the Olson and Cooper OLC opinions, the Reno and Bradbury opinions represent only persuasive authority. Hence, the Court concludes that the opinions are entitled to only as much weight as the force of their reasoning will support.

With that established, the Court is not at all persuaded by the Reno and Bradbury opinions. Unlike the Olson and Cooper OLC opinions, which are exhaustive efforts of sophisticated legal reasoning, bolstered by extensive citation to judicial authority, the Reno and Bradbury OLC opinions are for the most part conclusory and recursive. Neither cites to a single judicial opinion recognizing the asserted absolute immunity. Indeed, the three-page Bradbury OLC opinion was hastily issued on the same day that the President instructed Ms. Miers to invoke absolute immunity, and it relies almost exclusively upon the conclusory Reno OLC opinion and a statement from a memorandum written by then-Assistant Attorney General William Rehnquist in 1971. *See* 2007 WL 5038035 at *1. Mr. Rehnquist wrote:

> The President and his immediate advisers—that is, those who customarily meet with the President on a regular or frequent basis—should be deemed absolutely immune from testimonial compulsion by a congressional committee. They not only may not be examined with respect to their official duties, but they may not even be compelled to appear before a congressional committee.

See Pl.'s Mot. Ex. 43. Mr. Rehnquist also wrote that the rationale supporting the proposed immunity for senior advisors is grounded in the fact that those individuals "are presumptively available to the President 24 hours a day, and the necessity of either accommodating a congressional committee or persuading a court to arrange a more convenient time, could impair that availability." *Id.*

Significantly, Mr. Rehnquist referred to his conclusions as "tentative and sketchy," *see id.,* and then later apparently recanted those views. *See U.S. Government Information Policies and Practices—The Pentagon Papers: Hearings Before the Subcomm. on Foreign Operations and Gov't Info. of the H. Comm. on Gov't Operations,* 92nd Cong. 385 (1971) (testimony of William H. Rehnquist, Assistant Att'y Gen.) ("[M]embers[s] of the executive branch ... have to report, give [their] name and address and so forth, and then invoke the privilege."). In *Clinton v. Jones,* then-Chief Justice Rehnquist joined in holding that even the demands of the President's schedule could not relieve him of the duty to give a civil deposition. 520 U.S. at 706, 117 S.Ct. 1636 ("The burden on the President's time and energy that is a mere byproduct of such review surely cannot be considered as onerous as the direct burden imposed by judicial review and the occasional invalidation of his official actions. We therefore hold that the doctrine of separation of powers does not require federal courts to stay all private

actions against the President until he leaves office."). Whatever force the Rehnquist memorandum [36] had when written, then, it retains little vitality in light of *Clinton v. Jones.* If the President [37] must find time to comply with compulsory process in a civil lawsuit, so too must his senior advisors for a congressional subpoena.

At oral argument, counsel for the Executive stated that, as a fall back position, even if Ms. Miers is not entitled to absolute immunity, a qualified immunity analysis should apply. *See* Tr. at 125–26. That was, after all, the ultimate disposition in *Harlow:* senior presidential advisors are entitled to qualified immunity against damages actions. The qualified immunity inquiry, however, does not fit comfortably in the present context. Nevertheless, qualified immunity might conceivably be appropriate in some situations involving national security or foreign affairs. Similarly, it might apply where Congress is not utilizing its investigation authority for a legitimate purpose but rather aims simply to harass or embarrass a subpoenaed witness.

In any event, the Court need not decide whether qualified immunity can be applied as a general matter in a setting involving declaratory relief and congressional subpoenas because, even assuming that it can, Ms. Miers is not entitled to such immunity. It bears repeating that this inquiry does not involve the sensitive topics of national security or foreign affairs. Congress, moreover, is acting pursuant to a legitimate use of its investigative authority. Notwithstanding its best efforts, the Committee has been unable to discover the underlying causes of the forced terminations of the U.S. Attorneys. The Committee has legitimate reasons to believe that Ms. Miers's testimony can remedy that deficiency. There is no evidence that the Committee is merely seeking to harass Ms. Miers by calling her to testify. Importantly, moreover, Ms. Miers remains able to assert privilege in response to any specific question or subject matter. For its part, the Executive has not offered any independent reasons that Ms. Miers should be relieved from compelled congressional testimony beyond its blanket assertion of absolute immunity. The Executive's showing, then, does not support either absolute or qualified immunity in this case.

The Court once again emphasizes the narrow scope of today's decision. The Court holds only that Ms. Miers (and other senior presidential advisors) do not have

36. The Rehnquist memorandum actually provides no support for absolute immunity for Ms. Miers because at the time she received her subpoena she was no longer an executive branch official, thereby relieving her of the need to be available to the President twenty-four hours a day.

37. There is some ambiguity over the scope of the President's involvement in the decision to terminate the U.S. Attorneys in this case. The Committee contends that the White House has asserted that the "President was not involved in any way ... and that he did not receive advice from his aides about the U.S. Attorneys and he did not make a decision to fire any of them." *See* Pl.'s Opp'n & Reply at 12. That assertion is based on a statement made by Acting White House Press Secretary Dana Perino on March 27, 2007. The Executive, however, now maintains that the Committee "substantially overstates the record on this point." *See* Tr. at 57. As the Executive sees it, the record simply indicates that "the President was not involved in decisions about who would be asked to resign from the department," but "does not reflect that the President had no future involvement" in any capacity. *Id.* Given the Court's limited decision here, it is unnecessary to address this factual dispute at this time. The Court notes, however, that the degree and nature of the President's involvement may be relevant to the proper executive privilege characterization under *In re Sealed Case,* 121 F.3d at 746–49.

absolute immunity from compelled congressional process in the context of this particular subpoena dispute. There may be some instances where absolute (or qualified) immunity is appropriate for such advisors, but this is not one of them. For instance, where national security or foreign affairs form the basis for the Executive's assertion of privilege, it may be that absolute immunity is appropriate. Similarly, this decision applies only to *advisors*, not to the President. The Court has no occasion to address whether the President can be subject to compelled congressional process—the Supreme Court held in *Harlow* that the immunity inquiries for the President and senior advisors are analytically distinct. Similarly, there is no need to address here whether the Vice President could be subject to compelled congressional process. Most importantly, Ms. Miers may assert executive privilege in response to any specific questions posed by the Committee. The Court does not at this time pass judgment on any specific assertion of executive privilege.

There are powerful reasons supporting the rejection of absolute immunity as asserted by the Executive here. If the Court held otherwise, the presumptive presidential privilege could be transformed into an absolute privilege and Congress's legitimate interest in inquiry could be easily thwarted. Indeed, even in the Speech or Debate context—which has an explicit textual basis and confers absolute immunity—Members of Congress must still establish that their actions were legislative in nature before invoking the protection of the Clause. *See, e.g., Rayburn*, 497 F.3d at 660; *Jewish War Veterans of the U.S. of Am. v. Gates*, 506 F.Supp.2d 30, 54 (D.D.C. 2007). Members cannot simply assert, without more, that the Speech or Debate Clause shields their activities and thereby preclude all further inquiry. Yet that is precisely the treatment that the Executive requests here.

Similarly, if the Executive's absolute immunity argument were to prevail, Congress could be left with no recourse to obtain information that is plainly *not* subject to any colorable claim of executive privilege. For instance, surely at least some of the questions that the Committee intends to ask Ms. Miers would not elicit a response subject to an assertion of privilege; so, too, for responsive documents, many of which may even have been produced already. The Executive's proposed absolute immunity would thus deprive Congress of even non-privileged information. That is an unacceptable result.

Clear precedent and persuasive policy reasons confirm that the Executive cannot be the judge of its own privilege and hence Ms. Miers is not entitled to absolute immunity from compelled congressional process. Ms. Miers is not excused from compliance with the Committee's subpoena by virtue of a claim of executive privilege that may ultimately be made. Instead, she must appear before the Committee to provide testimony, and invoke executive privilege where appropriate.[38] And as the Supreme

38. Relying on *Cheney v. United States District Court for the District of Columbia*, 542 U.S. 367, 124 S.Ct. 2576, 159 L.Ed.2d 459 (2004), the Executive insists that invocation of executive privilege on a question-by-question basis is insufficient protection for its institutional interests. The Executive, however, misreads *Cheney*. There, the issue was whether "the assertion of executive privilege is a necessary precondition to [entertaining] the Government's separation-of-powers objections" to civil subpoenas that were unacceptably overbroad. *See* 542 U.S. at 391, 124 S.Ct. 2576. Because the assertion of executive privilege sets "coequal branches of the Government . . . on a collision course," *id.* at 389, 124 S.Ct. 2576, the Court explained that a district court may entertain separation of powers objections to overly broad document requests prior to the formal invocation of executive privilege,

Court has directed, the judiciary remains the ultimate arbiter of an executive privilege claim, since it is the duty of the courts to declare what the law is. *See United States v. Nixon*, 418 U.S. at 703–05, 94 S.Ct. 3090; *see also Marbury v. Madison*, 5 U.S. (1 Cranch) at 177.

B. Privilege Log Production

That leaves one final issue—whether Ms. Miers and Mr. Bolten are legally obligated to produce privilege logs in response to the Committee's subpoenas. The Court will not belabor this point. At oral argument, counsel for the Committee candidly admitted that there is "no statute or case law" that dictates that those individuals must produce privilege logs. *See* Tr. at 120–21. Instead, the Committee asserts that producing a privilege log is simply a very pragmatic practice that should be required here.

The Committee is certainly correct that privilege logs have great practical utility. Beyond their legal usefulness, the Court believes that a more detailed description of the documents withheld and the privileges asserted would be a tremendous aid during the negotiation and accommodation process. A more fulsome description, for instance, may lead the Committee to conclude that it has no need for certain categories of documents, thus helping to narrow the dispute between the parties and enhance the possibility of resolution. Notwithstanding such obvious benefits, however, in the absence of an applicable statute or controlling case law, the Court does not have a ready ground by which to *force* the Executive to make such a production strictly in response to a congressional subpoena. But the Court need not decide that question here because this case is no longer confined to that posture.

Now that the dispute is before this tribunal and the Court has denied the Executive's claim of absolute immunity, both the Court and the parties will need some way to evaluate privilege assertions going forward in the context of this litigation. More specifically, if the Court is called upon to decide the merits of any specific claim of privilege, it will need a better description of the documents withheld than the one found in Mr. Clement's letter of June 27, 2007. But the Court will stop short of requiring the Executive to produce a full privilege log. Instead, the Executive should produce a more detailed list and description of the nature and scope of the documents it seeks to withhold on the basis of executive privilege sufficient to enable resolution of any privilege claims. The Executive may use Fed.R.Civ.P. 45(d)(2)(A)(ii) as a guide, but it should exercise its judgment in this matter consistent with the twin goals of: (1) facilitating the parties' (and the Court's) needs in the context of this litigation; and (2) obviating the necessity for additional action by the Court on this issue.

id. Here, however, the Executive attempts to utilize absolute immunity, the basis of which is rooted in notions of executive privilege. The "collision course" that the Supreme Court feared in *Cheney*, then, has already been set in motion by the Executive. In any event, the Court indicated only that "the Executive Branch [does not] bear the onus of critiquing ... unacceptable discovery requests line by line." *Id.* at 388, 124 S.Ct. 2576. Indeed, the D.C. Circuit had already determined that the "discovery requests [were] anything but appropriate." *Id.* In *Cheney*, the Supreme Court focused on the heavy burden imposed by the wide breadth of the request for information. There is no similar burden created by Ms. Miers invoking executive privilege in response to specific, targeted questions. Here, the Executive does not claim that the Committee's questions will be overly broad; instead, it asserts that Ms. Miers need not provide any response whatsoever. That contention finds no support in *Cheney*.

CONCLUSION

For the foregoing reasons, the Court will deny the Executive's motion to dismiss and grant the Committee's motion for partial summary judgment. A separate Order accompanies this Memorandum Opinion.

ORDER

Upon consideration of [16] defendants' motion to dismiss and [14] plaintiff's motion for partial summary judgment, the oppositions and replies thereto, the various amicus briefs filed in this matter, the entire record herein, the hearing on June 23, 2008, and for the reasons identified in the Memorandum Opinion issued on this date, it is hereby

1. **ORDERED** that defendants' [16] motion to dismiss is DENIED; it is further
2. **ORDERED** that plaintiff's [14] motion for partial summary judgment is **GRANTED IN PART;** it is further
3. **DECLARED** that Harriet Miers is not immune from compelled congressional process; she is legally required to testify pursuant to a duly issued congressional subpoena from plaintiff; and Ms. Miers may invoke executive privilege in response to specific questions as appropriate; it is further
4. **ORDERED** that Joshua Bolten and Ms. Miers shall produce all non-privileged documents requested by the applicable subpoenas and shall provide to plaintiff a specific description of any documents withheld from production on the basis of executive privilege consistent with the terms of the Memorandum Opinion issued on this date; and it is further
5. **ORDERED** that the parties shall appear at a status call in this matter at 9:15 a.m. on August 27, 2008.

SO ORDERED.

SWEETSER, Plaintiff

v.

NETSMART TECHNOLOGIES, INC., Defendants.

Civil No. 07–202–P–S.

United States District Court,
D. Maine.

May 27, 2008.

Background: Customer brought action against provider of its computer software and hardware systems and related services, alleging claims for breach of contract, breach of express warranties, unjust enrichment, and negligence. Provider moved to dismiss.

Holdings: The District Court, George Z. Singal, Chief Judge, held that:

(1) customer's failure to allege in its complaint that it gave provider contractually required written notice of default and an opportunity to cure did not render its breach of contract claims unripe for adjudication;

(2) customer stated breach of contract claim; and

(3) customer stated breach of warranty claim.

Motion granted in part and denied in part.

Donald J. TRUMP, Plaintiff,

v.

Cyrus R. VANCE, Jr., in his official capacity as District Attorney of the County of New York, and Mazars USA, LLP, Defendants.

19 Civ. 8694 (VM)

United States District Court,
S.D. New York.

Signed 10/07/2019

Background: President of the United States brought suit under § 1983 to prevent enforcement of third-party grand jury subpoena for production of his personal financial and tax records and filed emergency motion for temporary restraining order and permanent injunction.

Holdings: The District Court, Victor Marrero, Senior District Judge, held that:

(1) the Anti-Injunction Act would not bar a claim for injunctive relief;

(2) state grand jury proceedings constituted an ongoing state criminal proceeding, for *Younger* abstention purposes;

(3) the President, even as someone who had not received third-party grand jury subpoena, would have procedurally adequate opportunity to raise claim of presidential immunity in state proceeding

(4) District court could not rely on statements made by New York officials other than the County District Attorney in order to impute to District Attorney any bad faith in commencing investigation;

(5) no extraordinary circumstances existed, such as might trigger exception to application of Younger abstention doctrine in order to prevent district court from hearing the President's claims; and

(6) the President was not entitled to temporary restraining order or preliminary injunction.

Request for abstention granted.

1. Courts ⚿508(2.1)

Assuming that the President's claim, on presidential immunity grounds, for injunctive relief to prevent enforcement of third-party grand jury subpoena for production of his personal financial and tax records, in connection with the County District Attorney's investigation of hush money payments and possible insurance and bank fraud by the President's organization, was not too vague and amorphous to be pursued in § 1983 action, the Anti-Injunction Act would not bar a claim for injunctive relief in connection with action under § 1983. 42 U.S.C.A. § 1983.

2. Federal Courts ⚿2578

Younger abstention is grounded in notion of comity, that is, in a proper respect for state functions, a recognition of the fact that entire country is made up of union of separate state governments, and a continuance of belief that the federal government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

3. Federal Courts ⚿2578

Despite federal courts' virtually unflagging obligation to exercise the jurisdiction given to them, *Younger* abstention requires federal courts to decline jurisdiction when a plaintiff seeks to enjoin one of the following three kinds of state proceedings: (1) ongoing state criminal prosecutions; (2) certain civil enforcement proceedings; and (3) civil proceedings involving certain orders uniquely in furtherance of the state courts' ability to perform their judicial functions.

4. Federal Courts ⚿2578

If federal plaintiff seeks to enjoin one of the three types of proceedings that trigger the possible application of *Younger* abstention doctrine, federal court may consider three additional conditions that further counsel in favor of *Younger* abstention: (1) whether there is a pending state proceeding, (2) that implicates an important state interest, and (3) the state proceeding affords the federal plaintiff an adequate opportunity for judicial review of his or her federal constitutional claims.

5. Federal Courts ⚿2578

There is an exception to *Younger* abstention, pursuant to which a federal court may entertain a suit from which it must otherwise abstain upon a showing of bad faith, harassment, or any other unusual circumstance that would call for equitable relief in federal court.

6. Federal Courts ⚿2646

State grand jury proceedings constituted an ongoing state criminal proceeding, for *Younger* abstention purposes.

7. Federal Courts ⚿2646

State's interest in enforcement of its criminal laws qualified as an important state interest, for *Younger* abstention purposes.

8. Federal Courts ⚿2646
United States ⚿248

President, even as someone who had not received third-party grand jury subpoena, would have procedurally adequate opportunity to raise claim of presidential immunity in pending state proceeding in order to prevent production of his personal financial and tax records, which counseled in favor of application of *Younger* abstention to prevent district court from hearing President's claims for injunctive relief, given the State's strong interest in enforcement of its criminal laws; President's interest in adjudicating his alleged immunity from state criminal process in federal court, in connection with state investigation that might or might not ultimately target the President, could not outweigh this strong state interest without much stronger proof of state judicial inadequacy beyond the President's conclusory claims of local prejudice.

9. Federal Courts ⚿2578

On motion for *Younger* abstention, any uncertainties as to scope of state proceedings or the availability of state remedies are generally resolved in favor of abstention.

10. Federal Courts ⚿2690

It is plaintiff's burden, in opposing motion for *Younger* abstention, to demonstrate that his state remedies are inadequate.

11. Federal Courts ⚿2690

In deciding whether to abstain pursuant to *Younger*, federal courts may not assume that state judges will interpret ambiguities in state procedural law to bar presentation of federal claims in pending state court proceeding.

12. Federal Courts ⚿2646
United States ⚿248

District court could not rely on statements made by New York officials other than the County District Attorney in order to impute to District Attorney any bad faith in commencing investigation into hush money payments and possible insurance and bank fraud by the President's organization, such as might trigger exception to application of *Younger* abstention doctrine to prevent district court from hearing claims of presidential immunity which the President sought to raise to prevent subpoena of his personal financial and tax records by the District Attorney,

and which he would have procedurally adequate opportunity to raise in pending state proceeding; President had not alleged that the District Attorney lacked any reasonable expectation of obtaining a favorable outcome.

13. Federal Courts ⚿2690

Plaintiff who seeks to head off *Younger* abstention bears burden of establishing that one of the *Younger* exceptions, such as the bad faith or harassment exception, applies.

14. Federal Courts ⚿2578

In order to permit invocation of the bad faith exception to *Younger* abstention, the party bringing state action must have no reasonable expectation of obtaining a favorable outcome.

15. Federal Courts ⚿2578

Subjective motivation of party in bringing state action is critical to, if not determinative of, the inquiry conducted by court in deciding whether the bad faith exception to *Younger* abstention applies.

16. Federal Courts ⚿2646

United States ⚿248

No extraordinary circumstances existed, such as might trigger exception to application of *Younger* abstention doctrine in order to prevent district court from hearing claims of presidential immunity, which the President sought to raise to prevent subpoena of his personal financial and tax records by County District Attorney, and which he would have procedurally adequate opportunity to raise in pending state proceeding; President had not been indicted, arrested, imprisoned, or even been identified as target of the District Attorney's investigation into hush money payments and possible insurance and bank fraud by the President's organization.

17. Federal Courts ⚿2578

Circumstances sufficient to trigger the extraordinary circumstances exception to *Younger* abstention must be extraordinary in the sense of creating an extraordinarily pressing need for immediate federal equitable relief, not merely in the sense of presenting a highly unusual factual situation.

18. Federal Courts ⚿2578

Two requirements must be met in order to trigger the extraordinary circumstances exception to *Younger* abstention: (1) there be no state remedy available to meaningfully, timely, and adequately remedy an alleged constitutional violation, and (2) finding must be made that litigant will suffer great and immediate harm if the federal court does not intervene.

19. Injunction ⚿1075, 1125

Temporary restraining orders and preliminary injunctions are among the most drastic tools in the arsenal of judicial remedies.

20. Injunction ⚿1092

Party moving for preliminary injunction must ordinarily establish the following: (1) irreparable harm; (2) either a likelihood of success on merits, or sufficiently serious questions going to the merits of its claims to make them fair ground for litigation plus balance of the hardships tipping decidedly in its favor; and (3) that a preliminary injunction is in public interest.

21. Injunction ⚿1246

"Likelihood of success" standard, rather than "sufficiently serious questions going to the merits" standard, governed the President's motion for preliminary injunction to prevent third-party grand jury subpoena of his personal financial and tax records in connection with ongoing state criminal investigation of hush money payments and possible insurance and bank fraud by the President's organization, given that the President's motion was an at-

tempt to stay government action taken in the public interest pursuant to a statutory scheme.

22. Injunction ⚿1246

As long as action to be preliminarily enjoined is taken pursuant to a statutory or regulatory scheme, even government action with respect to one litigant requires application of "likelihood of success" standard.

23. Injunction ⚿1246

President was not entitled to temporary restraining order or preliminary injunction to prevent production of his personal financial and tax records in response to third-party grand jury subpoena issued in connection with County District Attorney's investigation of hush money payments and possible insurance and bank fraud by the President's organization; interest which the President asserted in maintaining confidentiality of these records, which largely related to a time before he assumed office, and which might involve unlawful conduct by third persons and possibly the President, was far outweighed by interests of state law enforcement officers and the federal courts in ensuring full, fair, and effective administration of justice.

24. Injunction ⚿1102, 1114

"Irreparable injury," of kind required for issuance of preliminary injunction, is an injury which is not remote or speculative, but actual and imminent, and for which a monetary award cannot be adequate compensation.

See publication Words and Phrases for other judicial constructions and definitions.

25. Injunction ⚿1106

"Irreparable injury" that movant must demonstrate to obtain preliminary injunctive relief is a high standard that reflects courts' traditional reluctance to issue mandatory injunctions.

26. Injunction ⚿1246

Mere disclosure of the President's personal financial and tax records to grand jury sworn to keep them secret would not constitute irreparable harm, of kind which might warrant issuance of temporary restraining order or preliminary injunction to prevent subpoena of such documents by the grand jury in connection with a County District Attorney's investigation into hush money payments and possible insurance and bank fraud by the President's organization, an investigation that might or might not ultimately implicate the President.

27. Injunction ⚿1246

Even assuming that mere disclosure of the President's personal financial and tax records to grand jury that was sworn to keep them secret would constitute irreparable harm, such as might warrant issuance of temporary restraining order or preliminary injunction to prevent subpoena of such documents by grand jury in connection with County District Attorney's investigation into hush money payments and possible insurance and bank fraud by the President's organization, President failed to demonstrate a likelihood of success in demonstrating that he enjoyed any absolute presidential immunity such as would prevent third-party subpoena of these records, without regard to whether investigation implicated the President personally, and regardless of effect that such immunity might have on the State's ability to prosecute third parties for serious criminal misconduct before statute of limitations had expired.

28. District and Prosecuting Attorneys ⚿8(7)

United States ⚿248

Witnesses ⚿10

Except in circumstances involving military, diplomatic, or national security is-

sues, a county prosecutor acts within his or her authority when issuing a subpoena to third party, even though that subpoena relates to purportedly unlawful conduct or transactions involving third parties that may also implicate the sitting President of the United States.

29. United States ⚿248, 250

President is not above the law.

30. Constitutional Law ⚿2540

Separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States.

31. United States ⚿248

President of the United States is subject to judicial process in appropriate circumstances.

32. United States ⚿246

Witnesses ⚿8

Subpoena potentially implicating private conduct, records, or transactions of third persons and the President of the United States may lawfully be directed to third-party.

33. Public Employment ⚿899

Public official's absolute immunity should extend only to acts in performance of particular functions of his or her office.

34. Public Employment ⚿897

Immunities accorded to public officials are grounded in the nature of the function to be performed, not in the identity of the actor who performed it.

35. United States ⚿248

Among relevant considerations for court in assessing claim of presidential immunity are the following: whether events at issue involve conduct by the President in private or official capacity; whether conduct at issue involved acts of the President, of third parties, or of both; whether conduct of the President occurred while he was in office or before his tenure; whether acts in dispute related to functions of the President's office; whether subpoena for production of records was issued against the President directly or to third person; whether federal or state judicial process is at issue; whether the proceedings pertain to civil or criminal offense; whether enforcement of particular criminal process at issue would impose burdens and interferences on the President's ability to execute his constitutional duties and assigned functions; and whether effect of the President's asserting immunity under the circumstances would be to place the President, or other persons, above the law.

36. United States ⚿248

Analysis of claims of presidential immunity from process requires a balancing of interests, and the analysis should consider the interest of the President in protecting his office from undue burdens and interferences that could impair his ability to perform his official duties, and the interests of law enforcement officers and the judiciary in protecting and promoting the fair, full, and effective administration of justice.

37. Injunction ⚿1246

Public interest did not favor the grant of temporary restraining order or preliminary injunction to prevent production of personal financial and tax records of the President of the United States in response to third-party grand jury subpoena issued in connection with County District Attorney's investigation of hush money payments and possible insurance and bank fraud by the President's organization.

38. Grand Jury ⚿1

Grand juries are an essential component of the United States legal system, and the public has an interest in their unimpeded operation.

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Allen James Vickey, Solomon B Shinerock, Carey R. Dunne, I Christopher Conroy, James Henry Graham, New York County District Attorney Office, Major Economic Crimes Bureau, Inbal Paz Garrity, Jerry D. Bernstein, Nicholas Robert Tambone, Blank Rome LLP, New York, NY, for Defendants.

DECISION AND ORDER

VICTOR MARRERO, United States District Judge.

Plaintiff Donald J. Trump ("Plaintiff" or the "President"), filed this action seeking to enjoin enforcement of a grand jury subpoena (the "Mazars Subpoena") issued by Cyrus R. Vance, Jr., in his official capacity as the District Attorney of the County of New York (the "District Attorney"), to the accounting firm Mazars USA, LLP ("Mazars"). (See "Complaint," Dkt. No. 1; "Amended Complaint," Dkt. No. 27.) [1]

INTRODUCTION

The President asserts an extraordinary claim in the dispute now before this Court. He contends that, in his view of the President's duties and functions and the allocation of governmental powers between the executive and the judicial branches under the United States Constitution, the person who serves as President, while in office, enjoys absolute immunity from criminal process of any kind. Consider the reach of the President's argument. As the Court reads it, presidential immunity would stretch to cover every phase of criminal proceedings, including investigations, grand jury proceedings and subpoenas, indictment, prosecution, arrest, trial, conviction, and incarceration. That constitutional protection presumably would encompass any conduct, at any time, in any forum, whether federal or state, and whether the President acted alone or in concert with other individuals.

Hence, according to this categorical doctrine as presented in this proceeding, the constitutional dimensions of the presidential shield from judicial process are virtually limitless: Until the President leaves office by expiration of his term, resignation, or removal through impeachment and conviction, his exemption from criminal proceedings would extend not only to matters arising from performance of the President's duties and functions in his official capacity, but also to ones arising from his private affairs, financial transactions, and all other conduct undertaken by him as an ordinary citizen, both during and before his tenure in office.

Moreover, on this theory, the President's special dispensation from the criminal law's purview and judicial inquiry would embrace not only the behavior and activities of the President himself, but also extend derivatively so as to potentially immunize the misconduct of any other person, business affiliate, associate, or relative

1. The Court notes a measure of ambiguity regarding whether the President purports to bring this suit in his official capacity as President. The President never explicitly states that he does so, yet his arguments depend on his status as the sitting President. Whether privately retained, non-government attorneys accountable only to the President as an individual are entitled to invoke an immunity allegedly derived from the office of the Presidency, raises questions not addressed here. In any event, the Court finds resolution of this ambiguity unnecessary to its analysis.

who may have collaborated with the President in committing purportedly unlawful acts and whose offenses ordinarily would warrant criminal investigation and prosecution of all involved.

In practice, the implications and actual effects of the President's categorical rule could be far-reaching. In some circumstances, by raising his protective shield, applicable statutes of limitations could run, barring further investigation and prosecution of serious criminal offenses, thus potentially enabling both the President and any accomplices to escape being brought to justice. Temporally, such immunity would operate to frustrate the administration of justice by insulating from criminal law scrutiny and judicial review, whether by federal or state courts, not only matters occurring during the President's tenure in office, but potentially also records relating to transactions and illegal actions the President and others may have committed before he assumed the Presidency.

This Court cannot endorse such a categorical and limitless assertion of presidential immunity from judicial process as being countenanced by the nation's constitutional plan, especially in the light of the fundamental concerns over excessive arrogation of power that animated the Constitution's delicate structure and its calibrated balance of authority among the three branches of the national government, as well as between the federal and state authorities. Hence, the expansive notion of constitutional immunity invoked here to shield the President from judicial process would constitute an overreach of executive power.

The Court recognizes that subjecting the President to some aspects of criminal proceedings could impermissibly interfere with or even incapacitate the President's ability to discharge constitutional functions. Certainly lengthy imprisonment upon conviction would produce that result. But, as elaborated below, and contrary to the President's immunity claim as asserted here, that consequence would not necessarily follow every stage of every criminal proceeding. In particular that concern would not apply to the specific set of facts presented here to which the Court's holding is limited: the President's compliance with a grand jury subpoena issued in the course of a state prosecutor's criminal investigation of conduct and transactions relating to third persons that occurred at least in part prior to the President assuming office, that may or may not have involved the President, but that at this phase of the proceedings demand review of records the President possesses or controls.

Alternatives exist that would recognize such distinctions and reconcile varying effects associated with a claim of presidential immunity in different criminal proceedings and at different stages of the process. The Court rejects the President's theory because, as articulated, such sweeping doctrine finds no support in the Constitution's text or history, or in germane guidance charted by rulings of the United States Supreme Court.

Questions and controversy over the scope of presidential immunity from judicial process, and unqualified invocations of such an exemption as advanced by some Presidents, are not new in the nation's constitutional experience. In fact, disputes concerning the doctrine arose during the Constitutional Convention in 1787 and the Framers' deliberations gave it some consideration. The underlying issues, however, were not explicitly articulated in the text of the charter that emerged from the Convention and thus have remained largely unresolved. Consequently, the only thing truly absolute about presidential immunity from criminal process is the Constitution's silence about the existence and contours of

such an exemption, a void the President seeks to fill by the expansive theory he proffers.

Nonetheless, the Founders and courts and legal commentators have repeatedly expressed one overarching concern about the breadth of the President's immunity from judicial process, a fear that served as a vital principle for subsequent court and scholarly review of the question: whether while in office the President stands above the law and absolutely beyond the reach of judicial process in any criminal proceeding. Shunning the concept of the inviolability of the person of the King of England and the bounds of the monarch's protective screen covering the Crown's actions from legal scrutiny, the Founders disclaimed any notion that the Constitution generally conferred similarly all-encompassing immunity upon the President. They gave expression to that rejection by recognizing the duality the President embodied as a unique figure, serving as head of the nation's government, but also existing as a private citizen.[2] As detailed below, the wisdom of that view has been tested before the courts on various occasions and has been roundly and consistently reaffirmed by the Supreme Court and lower courts.

In numerous rulings, the courts have circumscribed claims of presidential immunity in multiple ways. Specifically, they have held that such protection from judicial process does not extend to civil suits regarding private conduct that occurred before the President assumed office, to responding to subpoenas regarding the conduct of third-persons, and to providing testimony in court proceedings relating to private disputes involving third persons.

The notion of federal supremacy and presidential immunity from judicial process that the President here invokes, unqualified and boundless in its reach as described above, cuts across the grain of these constitutional precedents. It also ignores the analytic framework that the Supreme Court has counseled should guide review of presidential claims of immunity from judicial process. Of equal fundamental concern, the President's claim would tread upon principles of federalism and comity that form essential components of our constitutional structure and the federal/state balance of governmental powers and functions. Bared to its core, the proposition the President advances reduces to the very notion that the Founders rejected at the inception of the Republic, and that the Supreme Court has since unequivocally repudiated: that a constitutional domain exists in this country in which not only the President, but, derivatively, relatives and persons and business entities associated with him in potentially unlawful private activities, are in fact above the law.

Because this Court finds aspects of such a doctrine repugnant to the nation's governmental structure and constitutional values, and for the reasons further stated below, it ABSTAINS from adjudicating this dispute and DISMISSES the President's suit. In the alternative, in the event on appeal abstention were found unwarranted under the circumstances presented here, the Court DENIES the President's motion for injunctive relief.

2. See Memorandum from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, Re: Amenability of the President, Vice President and Other Civil Officers to Federal Criminal Prosecution While in Office at 20 n.14 (Sept. 24, 1973) ("The Framers of the Constitutions made it abundantly clear that the President was intended to be a Chief Executive, responsible, subject to the law, and lacking the prerogatives and privileges of the King of England ... and that the President would not be above the law, nor have a single privilege annexed to his character.") (citing sources).

I. BACKGROUND

The Court begins by briefly recounting some facts that appear to be uncontested. The District Attorney is investigating conduct that occurred in New York State. As part of that investigation, the District Attorney served a grand jury subpoena on the Trump Organization, LLC (the "Trump Organization") on August 1, 2019. That subpoena seeks various documents and records of the Trump Organization covering the period from June 2015 through September 2018. The Trump Organization proceeded to respond, at least in part, to that subpoena without court involvement. On August 29, 2019, the District Attorney served the Mazars Subpoena on Mazars. The Mazars Subpoena seeks various documents and records, including tax returns of the President and possibly third persons, covering the period from January 2011 through the present. In mid-September, counsel for the President informed the District Attorney that the President would seek to prevent enforcement of and compliance with the Mazars Subpoena as it related to the production of tax records. The President has now done so through this action.

On September 19, 2019, the President filed the Complaint in this action. On the same day, the President filed an emergency motion for a temporary restraining order and a preliminary injunction. (See "Pl.'s Motion," Dkt. No. 6; "Pl.'s Mem.," Dkt. No. 10-1 [3]; "Consovoy Decl.," Dkt. No. 6-2.) Upon receipt of the President's motion and supporting documents, the Court directed the parties to confer on a briefing schedule and hearing date. Consistent with the Court's request, the parties submitted a joint letter with a proposed briefing schedule and hearing date, which the Court endorsed. (See Dkt. No. 4.) At the same time, the District Attorney agreed to stay enforcement of and compliance with the Mazars Subpoena until Wednesday, September 25, 2019 at 1:00 p.m. (See id.)

On September 23, 2019, the District Attorney filed a memorandum of law in opposition to the President's motion for injunctive relief and in favor of the District Attorney's motion to dismiss the Complaint. (See "September 23 Letter," Dkt. No. 15; "Def.'s Mem.," Dkt. No. 16; "Shinerock Decl.," Dkt. No. 17.)

On September 24, 2019, the President filed an opposition to the District Attorney's motion to dismiss and a reply in further support of the President's motion for injunctive relief. (See "Pl.'s Reply," Dkt. No. 22.)

On the same day, the United States filed a statement in support of the entry of a temporary restraining order. (See Dkt. No. 24.) Specifically, the United States supported the granting of a temporary restraining order in order to afford the United States additional time to consider whether to participate in this action. (See id.)

Also on the same day, the Court received a letter from Mazars, which indicated that Mazars "takes no position on the legal issues raised by Plaintiff." (See Dkt. No. 26.)

The Court heard oral arguments from the President and the District Attorney on September 25, 2019. (See Dkt. Minute Entry dated 9/25/2019; Transcript ("Tr.").) At the conclusion of oral argument, the Court extended the stay of enforcement of and compliance with the Mazars Subpoena to

3. Citations to the memorandum of law in support of the President's motion for injunctive relief herein shall be citations to Dkt. No. 10-1. The Court notes, however, that the memorandum of law at that docket entry is an amended version of the memorandum of law originally filed with the Court at Dkt. No. 6-3. (See Dkt. No. 10.)

September 26, 2019 at 5:00 p.m.; ordered the parties to meet and confer regarding their concerns, and to inform the Court by September 26, 2019 at 4:00 p.m. whether they had agreed upon a process for proceeding; and granted the request of the United States for additional time to consider whether to participate in the action. (See Dkt. No. 25.)

By letter dated September 26, 2019, the District Attorney informed the Court that the parties had agreed that the District Attorney would forbear from enforcement of the Mazars Subpoena until 1:00 p.m. two business days after the Court's ruling (or until 1:00 p.m. on Monday, October 7, 2019, whichever is sooner) and Mazars would gather and prepare responsive documents in the interim. (See Dkt. No. 28.)

By letter dated September 30, 2019, the United States indicated its intent to file a submission. (See Dkt. No. 30.) On October 2, 2019, the United States filed a Statement of Interest, urging the Court not to abstain, but to exercise jurisdiction over this dispute and, following additional briefing, to reach the merits of the President's claimed immunity. (See "Statement of Interest," Dkt. No. 32.) By letter dated October 3, 2019, the District Attorney responded to the Statement of Interest. (See "Def.'s Response," Dkt. No. 33.)

II. DISCUSSION

A. ANTI-INJUNCTION ACT

[1] The Court begins its analysis by considering the District Attorney's argument that the Anti-Injunction Act, 28 U.S.C. Section 2283 (the "AIA"), forecloses the injunctive relief the President seeks. (See Def.'s Mem. 5-6, 8-9.) Dating to the 18th century and designed "to forestall the inevitable friction between the state and federal courts that ensues from the injunction of state judicial proceedings by a federal court," Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 630, 97 S.Ct. 2881, 53 L.Ed.2d 1009 (1977), the AIA provides that a "court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. The President has amended his complaint to clarify that he brings suit under 42 U.S.C. Section 1983 ("Section 1983") (see Amended Complaint ¶ 8), meaning this case fits squarely into the first of the AIA's three exceptions.[4] See Mitchum v. Foster, 407 U.S. 225, 243, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972) ("[Section] 1983 is an Act of Congress that falls within the 'expressly authorized' exception of [the AIA]."). Because Mitchum allows the Court to conclude that the AIA is no bar to injunctive relief here, the Court finds it unnecessary to reach the President's alternative arguments for the inapplicability of the AIA.

B. ABSTENTION

[2, 3] The District Attorney also submits that, under the abstention doctrine set forth in Younger v. Harris, 401 U.S. 37,

4. The District Attorney argues that the President's claimed immunity is "too vague and amorphous" to be cognizable under Section 1983. (Def.'s Response at 2 (quoting Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 106, 110 S.Ct. 444, 107 L.Ed.2d 420 (1989)).) The Court shares the District Attorney's doubts on this score. However, because the Court declines to exercise jurisdiction on other grounds, it will assume without deciding that the claim is properly brought under Section 1983. See Spargo v. New York State Comm'n on Judicial Conduct, 351 F.3d 65, 74 (2d Cir. 2003) (noting that federal courts may "choose among threshold grounds for disposing of a case without reaching the merits" (internal quotation marks omitted)).

91 S.Ct. 746, 27 L.Ed.2d 669 (1971), the Court must decline to exercise jurisdiction over the President's suit. (See Def.'s Mem. at 5-9.) Younger abstention is grounded in

> the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This ... is referred to by many as "Our Federalism" .... What the concept ... represent[s] is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

401 U.S. at 44, 91 S.Ct. 746. Hence notwithstanding federal courts' "virtually unflagging obligation ... to exercise the jurisdiction given them," Colorado River Water Conserv. Dist. v. United States, 424 U.S. 800, 817, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), Younger requires federal courts to decline jurisdiction when a plaintiff seeks to enjoin one of the following three kinds of state proceedings: (1) "ongoing state criminal prosecutions," (2) "certain civil enforcement proceedings," and (3) "civil proceedings involving certain orders ... uniquely in furtherance of the state courts' ability to perform their judicial functions." Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 78, 134 S.Ct. 584, 187 L.Ed.2d 505 (2013) (quoting New Orleans Pub. Serv., Inc. v. Council of City of New Orleans, 491 U.S. 350, 368, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989) (internal quotation marks omitted)).

[4, 5] If the federal plaintiff seeks to enjoin one of these three types of proceedings, a federal court may consider three additional conditions that further counsel in favor of Younger abstention, first laid out in Middlesex County Ethics Commission v. Garden State Bar Association. See 457 U.S. 423, 432, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982). The "Middlesex conditions" are "(1) [whether] there is a pending state proceeding, (2) that implicates an important state interest, and (3) the state proceeding affords the federal plaintiff an adequate opportunity for judicial review of his or her federal constitutional claims." Falco v. Justices of the Matrimonial Parts of Supreme Ct. of Suffolk Cty., 805 F.3d 425, 427 (2d Cir. 2015).[5] Moreover, Younger also provides for an exception, pursuant to which a federal court may entertain a suit from which it must otherwise abstain, upon a showing of "bad faith, harassment, or any other unusual circumstance that would call for equitable relief" in federal court. 401 U.S. at 54, 91 S.Ct. 746.

For the reasons set forth below, the Court concludes that it must abstain under Younger.

1. Ongoing State Criminal Prosecution

[6] Although the District Attorney views the Mazars Subpoena as part of an ongoing state criminal prosecution (see Def.'s Mem. at 6-7), the President disputes that contention. (See Pl.'s Reply at 10-11.) Hence the President denies the existence of either an "ongoing state criminal prose-

5. Federal courts previously treated the Middlesex conditions as dispositive of the abstention inquiry, but it is unclear how much weight they should be given after the Sprint Court's clarification that they are merely "additional factors" appropriately considered in an abstention inquiry. See Falco, 805 F.3d at 427.

cution" under Sprint or a "pending state proceeding" per the first Middlesex condition. No party argues that there is a distinction between an "ongoing" proceeding and a "pending" one, and the Court finds no such distinction in the law. The Court consequently considers these two terms identical for the purpose of its abstention analysis and concludes that the Mazars Subpoena does qualify as part of an ongoing state criminal prosecution for Younger purposes -- though not necessarily a prosecution of the President himself.

In the spirit of comity, the Court begins its analysis by observing that New York law considers the issuance of a grand jury subpoena to be a criminal proceeding. C.P.L. Section 1.20(18) defines a "[c]riminal proceeding" to cover "any proceeding which . . . occurs in a criminal court and is related to a prospective, pending or completed criminal action, . . . or involves a criminal investigation." C.P.L. Section 10.10(1) explains that the "'criminal courts' of [New York] state are comprised of the superior courts and the local criminal courts." Finally, C.P.L. Section 190.05 defines a grand jury as "a body . . . impaneled by a superior court and constituting a part of such court." Because the Mazars Subpoena relates to a criminal investigation and was issued by the grand jury, which constitutes a part of a criminal court, the Court finds as a matter of New York law that the Mazars Subpoena constitutes a criminal proceeding.

State law aside, the President correctly notes that the United States Courts of Appeals are divided on whether the issuance of a grand jury or investigative subpoena constitutes a pending state proceeding for Younger purposes. Compare Monaghan v. Deakins, 798 F.2d 632, 637 (3d Cir. 1986)(holding that grand jury subpoenas do not constitute a pending state proceeding), vacated in part, 484 U.S. 193, 108 S.Ct. 523, 98 L.Ed.2d 529 (1988), with Craig v. Barney, 678 F.2d 1200, 1202 (4th Cir. 1982) (abstaining because of "Virginia's interest in the unfettered operation of its grand jury system"), Kaylor v. Fields, 661 F.2d 1177, 1182 (8th Cir. 1981), and Kingston v. Utah County, 161 F.3d 17, *4 (10th Cir. 1998) (Table). The United States Court of Appeals for the Second Circuit appears not to have yet ruled on the question.

The President asks the Court to agree with the Monaghan Court and hold that no ongoing criminal prosecution exists here because a state grand jury does not "adjudicate anything" and "exists only to charge that the defendant has violated the criminal law." (Pl.'s Reply at 11 (internal quotation marks omitted).) He also cites Google, Inc. v. Hood for the proposition that "Sprint undermined prior cases applying Younger abstention to grand-jury subpoenas." (Id. (citing 822 F.3d 212, 224 & n.7 (5th Cir. 2016)).)

However, the Sprint Court did not address what makes a criminal proceeding an ongoing prosecution. Instead, it reaffirmed that Younger applies only to criminal prosecutions and state civil proceedings that are "akin to a criminal prosecution," and not to other civil proceedings. Sprint, 571 U.S. at 80, 134 S.Ct. 584. Here, there is no doubt that grand jury proceedings are criminal in nature. Moreover, the Hood Court explicitly observed that abstention was merited where Texas law reflected that a grand jury was "an arm of the court by which it is appointed." 822 F.3d at 223. As noted above, New York law similarly considers grand juries a part of the criminal court that impanels them. See also People v. Thompson, 22 N.Y.3d 687, 985 N.Y.S.2d 428, 8 N.E.3d 803, 810 (N.Y. 2014) ("[G]rand jurors are empowered to carry out numerous vital functions independently of the prosecutor, for they

'ha[ve] long been heralded as the shield of innocence ... and as the guard of the liberties of the people against the encroachments of unfounded accusations from any source.' ") (quoting People v. Sayavong, 83 N.Y.2d 702, 613 N.Y.S.2d 343, 635 N.E.2d 1213, 1215 (1994) (internal quotation marks omitted)). The Second Circuit has further confirmed that "Grand Juries exist by virtue of the New York State Constitution and the Superior Court that impanels them; they are not arms or instruments of the District Attorney." United States v. Reed, 756 F.3d 184, 188 (2d Cir. 2014).

Although the Second Circuit has not explicitly addressed whether grand jury proceedings constitute an ongoing state prosecution under Younger, judges of this district have "routinely applied Younger where investigatory subpoenas have been issued," even prior to a "full-fledged state prosecution" and outside of the criminal context. Mir v. Shah, No. 11 Civ. 5211, 2012 WL 6097770, at *3 (S.D.N.Y. Dec. 4, 2012); aff'd, 569 F. App'x 48, 50-51 (2d Cir. 2014) (affirming on basis that "abstention is still appropriate here under the Sprint framework"); see also Mirka United, Inc. v. Cuomo, No. 06 Civ. 14292, 2007 WL 4225487, at *4 (S.D.N.Y. Nov. 27, 2007) ("Numerous courts have held that investigatory proceedings that occur pre-indictment and that are an integral part of a state criminal prosecution may constitute 'ongoing state proceedings' for Younger purposes."); J. & W. Seligman & Co. Inc. v. Spitzer, No. 05 Civ. 7781, 2007 WL 2822208, at *5 (S.D.N.Y. Sept. 27, 2007) ("[T]he issuance of compulsory process, including subpoenas, in criminal cases, initiates an 'ongoing' proceeding for the purposes of Younger abstention."); Nick v. Abrams, 717 F. Supp. 1053, 1056 (S.D.N.Y. 1989) ("[C]ommon sense dictates that a criminal investigation is an integral part of a criminal proceeding.... Permitting the targets of state criminal investigations to challenge subpoenas ... in federal court prior to their indictment or arrest, therefore, would do ... much damage to principles of equity, comity, and federalism ...."). The Court declines to contradict over thirty years' worth of settled and well-reasoned precedent of courts in this district and instead concludes that this case involves an ongoing state criminal prosecution.

2. The Second Middlesex Condition

[7] The second Middlesex condition favors abstention if the pending state proceeding implicates an important state interest. See Falco, 805 F.3d at 427. The Court finds this condition satisfied. A state's interest in enforcement of its criminal laws undoubtedly qualifies as an important state interest, particularly considering that Younger itself concerned a challenge to state criminal proceedings. See Arizona v. Manypenny, 451 U.S. 232, 243, 101 S.Ct. 1657, 68 L.Ed.2d 58 (1981); see generally Younger, 401 U.S. 37, 91 S.Ct. 746.

3. The Third Middlesex Condition

[8–11] The third Middlesex condition favors abstention if "the state proceeding affords the federal plaintiff an adequate opportunity for judicial review of his or her federal constitutional claims." Falco, 805 F.3d at 427 (internal quotation marks omitted). "[A]ny uncertainties as to the scope of state proceedings or the availability of state remedies are generally resolved in favor of abstention.... [I]t is the plaintiff's burden to demonstrate that state remedies are inadequate." Spargo, 351 F.3d at 78. In this respect, federal courts may not "assume that state judges will interpret ambiguities in state procedural law to bar presentation of federal claims." Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 15, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987).

The President argues that state proceedings are inadequate because "under current New York law, it does not appear that the President could move to quash a subpoena he did not receive." (Pl.'s Reply at 9.) However, the Court's review of New York law suggests otherwise. A non-recipient can challenge a subpoena under certain circumstances. See Beach v. Oil Transfer Corp., 23 Misc.2d 47, 199 N.Y.S.2d 74, 76 (Sup. Ct. Kings Cty. 1960) ("In situations where witnesses served with subpoenas are not parties, nevertheless, upon a claim of privilege, the defendant being the party principally concerned by the adverse effect of the subpoenas served upon the witnesses and being the party whose rights are invaded by such process may apply to the court whose duty it is to enforce it, to set aside such process if it is invalid." (internal quotation marks omitted)); see also In re Roden, 200 Misc. 513, 106 N.Y.S.2d 345, 347-48 (Sup. Ct. N.Y. Cty. 1951) ("Any party affected by the process of the court or its mandate may apply to the court for its modification, vacatur, quashal or other relief he feels he is entitled to receive."); accord Colfin Bulls Funding B, LLC v. Ampton Invs., Inc., No. 151885/2015, 2018 WL 7051063, at *8 (Sup. Ct. N.Y. Cty. Nov. 26, 2018) (quoting In re Roden for same proposition); People v. Grosunor, 108 Misc.2d 932, 439 N.Y.S.2d 243, 246 (Crim. Ct. Bronx Cty. 1981) (same).

The preceding decisions indicate that the President can challenge the Mazars Subpoena in a state forum on the basis of his asserted immunity. At the very least, they reflect an ambiguity in state law that the Court must resolve in favor of abstention.[6]

The President raises a closer question by arguing that, even if available, a state forum would "not be truly adequate" given that the federal and state governments are already in conflict. (Pl.'s Reply at 9.) As the President notes, some sources suggest that Younger is inapplicable to suits the federal government chooses to bring against state governments in federal court, on the theory that in those situations the federal-state conflict Younger seeks to preempt will occur even if the federal court abstains. See United States v. Morros, 268 F.3d 695, 707 (9th Cir. 2001); United States v. Composite State Bd. of Med. Examiners, 656 F.2d 131, 135-36 (5th Cir. 1981). The United States echoes these arguments, contending that the "principles of comity and federalism ... lose their force when the federal government's own Chief Executive invokes federal constitutional law to challenge a state grand jury subpoena demanding his records." (Statement of Interest at 4.)

As an initial note, as pointed out above, the Court is not certain that attorneys privately retained by the person who is President can bring suit on behalf of the United States. Indeed, the Justice Department has filed a Statement of Interest on behalf of the United States pursuant to 28 U.S.C. Section 517, rather than formally intervening as a party, or explicitly stating

6. Even if the President could not challenge the Mazars Subpoena in state proceedings, it is unclear why he could not raise his constitutional arguments in a challenge to the subpoena served upon the Trump Organization (the "Trump Organization Subpoena"). As the President's counsel noted at oral argument, "there's not a document Mazars has that [the Trump Organization does not] have in [its] possession," Tr. 47:22-23. Counsel further stated that the Mazars Subpoena was prompted by the Trump Organization's refusal to comply with the Trump Organization Subpoena. Tr. 47:24-48:3. If the President views both subpoenas as attempts to criminally prosecute him, he could litigate his claimed immunity in a challenge to the Trump Organization Subpoena and incidentally render compliance with the Mazars Subpoena a moot point.

that it is appearing on behalf of the President in connection with official presidential business implicating United States interests.

Even assuming that this action is brought by the federal government, however, the Supreme Court appears not to have addressed the impact of this consideration on Younger analysis, and there is precedent to the contrary. See Colorado River, 424 U.S. at 816 n.23, 96 S.Ct. 1236 (declining to consider "when, if at all, abstention would be appropriate where the Federal Government seeks to invoke federal jurisdiction"); United States v. Ohio, 614 F.2d 101, 104 (6th Cir. 1979) ("Abstention from exercise of federal jurisdiction is not improper simply because the United States is the party seeking a federal forum."); United States v. Oregon, No. 10 Civ. 528, 2011 WL 11426, at *5 (D. Or. Jan. 4, 2011) ("[T]he United States' role as plaintiff is not dispositive to this question. Comity principles can justify abstention even when the United States is the plaintiff."), aff'd, 503 F. App'x 525, 527 (9th Cir. 2013) (affirming abstention on basis that the distinction between the federal government and a private citizen "is not material given the [Supreme Court's] comity rationale" in Levin v. Commerce Energy, Inc., 560 U.S. 413, 130 S.Ct. 2323, 176 L.Ed.2d 1131 (2010)).

The Court cannot agree that the President's filing of this action renders the principles of comity and federalism a nullity. While the Second Circuit does not appear to have directly addressed this "difficult question with regard to federal-state relations" in the Younger context, it has denied "that a stay [should be] automatically granted simply on the application of the United States." United States v. Certified Indus., Inc., 361 F.2d 857, 859 (2d Cir. 1966); see also United States v. Augspurger, 452 F. Supp. 659, 668 (W.D.N.Y. 1978) ("[T]he general rules of comity do apply even when the United States is the plaintiff.").

Instead, it is "necessary to inquire 'whether the granting of an injunction [is] proper in the circumstances of this case.' " Certified Indus., 361 F.2d at 859 (quoting Leiter Minerals, Inc. v. United States, 352 U.S. 220, 226, 77 S.Ct. 287, 1 L.Ed.2d 267 (1957)). This circumstantial test better accords with the vision of a federal court system "in which there is sensitivity to the legitimate interests of both State and National Governments ... anxious though [the Court] may be to vindicate and protect federal rights and federal interests." Younger, 401 U.S. at 44, 91 S.Ct. 746. Automatically deferring to federal interests in suits brought by the federal government is as incompatible with our federalism as unthinkingly deferring to states' interests in state proceedings.[7]

Further, the President provides no compelling proof that New York courts would fail to adequately adjudicate his immunity claim, relying instead on the unsubstantiated allegation that he would risk "local prejudice." (Pl.'s Reply at 9 (quoting Clinton v. Jones, 520 U.S. 681, 691, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997)).) Absent a much more compelling showing, the Court

7. The Court does not believe that the cases cited by the President compel a contrary conclusion. The Composite State Court specifically distinguished its set of facts from a case where, as here, "the state and federal governments are not in direct conflict" even though the federal government might have "an interest in the outcome of the action to the extent that a federal right is implicated." 656 F.2d at 136. And the Morros Court found that the federal-state conflict inhered where the two governments were locked in a contentious dispute spanning over ten years. See 268 F.3d at 708. By contrast, a direct or inherent conflict is not inevitable in this case, where the state grand jury has merely requested records pertaining to a broad set of facts and actors and may not ultimately target the President.

declines to conclude that New York courts will treat the President with prejudice. Similarly, the United States misses the mark when it argues that "the state's interest in litigating such an unusual dispute in a state forum is minimal." (Statement of Interest at 8.) To the contrary, "[u]nder our federal system, it goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government. Because the regulation of crime is pre-eminently a matter for the States, we have identified a strong judicial policy against federal interference with state criminal proceedings." Manypenny, 451 U.S. at 243, 101 S.Ct. 1657 (internal alterations, citations, and quotations omitted). The President's interest in adjudicating an alleged immunity from state criminal process in federal court, with respect to a state investigation that may or may not ultimately target the President, cannot outweigh the State interest without much stronger proof of State judicial inadequacy.[8]

Even if the law regarding suits brought by the federal government is ultimately unclear, the Court cannot disregard the principles underlying Younger on this basis alone. And in any event, "it remains unclear how much weight [the Court] should afford [the Middlesex conditions] after Sprint." Falco, 805 F.3d at 427. Because the Court finds that there is an ongoing state criminal prosecution, an important state interest is implicated, and the state proceeding would afford the President at least a procedurally adequate opportunity for judicial review of his federal claims, the weight of the Court's analysis under Sprint and the Middlesex conditions requires abstention.[9]

4. The Bad Faith or Harassment Exception

[12–15] Although the Court finds that a state criminal prosecution is ongoing and the Middlesex conditions further discourage the Court's exercise of jurisdiction, abstention may still be inappropriate if the President can demonstrate "bad faith, harassment, or any other unusual circumstance that would call for equitable relief."

8. The United States also argues against abstention by analogizing to 28 U.S.C. Section 14 42, which authorizes a federal officer to remove a state court action to federal court if she is directly sued "for or relating to any act under color of" her office. (Statement of Interest at 9.) But Mazars's duties and services with respect to the President's personal financial records do not appear to relate to any act taken under the color of the President's office, and no party argues otherwise. Nor has any party pointed to a federal defense that Mazars could bring, as might otherwise justify removal under the statute. See Watson v. Philip Morris Cos., 551 U.S. 142, 151, 127 S.Ct. 2301, 168 L.Ed.2d 42 (2007); Isaacson v. Dow Chem. Co., 517 F.3d 129, 139 (2d Cir. 2008). Far from being directed to a federal officer for her federal acts, the Mazars Subpoena requests private records from a private third party. The Court declines to upend its broader Younger analysis on the basis of an inapposite hypothetical.

9. The Court is sensitive to the President's argument that abstention under these circumstances might embolden state-level investigation of future Presidents, especially by elected prosecutors in jurisdictions strongly opposed to a given incumbent. However, the Court cannot conclude that this argument merits the exercise of jurisdiction here, where the District Attorney has subpoenaed a third party in a broad investigation that may not ultimately target the President. If future criminal investigations by state prosecutors more clearly target a President on politicized grounds or invade on the prerogatives of the Presidency, then either such exceptional circumstances or evidence that the investigations lacked a good-faith basis could potentially warrant the exercise of federal court jurisdiction to consider such a challenge.

Younger, 401 U.S. at 54, 91 S.Ct. 746. "However, a plaintiff who seeks to head off Younger abstention bears the burden of establishing that one of the exceptions applies." Diamond "D" Constr. Corp. v. McGowan, 282 F.3d 191, 198 (2d Cir. 2002). To invoke the bad faith exception, "the party bringing the state action must have no reasonable expectation of obtaining a favorable outcome." Id. at 199 (internal quotation marks omitted). "[R]ecent cases concerning the bad faith exception have further emphasized that the subjective motivation of the state authority in bringing the proceeding is critical to, if not determinative of, this inquiry." Id.

The President argues that the Mazars Subpoena was issued in bad faith because it essentially copies two congressional subpoenas which cover subject matter allegedly exceeding the District Attorney's jurisdiction. The President also cites numerous statements by federal and state officials indicating their intent to investigate the President's finances and remove him from office. (See Amended Complaint ¶¶ 25-41.) The President further relies on Black Jack Distributors, Inc. v. Beame to claim that this evidence raises an inference that the District Attorney's "activities have a secondary motive" and are "going beyond good faith enforcement of the [criminal] laws." (Pl.'s Reply at 10 (quoting 433 F. Supp. 1297, 1304-07 (S.D.N.Y. 1977)).)

The District Attorney acknowledges that the Mazars Subpoena is substantially identical to the congressional subpoenas, but he argues that the Mazars Subpoena remains appropriate because it would encompass documents relevant to the state's investigation and enable Mazars to produce those documents promptly, as Mazars had already begun collecting the same documents in order to respond to the congressional subpoenas. (Tr. 30:16-25.) The District Attorney adds that although the documents covered by the subpoenas may relate to matters of federal law, they nevertheless "certainly pertain to potential issues under state law," which would be the "exclusive focus" of his investigation. (Tr. 30:1-5.)

And although the statements cited in the President's complaint certainly reflect that a number of New York State elected officials may wish the President's tenure in office to end, those statements do not reveal the "subjective motive" of the District Attorney in initiating these particular proceedings -- particularly when the District Attorney made none of these statements himself, and they cannot otherwise be attributed to him. To hold otherwise and impute bad faith to the District Attorney on the basis of statements made by various legislators and the New York Attorney General would be "incompatible with federal expression of 'a decent respect' for" the state authority's functions. Glatzer v. Barone, 614 F. Supp. 2d 450, 460 (S.D.N.Y. 2009).

This case is thus distinguishable from Black Jack Distributors, where the court's finding of bad faith relied on a police department's consistent and repeated use of arrest procedures that had been "long ago held invalid under New York law," pursuant to the head of the enforcement project's declaration that the department would "undertake activities knowing that they are illegal" and "despite all constitutional limitations . . . stop at nothing" to put the plaintiff out of business. 433 F. Supp. at 1306. The President has not shown that the District Attorney is acting with anywhere near the same level of disregard for the law at this point in the investigation.

Moreover, the President has not alleged that the District Attorney lacks any "reasonable expectation of obtaining a favorable outcome," Diamond "D" Constr.

Corp., 282 F.3d at 199, in the criminal prosecution of which the Mazars Subpoena is part -- a proceeding which, after all, need not necessarily lead to an indictment of the President himself. Indeed, the Declaration of Solomon Shinerock reflects that the District Attorney's investigation relates at least in part to " 'hush money' payments to Stephanie Clifford and Karen McDougal, how those payments were reflected in the Trump Organization's books and records, and who was involved in determining how those payments would be reflected in the Trump Organization's books and records." (See Shinerock Decl. ¶ 9.)

The Declaration also reflects that a variety of investigations related to similar conduct are either ongoing or resolved, including a non-prosecution agreement between federal prosecutors and American Media, Inc. related to an investigation of the lawfulness of the "hush money" payments; the conviction of Michael D. Cohen for tax fraud, false statements, and campaign finance violations during the period he was counsel to the President; and investigations by multiple other New York regulatory authorities concerning alleged insurance and bank fraud by the Trump Organization and its officers. (See id. ¶ 17.) None of these investigations necessarily involve the President himself, and the President fails to show that the District Attorney could not reasonably expect to obtain a favorable outcome in a criminal investigation that is substantially related to the topics and targets listed above. Barring a stronger showing from the President, the Court declines to impute bad faith to the District Attorney in relation to these proceedings.

5. The Extraordinary Circumstances Exception

[16–18] Even if bad faith and harassment do not apply, a district court that would otherwise abstain under Younger may hear the federal plaintiff's claims if the claimant can prove that extraordinary or unusual circumstances justify enjoining the state court proceeding. See Younger, 401 U.S. at 54. "[S]uch circumstances must be 'extraordinary' in the sense of creating an extraordinarily pressing need for immediate federal equitable relief, not merely in the sense of presenting a highly unusual factual situation." Kugler v. Helfant, 421 U.S. 117, 124-25, 95 S.Ct. 1524, 44 L.Ed.2d 15 (1975). The Second Circuit has construed Kugler and related Supreme Court precedent to require "(1) that there be no state remedy available to meaningfully, timely, and adequately remedy the alleged constitutional violation; and (2) that a finding be made that the litigant will suffer 'great and immediate' harm if the federal court does not intervene" for the exception to apply. Diamond "D" Const. Corp., 282 F.3d at 201.

As noted in Section II.B.3 supra, New York state courts appear to provide an at least procedurally adequate avenue for remedying the alleged constitutional violation at issue. While the Court is mindful of "the special solicitude due to claims alleging a threatened breach of essential Presidential prerogatives," Nixon v. Fitzgerald, 457 U.S. 731, 743, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982), the President's claims nevertheless fail to demonstrate an "extraordinarily pressing need for immediate federal equitable relief." Kugler, 421 U.S. at 125, 95 S.Ct. 1524. As described further in Section II.C.3.i infra, the President fails to show irreparable harm. The double jeopardy cases that the President cites are likewise inapposite to support his proposition that a claim of Presidential immunity would be "irreparably lost if . . . not vindicated immediately." (Pl.'s Reply at 8.) The President has not been the subject of any of the criminal proceedings he lists as

grounds showing irreparable harm; he has not been indicted, arrested, or imprisoned, or even been identified as a target of the District Attorney's investigation -- let alone been tried once before, as required in the double jeopardy context.

Though the President and the United States devote significant attention to the President's unique constitutional position, these arguments reflect the highly unusual factual underpinning of this case rather than the "extraordinarily pressing need for immediate federal equitable relief" demanded by Kugler. Far from requesting immediate relief, the United States asks that this Court schedule additional briefing on the merits of the President's claims.[10] (See Statement of Interest at 10.) The President's claim that his absolute immunity defense must be "vindicated immediately" also runs counter to his counsel's representations at oral argument that the President is not currently "seeking a permanent resolution of this dispute" but is instead merely asking for "an orderly process that allows the serious constitutional questions to be adjudicated carefully and thoughtfully[,] that preserves the [P]resident's right to be heard and allows him a reasonable chance to appeal any adverse decision that might alter the status quo." (Tr. 11:4, 10-14.)

The President fails to show that New York courts would not afford him such an orderly process, and his claim to absolute immunity simply does not demonstrate "an extraordinarily pressing need for immediate federal equitable relief" where the District Attorney has not identified the President as a target of the state investigation, let alone actually indicted him. On the contrary, the President's prophecies that he will be indicted and denied due process in state proceedings are, at best, speculative and unripe. The Second Circuit has previously held that "[t]he exceptional circumstances exception does not apply [where] the likelihood of immediate harm is speculative." See Miller v. Sutton, 697 F. App'x 27, 28 (2d Cir. 2017). This Court now so holds.

For these reasons, the Court abstains from exercising jurisdiction over the President's suit.

C. PRESIDENTIAL IMMUNITY

Notwithstanding the Court's decision to abstain, and mindful of the complexities and uncharted ground that the Younger doctrine presents, the Court will proceed to examine the merits of the President's claimed immunity and articulate an alternative holding, so as to obviate a remand in the event on appeal the Second Circuit disagrees with the Court's abstention holding. For the reasons stated below, the Court would deny the motion of the President for a temporary restraining order and a preliminary injunction (collectively, "injunctive relief").

At the outset, the Court notes that the question it addresses in this Order is narrower than the one upon which the President urges the Court to focus. Based on the record before it, and as noted in the preceding section of the Court's decision, the Court finds no clear and convincing evidence that the President himself is the target -- or, at minimum, the sole target -- of the investigation by the District Attorney. Rather, the record before the Court indicates that the District Attorney is investigating a set of facts, and a number of individuals and business entities, in relation to which conduct by the President,

10. The Court denies this request, as the Court fails to see how further briefing on the merits of the President's immunity arguments would add to the parties' already extensive treatment of the subject, including a lengthy oral argument.

lawful or unlawful, may or may not be a part. Accordingly, the question before the Court narrows to whether the District Attorney may issue a grand jury subpoena to a third person or entity requiring production of personal and business records of the President and other persons and entities? The Court's answer to that question is yes.

1. Legal Standard

[19, 20] Temporary restraining orders and preliminary injunctions are among "the most drastic tools in the arsenal of judicial remedies." Grand River Enter. Six Nations, Ltd. v. Pryor, 481 F.3d 60, 66 (2d Cir. 2007) (per curiam). To obtain this extraordinary remedy,

> [a] party seeking a preliminary injunction must ordinarily establish (1) irreparable harm; (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits of its claims to make them fair ground for litigation, plus a balance of the hardships tipping decidedly in favor of the moving party; and (3) that a preliminary injunction is in the public interest.

New York ex rel. Schneiderman v. Actavis PLC, 787 F.3d 638, 650 (2d Cir. 2015) (internal quotation marks omitted). Because it is well-recognized that the legal standards governing preliminary injunctions and temporary restraining orders are the same, the Court addresses them together. See AFA Dispensing Grp. B.V. v. Anheuser-Busch, Inc., 740 F. Supp. 2d 465, 471 (S.D.N.Y. 2010).

[21, 22] On the second element, the President advocates for the standard requiring "sufficiently serious questions going to the merits." (Pl.'s Reply at 17-18.) The Court finds, however, that the proper test here is the "likelihood of success" standard. The grand jury issued its subpoena in the course of an investigation into violations of New York law; the President's motion is thus an attempt to "stay government action taken in the public interest pursuant to a statutory ... scheme." Able v. United States, 44 F.3d 128, 131 (2d Cir. 1995). It is of no consequence that the proposed injunction would not restrain the State's financial laws themselves: "As long as the action to be enjoined is taken pursuant to a statutory or regulatory scheme, even government action with respect to one litigant requires application of the 'likelihood of success' standard." Id.; see also Plaza Health Labs., Inc. v. Perales, 878 F.2d 577, 580-81 (2d Cir. 1989). Nevertheless, given the Court's holding on the other prongs of the preliminary injunction standard, the President would not prevail even under the different but no less stringent "sufficiently serious questions" analysis. Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd., 598 F.3d 30, 35 (2d Cir. 2010).

2. Parties' Arguments

The President advances two fundamental reasons for why he is entitled to injunctive relief. First, he argues that he will suffer an irreparable harm in the absence of injunctive relief, because "there will be no way to unring the bell once Mazars complies with the District Attorney's subpoena." (Pl.'s Mem. at 3.) Second, the President argues that he has demonstrated a likelihood of success on the merits, because, according to the President, it is clear that "[n]o State can criminally investigate, prosecute, or indict a President while he is in office." (Id.)

The District Attorney counters that the President's motion for injunctive relief should be denied, because the President has failed to carry his burden of showing entitlement to the requested relief. The District Attorney primarily maintains that the President has failed to demonstrate

that he will suffer irreparable harm in the absence of injunctive relief for three reasons. First, the District Attorney contends that compliance with the Mazars Subpoena could be "undone" if the Court were to find the Mazars Subpoena to be invalid and unenforceable. (Def.'s Mem. at 12-13.) Second, the District Attorney notes that both his office and the grand jury are obligated to maintain confidential any documents produced in response to the Mazars Subpoena. (See id. at 13.) Third, the District Attorney argues that no irreparable harm will ensue "if it becomes public that there is an ongoing criminal investigation that includes requests from third-parties about business transactions that relate to the President," in part because other entities have already been investigating conduct related to the President and those investigations have been public. (Id. at 13-14.)

The District Attorney also argues that the President has failed to demonstrate a likelihood of success on the merits. According to the District Attorney, there exists no law supporting a presidential immunity as expansive as the one claimed by the President in this action. (See id. at 15.) Finally, the District Attorney argues that the balance of equities and public interest both weigh in favor of denying the requested injunctive relief, because there is a public interest in having the grand jury investigation at issue proceed expeditiously. (See id. at 19.)

3. Analysis

[23] The Court is not persuaded that the immunity claimed by the President in this action is so expansive as to encompass enforcement of and compliance with the Mazars Subpoena. As such, the President has not satisfied his burden of showing entitlement to the "extraordinary and drastic remedy" of injunctive relief. Grand River Enter., 481 F.3d at 66. The Court turns to each element of the preliminary injunction standard in turn.

i. Irreparable Harm

[24, 25] The first element is irreparable harm, which is "an injury that is not remote or speculative but actual and imminent, and 'for which a monetary award cannot be adequate compensation.' " Dexter 345 Inc. v. Cuomo, 663 F.3d 59, 63 (2d Cir. 2011) (quoting Tom Doherty Assocs. v. Saban Entm't, Inc., 60 F.3d 27, 37 (2d Cir. 1995)). This high standard reflects courts' "traditional reluctance to issue mandatory injunctions." North Am. Soccer League, LLC v. United States Soccer Fed'n, Inc., 883 F.3d 32, 38 n.8 (2d Cir. 2018) (quoting Jacobson & Co., Inc. v. Armstrong Cork Co., 548 F.2d 438, 441 n.3 (2d Cir. 1977)).

The Court finds that enforcement of and compliance with the Mazars Subpoena would not cause irreparable harm to the President. The President urges the Court to find otherwise on the basis that public disclosure of his personal records would cause irreparable harm, first, to the confidentiality of the President's tax and financial records and, second, to the President's opportunity for judicial review of his claims in this action.

[26] The Court is not persuaded that disclosure of the President's financial records to the office of the District Attorney and the grand jury would cause the President irreparable harm. The President relies on a number of cases to support his argument that mere disclosure -- without more -- of the documents requested by the Mazars Subpoena would cause irreparable harm, but none of those cases relate to ongoing criminal investigations, let alone to the disclosure of documents and records to a grand jury bound by law and sworn official oath to keep such documents and records confidential. See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bishop,

839 F. Supp. 68 (D. Me. 1993) (disclosure of plaintiff's business records to competitor by a former employee); Providence Journal Co. v. Fed. Bureau of Investigation, 595 F.2d 889 (1st Cir. 1979) (disclosure of FBI documents to plaintiff); PepsiCo, Inc. v. Redmond, No. 94 Civ. 6838, 1996 WL 3965 (N.D. Ill. Jan. 2, 1996) (disclosure of plaintiff's trade secrets or confidential information to competitor defendant); Metro. Life Ins. Co. v. Usery, 426 F. Supp. 150 (D.D.C. 1976) (disclosure -- to a chapter of the National Organization for Women -- of certain forms and plans submitted by insurance companies to federal offices); Airbnb, Inc. v. City of New York, 373 F.Supp.3d 467 (S.D.N.Y. 2019) (disclosure of data regarding businesses' customers to Mayor's Office).

The Court agrees with the District Attorney that the grand jury is a "constitutional fixture." United States v. Williams, 504 U.S. 36, 47, 112 S.Ct. 1735, 118 L.Ed.2d 352 (1992). As such, the Court finds that disclosure to a grand jury is different from disclosure to other persons or entities like those identified in the cases cited by the President. And because a grand jury is under a legal obligation to keep the confidentiality of its records, the Court finds that no irreparable harm will ensue from disclosure to it of the President's records sought here. See, e.g., People v. Fetcho, 91 N.Y.2d 765, 676 N.Y.S.2d 106, 698 N.E.2d 935, 938 (1998) ("[S]ecrecy has been an integral feature of Grand Jury proceedings since well before the founding of our Nation.... The reasons for this venerable and important policy include preserving the reputations of those being investigated by and appearing before a Grand Jury, safeguarding the independence of the Grand Jury, preventing the flight of the accused and encouraging free disclosure of information by witnesses.") (internal citation and quotation marks omitted); People v. Bonelli, 36 Misc.3d 625, 945 N.Y.S.2d 539, 541 (N.Y. Sup. Ct. 2012) ("Grand Jury secrecy is of paramount public interest and courts may not disclose these materials lightly." (internal quotation marks omitted)).

Further, as explained in Section II.B.3 supra, the Court finds that a state forum exists for judicial review of the President's claim.

ii. Likelihood of Success on the Merits

[27] Even if the President had made a sufficient showing that enforcement of the Mazars Subpoena and the President's compliance with it would cause the President irreparable harm -- and, to be clear, the Court finds it would not -- the Court would nonetheless deny the President's motion for injunctive relief because the President has failed to demonstrate a likelihood of success on the merits.

The Court disagrees with the President's position that a third person or entity cannot be subpoenaed requesting documents related to an investigation concerning potentially unlawful transactions and conduct of third parties in which records possessed or controlled by the sitting President may be critical to establish the guilt or innocence of such third parties, or of the President. The Court also rejects the President's contention that the Constitution, the historical record, and the relevant case law support such a presidential claim.

As a threshold matter, the. Court underscores several vital points. First, the President recognizes that the precise constitutional question this action presents -- the core boundaries of the President's immunity from criminal process -- has not been presented squarely in any judicial forum, and thus has never been definitively resolved. (See Amended Complaint ¶ 10 ("no court has had to squarely consider the

question" of whether a President can be subject to criminal process while in office).)

The President urges the Court to conclude that the powers vested in the President by Article II and the Supremacy Clause necessarily imply that the President cannot "be investigated, indicted, or otherwise subjected to criminal process" while in office (Pl.'s Mem. at 9), and that "criminal process" encompasses investigations of third persons concerning matters that may relate to conduct or transactions of third persons, or of the President. (Id. at 8, 13.) As the Court reads the proposition, the President's definition of "criminal process" is all-encompassing; it would extend a blanket presidential and derivative immunity to all stages of federal and state criminal law enforcement proceedings and judicial process: investigations, grand jury proceedings, indictment, arrest, prosecution, trial, conviction, and punishment by incarceration and perhaps even by fine. The Court will proceed to canvas the various relevant authorities to assess that proposition.

a. Department of Justice Memoranda

As authority for the absolute immunity doctrine he proclaims, the President points to and rests substantially upon two documents issued by the Justice Department's Office of Legal Counsel ("OLC"). The first memorandum appeared in 2000. See Memorandum Opinion for the Attorney General, from Randolph D. Moss, Assistant Attorney General, Office of Legal Counsel, A Sitting President's Amenability to Indictment and Criminal Prosecution (Oct. 16, 2000) (the "Moss Memo"). The Moss Memo in turn contains a review and reaffirmation of an OLC memorandum from 1973. See Memorandum from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, Re: Amenability of the President, Vice President and Other Civil Officers to Federal Criminal Prosecution While in Office (Sept. 24, 1973) (the "Dixon Memo"). In addition, the President relies upon a 1973 brief filed by Solicitor General Robert Bork in the United States District Court for the District of Maryland in connection with a federal grand jury proceeding regarding misconduct of Vice President Spiro Agnew.[11] See Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity (filed Oct. 5, 1973), In re Proceedings of the Grand Jury Impaneled December 5, 1972: Application of Spiro T. Agnew, Vice President of the United States, No. 73 Civ. 965 (D. Md. 1973) (the "Bork Memo"). The Dixon, Moss, and Bork Memos are here referred to collectively as the "DOJ Memos." The gist of these documents is that a sitting President is categorically immune from criminal investigation, indictment, and prosecution.

The Court is not persuaded that it should accord the weight and legal force the President ascribes to the DOJ Memos, or accept as controlling the far-reaching proposition for which they are cited in the context of the controversy at hand. As a point of departure, the Court notes that many statements of the principle that "a sitting President cannot be indicted or criminally prosecuted" typically cite to the DOJ Memos as sole authority for that proposition. Accordingly, the theory has gained a certain degree of axiomatic acceptance, and the DOJ Memos which propagate it have assumed substantial legal

11. The Moss Memo reexamined and updated the Dixon and Bork Memos and essentially reaffirmed their conclusion that indictment and prosecution of a President while in office would be unconstitutional because "it would impermissibly interfere with the President's ability to carry out his constitutionally assigned functions and thus would be inconsistent with the constitutional structure." See Moss Memo at 223.

force as if their conclusion were inscribed on constitutional tablets so-etched by the Supreme Court. The Court considers such popular currency for the categorical concept and its legal support as not warranted.

Because the arguments the President advances are so substantially grounded on the supposed constitutional doctrine and rationale the DOJ Memos present, a close review of the DOJ Memos is called for. On such assessment, the Court rejects the DOJ Memos' position. It concludes that better-calibrated alternatives to absolute presidential immunity exist yielding a more appropriate balance between, on the one hand, the burdens that subjecting the President to criminal proceedings would impose on his ability to perform constitutional duties, and, on the other, the need to promote the courts' legitimate interests and functions in ensuring effective law enforcement attendant to the proper and fair administration of justice.

The heavy reliance the President places on the DOJ Memos is misplaced for several reasons. First, though they contain an exhaustive and learned consideration of the constitutional questions presented here, the DOJ Memos do not constitute authoritative judicial interpretation of the Constitution concerning those issues. In fact, as the DOJ Memos themselves also concede, the precise presidential immunity questions this litigation raises have never been squarely presented or fully addressed by the Supreme Court. See Moss Memo at 237; Dixon Memo at 21. Nonetheless, as elaborated in Section II.C.3.ii.c infra, insofar as the Supreme Court has examined some of the relevant presidential privileges and immunities issues as applied in other contexts, the case law does not support the President's and the DOJ Memos' absolute immunity argument to its full extremity and ramifications.

Second, the DOJ Memos address solely the amenability of the President to federal criminal process. Hence, because state law enforcement proceedings were not directly at issue in the matters that prompted the memos, as they are here, the DOJ Memos do not address the unique concerns implicated by a blanket assertion of presidential immunity from state criminal law enforcement and judicial proceedings.[12] That gap and its significant distinction would include due recognition of the principles of federalism and comity, and the proper balance between the legitimate interests of federal and state authorities in the administration of justice, as discussed above in the section addressing Younger abstention. See Clinton v. Jones, 520 U.S. 681, 691, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997) (noting that in the context of state law enforcement proceedings, invocation of presidential privilege could implicate "federalism and comity concerns").

State criminal law enforcement proceedings and judicial process, moreover, do not implicate one of the DOJ Memos' rationales justifying broad presidential immunity from federal criminal process: that by virtue of the President's functions as Chief Executive, giving him power over prosecution, invocation of privilege, and pardons in federal criminal proceedings against the President would be inappropriate and ineffective, as such process would turn the President into prosecutor and defendant at the same time.[13] See Dixon Memo at 26.

12. The Moss Memo acknowledged that its analysis, and that of the Dixon Memo, focused solely on federal rather than state prosecution of a President while in office, and therefore did not consider "any additional concerns that may be implicated by state criminal prosecution of a sitting President." Moss Memo at 223 n.2.

13. Of course, as the Watergate scandal and more recent events confirm, there are prac-

Third, the Memos' analyses are flawed by ambiguities (if not outright conflicts) on an essential point: the scope of presidential immunity as presented in the DOJ Memos and asserted here by the President's claim. For instance, the Dixon Memo refers to the immunity of a sitting President from "criminal proceedings," without explicitly defining what "proceedings" the rule would encompass. See, e.g., Dixon Memo at 18. The Bork Memo, again without further elaboration, discusses the President's immunity from federal "criminal process" while in office. See Bork Memo at 3. Whether there is a difference between "criminal proceedings" and "criminal process" is a basic open question.

The Moss Memo, rather than addressing this uncertainty, compounds it by introducing a third expression of the principle that, though not further defined, clearly suggests a narrower scope of presidential immunity than that expressed in the Dixon and Bork Memos. In particular, throughout, the Moss Memo's analysis refers to the exemption as not subjecting a President while in office to "indictment and criminal prosecution." See, e.g., Moss Memo at 222. That articulation invites inquiry as to whether the rule it states would not apply to pre-indictment stages of criminal process such as investigations and grand jury proceedings, including responding to subpoenas.

On this crucial point the DOJ Memos may be at odds with one another. The specific circumstance that impelled the Dixon and Bork Memos was a grand jury investigation of Vice President Agnew, in which he objected to responding to a grand jury subpoena and argued that the Constitution prohibited investigation and indictment of an incumbent Vice President, and consequently that he could not be compelled to answer a subpoena. The Dixon and Bork Memos rejected that contention and concluded that the Vice President was not entitled to claim immunity from criminal process and prosecution. But both Memos went further and indicated that such a broad exemption would extend to the sitting President. Implicitly, therefore, as suggested by the context, the Dixon and Bork Memos would expand the scope of their reference to "criminal proceedings" and "criminal process" to cover presidential immunity from all pre-indictment phases of criminal law prosecutions, presumably including exemption from investigations, grand jury proceedings, and subpoenas.

The Moss Memo, however, by framing its analysis of the scope of the President's immunity from criminal law enforcement by reference specifically to "indictment or criminal prosecution," could be read to suggest that the exemption would not encompass investigations and grand jury proceedings, including responding to subpoenas. In fact, the Moss Memo expressly distinguishes the other two memos on this point.[14] Addressing concern over the potential prejudicial loss of evidence that could occur during a period of presidential immunity prior to indictment, the Moss Memo states that "[a] grand jury could continue to gather evidence throughout the period of immunity, even passing this task down to subsequently empaneled grand juries if necessary." Moss Memo at 257 n.36. Moreover, the Moss Memo disavows an

tical and legal constraints over a president's power to interfere with a federal law enforcement investigation of himself or his Office, without risking serious charges of obstruction of justice.

14. See Moss Memo at 232 n.10 (noting that unlike the Dixon Memo, the Bork Memo "did not specifically distinguish between indictment and other phases of the 'criminal process' ").

interpretation of the Dixon and Bork Memos' analyses as positing "a broad contention that the President is immune from all judicial process while in office." Moss Memo at 239 n.15. It further notes that the Dixon Memo "specifically cast doubt upon such a contention" and explains that a broader statement by Attorney General Stanbury in 1867 "is presumably limited to the power of the courts to review official action of the President." Id. (emphasis added).

The Moss Memo thus stepped back from the extreme position advanced by Vice President Agnew, and that is repeated here by the President's argument, that immunity extends to all criminal investigations and grand jury proceedings, including responding to subpoenas. In fact, as the Moss Memo acknowledges, such a view has been rejected by longstanding case law. Supporting this observation, the Moss Memo quotes another OLC Memorandum, dating to 1988, which declared that "it has been the rule since the Presidency of Thomas Jefferson that a judicial subpoena in a criminal case may be issued to the President, and any challenge to the subpoena must be based on the nature of the information sought rather than any immunity from process belonging to the President." Id. at 253 n.29 (quoting Memorandum for Arthur B. Culvahouse, Jr., Counsel to the President, from Douglas W. Kmiec, Assistant Attorney General, Office of Legal Counsel, Re: Constitutional Concerns Implicated by Demand for Presidential Evidence in a Criminal Prosecution at 2 (Oct. 17, 1988)); see also United States v. Burr, 25 Fed. Cas. 30, No. 14692 (C.C.D. Va. 1807) (Chief Justice Marshall noting that "[t]he guard, furnished to [the President] to protect him from being harassed by vexatious and unnecessary subpoenas, is to be looked for in the conduct of a court after those subpoenas have issued; not in any circumstances which is to [ ] precede their being issued"); Clinton, 520 U.S. at 704-05, 117 S.Ct. 1636 ("It is also settled that the President is subject to judicial process in appropriate circumstances.... We unequivocally and emphatically endorsed [Chief Justice] Marshall's position when we held that President Nixon was obligated to comply with a subpoena commanding him to produce certain tape recordings of his conversations with his aides.... As we explained, '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.' " (quoting United States v. Nixon, 418 U.S. 683, 706, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974) (internal citations omitted)); Memorandum from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, Re: Presidential Amenability to Judicial Subpoena (June 25, 1973) (noting the view expressed by Chief Justice Marshall in Burr that while the President's duties may create difficulties complying with a subpoena, this "was a matter to be shown upon the return of the subpoena as a justification for not obeying the process; it did not constitute a reason for not issuing it").

The uncertainties and inconsistencies these various statements manifest about an essential question of constitutional interpretation suggest that the DOJ Memos' position concerning presidential immunity from criminal law enforcement and judicial process cannot serve as compelling authority for the President's claim of absolute immunity, at least insofar as the argument would extend to pre-indictment investigations and grand jury proceedings such as those at issue in this case.

Finally, the DOJ Memos lose persuasive force because their analysis and con-

clusions derive not from a real case presenting real facts, but instead from an unqualified abstract doctrine conclusorily asserting a generalized principle, specifically the proposition that while in office the President is not subject to criminal process. Because the constitutional text and history on point are scant and inconclusive, the DOJ Memos construct a doctrinal foundation and structure to support a presidential immunity theory that substantially relies on suppositions, practicalities, and public policy, as well as on conjurings of remote prospects and hyperbolic horrors about the consequences to the Presidency and the nation as a whole that would befall under any model of presidential immunity other than the categorical rule on which the DOJ Memos and the President's claim ultimately rest.

The shortcomings of formulating a categorical rule from abstract principles may be highlighted by various concrete examples demonstrating that other plausible alternatives exist that would not produce the dire consequences the DOJ Memos portray absent the absolute presidential exemption they propound. The indictment stage of criminal process presents such an illustration, raising fundamental questions, reasonable doubts, and feasible grounds for making exceptions to an unqualified presidential immunity doctrine. The Dixon Memo itself acknowledges as "arguable" the possibility of an alternative approach that would not implicate the concerns about the burdens and interferences with the President's ability to carry out official duties that are advanced to justify a categorical immunity rule: Permit the indictment of a sitting President but defer further prosecution until he or she leaves office. See Dixon Memo at 31. The Dixon Memo concludes that "[f]rom the standpoint of minimizing direct interruption of official duties . . . this procedure might be a course to be considered." Id. at 29. Nonetheless, the Dixon Memo rejects that alternative, declaring without further analysis or support that an indictment pending while the President remains in office would harm the Presidency virtually as much as an actual conviction. Id.

Perhaps the most substantial flaw in the DOJ Memos' case in favor of a categorical presidential immunity rule extending to all stages of criminal process is manifested in their expressions of absolutism that upon close parsing and deeper probing does not bear out. On this point, the DOJ Memos engage in rhetorical flair -- also embraced by the President's arguments -- that not only overstates their point, but does not consider the possibility of substantive distinctions which could reasonably address concerns about the burdens and intrusions that criminal proceedings against a sitting President could entail, and thus could support a practical alternative to a regime of absolute presidential immunity.

The thrust of the DOJ Memos' argument is that a doctrine of complete immunity of the President from criminal proceedings while in office can be justified by the consideration that subjecting the President to the jurisdiction of the courts would be unconstitutional because "it would impermissibly interfere with the President's ability to carry out his constitutionally assigned functions and thus would be inconsistent with the constitutional structure." Moss Memo at 223.

In support of that peremptory claim, the DOJ Memos -- and the President -- describe various physical and non-physical interferences associated with defending criminal proceedings that they contend could impair the ability of a President to govern, even possibly amounting to a complete functional disabling of the President. In particular, the DOJ Memos cite mental

distraction, the effect of public stigma, loss of stature and respect, the need to assist in the preparation of a defense, the time commitment demanded by personal appearance at a trial, and the incapacitation effected by an arrest or imprisonment if convicted. See, e.g., Moss Memo at 249-54. Summarizing these potential impediments, the Dixon Memo concludes:

> [T]he President is the symbolic head of the Nation. To wound him by a criminal proceeding is to hamstring the operation of the whole governmental apparatus, both in foreign and domestic affairs.... [T]he spectacle of an indicted President still trying to serve as Chief Executive boggles the imagination.

Dixon Memo at 30. To a similar effect, the Moss Memo declares that

> the ordinary workings of the criminal process would impose burdens upon a sitting President that would directly and substantially impede the executive branch from performing its constitutionally assigned functions, and the accusation or adjudication of the criminal culpability of the nation's chief executive by either a grand jury returning an indictment or a petit jury returning a verdict would have a dramatically destabilizing effect upon the ability of a coordinate branch of government to function.[15]

Moss Memo at 236.

A major problem with constructing a categorical rule founded upon hypothesizing and extrapolating from an abstract general proposition disembodied from an actual set of facts, is that the entire theoretical structure could collapse when it encounters a real-world application that shakes the underpinnings of the unqualified doctrine. To propound as a blanket constitutional principle that a President cannot be subjected to criminal process presupposes a faulty premise. Implicit in that pronouncement is the assumption that every crime -- and every stage of every criminal proceeding, at any time and forum, whether involving only one or many other offenders -- is just like every other instance of its kind.

The absolute proposition also presumes uniformity of consequences: that but for the application of absolute presidential immunity every one of these circumstances would give rise to every one of the alarming outcomes conjured by the DOJ Memos to justify unqualified presidential protection from any form of criminal process. But on deeper scrutiny of the rationale for the categorical doctrine, and by constructing alternatives that eliminate or substantially mitigate even the most extreme fears conjured, the assumptions underlying the categorical rule may prove both unjustified and wrong.

In fact, not every criminal proceeding to which a President may be subjected would raise the grim specters the DOJ Memos portray as incapacitation of the President, as impeding him from discharging official duties, or as hamstringing "the operation of the whole governmental apparatus." Dixon Memo at 30. To be sure, some crimes and some criminal proceedings may involve very serious offenses that undisputably may demand the President's full personal time, energy, and attention to prepare a defense, and that consequently could justify recognition of broader immu-

15. The Court notes that in this statement the Moss Memo essentially implies that the scope of presidential immunity it urges would extend to grand jury proceedings, not only to "indictment and criminal prosecution," as expressed throughout the rest of the memo. The remark apparently contradicts expressions elsewhere in the memo suggesting that a sitting President could be the subject of grand jury investigations. See, e.g., supra pages 307–08.

nity from criminal process in the particular case.

Nonetheless, not every criminal offense falls into that exceptional category. Some crimes may require months or even years to resolve, while others conceivably could be disposed of in a matter of days, even hours. To be specific, perhaps a charge of murder and imprisonment upon conviction would present extraordinary circumstances raising the burdens and interferences the DOJ Memos describe and thus justify broad immunity. But a charge of failing to pay state taxes, or of driving while intoxicated, may not necessarily implicate such concerns. Similarly, responding to a subpoena relating to the conduct of a third party, as is the case here, would likely not create the catastrophic intrusions on the President's personal time and energy, or impair his ability to discharge official functions, or threaten the "dramatic destabilization" of the nation's government that the DOJ Memos and the President depict. See Dixon Memo at 29 (acknowledging that "[t]he physical interference consideration ... would not be quite as serious regarding minor offenses leading to a short trial and a fine," and that "Presidents have submitted to the jurisdiction of the courts in connection with traffic offenses"). See also, Moss Memo at 254 (acknowledging that "[i]t is conceivable that, in a particular set of circumstances, a particular criminal charge will not in fact require so much time and energy of a sitting President so as materially to impede the capacity of the executive branch to perform its constitutionally assigned functions.").

As regards public stigma, vilification, and loss of stature associated with criminal prosecutions, again some criminal offenses undoubtedly could engender such consequences and would warrant significant weight in assessing a claim of immunity from criminal process, but others would not. Indeed, some civil wrongs, such as sexual harassment, could arouse much greater public opprobrium and cause more severe mental anguish and personal distraction than, for example, criminal possession of a marijuana joint. Moreover, as Paula Jones's lawsuit against President Clinton illustrated, civil charges of sexual misconduct filed against a sitting President could entail an extensive call on a President's time and energy, and potentially interfere with performance of official duties,[16] perhaps to a greater degree than some criminal charges that could be more readily resolved. And not every crime and not every conviction necessarily results in a sentence requiring imprisonment.

In a similar vein, a criminal accusation involving the President alone cannot be considered in the same light as one entailing unlawful actions committed by other persons that in some way may also implicate potential criminal conduct by the President. This circumstance presents unique implications that demand recognizing and making finer distinctions. A grand jury investigation of serious unlawful acts committed by third persons may turn up evidence incriminating the sitting President. It would create significant issues impairing the fair and effective administration of justice if the proceedings had to be suspended or abandoned because the President, invoking absolute immunity from all criminal investigations and grand jury proceedings, refused to provide critical evidence he may possess that could, either during the investigation or at later pro-

16. See Clinton, 520 U.S. at 701-02, 117 S.Ct. 1636 ("As a factual matter, [President Clinton] contends that this particular case -- as well as the potential additional litigation that an affirmance ... might spawn -- may impose an unacceptable burden on the President's time and energy and thereby impair the effective performance of his office.").

ceedings, convict or exonerate any of the co-conspirators. In that instance, the President's claim of absolute immunity conceivably could enable the guilty to go free, and deprive the innocent of an opportunity to resolve serious accusations in a court of law.

The running of a statute of limitations in favor of the President or third persons during the period of immunity presents additional complexities and exceptional circumstances in these situations, similarly raising the prospect of frustrating the proper administration of justice.

A hypothetical combining all of these difficulties may illustrate how a real and compelling set of facts could undermine a blanket invocation of presidential immunity from all criminal process. Suppose that during the course of a criminal investigation of numerous third persons engaged in very serious crimes, some of the targets being high-ranking government officials, substantial evidence is uncovered indicating that the President was closely involved with those other persons in committing the offenses under investigation. The accusations come to light not long before the President's term is about to expire, leaving no time for the House of Representatives to present articles of impeachment, nor for the Senate to conduct a trial. But the applicable statute of limitations is also about to expire before the President leaves office.

On these facts, no persuasive argument could be made that an indictment of the President while in office, along with the co-conspirators -- thereby tolling the statute of limitations -- would present the severe burdens and interferences with the discharge of the President's duties that the DOJ Memos interpose. Balanced against the prospect of a number of powerful individuals going free and escaping punishment for serious crimes by virtue of the President asserting absolute immunity from criminal process, an alternative that would allow the indictment and prosecution to proceed under these circumstances may weigh against recognizing a categorical claim of presidential immunity.

The Dixon Memo acknowledges the special difficulties that criminal proceedings involving co-conspirators and statute of limitations problems present. See Dixon Memo at 29, 32, 41. In response, the Dixon Memo dismisses such concerns as not sufficient to overcome the argument in favor of the President's absolute immunity. See id. On that point, the Dixon Memo remarks: "In this difficult area all courses of action have costs and we recognize that a situation of the type just mentioned could cause a complete hiatus in criminal liability." Id. at 32. But failure to do full and fair justice in any case should not be shrugged off as mere collateral damage caused by a claim of presidential privilege or immunity. If in fact criminal justice falls to an assertion of immunity, that verdict should be an absolutely last resort. It should be justified by exacting reasons of momentous public interest such as national security, and be reviewable by a court of law. Above all, its effect should not be to shield the President from all legal process, especially in circumstances where it may appear that a claim of generalized immunity is invoked more on personal than on official grounds, and work to place the President above the law. See Nixon, 418 U.S. at 706, 94 S.Ct. 3090 (holding that "[a]bsent a claim of need to protect military, diplomatic, or sensitive national security secrets," a generalized interest in protecting the confidentiality of presidential communications in the performance of the President's duties must yield to the adverse effects of such a privilege on the fair administration of justice). As the Nixon Court declared under pertinent circumstances, "[t]he impediment that

an absolute unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III." Id. at 707, 94 S.Ct. 3090; see also Clinton, 520 U.S. at 708, 117 S.Ct. 1636. Here, this Court is not persuaded that the President has met this rigorous standard.

b. Constitutional Text and History

[28, 29] The Court finds that the structure of the Constitution, the historical record, and the relevant case law support its conclusion that, except in circumstances involving military, diplomatic, or national security issues, a county prosecutor acts within his or her authority -- at the very least -- when issuing a subpoena to a third party even though that subpoena relates to purportedly unlawful conduct or transactions involving third parties that may also implicate the sitting President. No other conclusion squares with the fundamental notion, embodied in those sources, that the President is not above the law.

Turning first to the text of the Constitution and the historical record, the Court concludes that neither the Constitution nor the history surrounding the founding support as broad an interpretation of presidential immunity as the one now espoused by the President. As the Supreme Court did in Clinton, this Court notes that the historical record does not conclusively answer the question presented to the Court:

> Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side .... They largely cancel each other.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634-35, 72 S.Ct. 863, 96 L.Ed. 1153 (1952).

c. Supreme Court Guidance

[30, 31] Turning to the opinions issued by the Supreme Court, the Court finds that they support this Court's conclusions in this action. The Supreme Court has twice recognized that "[i]t is settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States." Clinton, 520 U.S. at 705, 117 S.Ct. 1636 (quoting Fitzgerald, 457 U.S. at 753-54, 102 S.Ct. 2690). "[I]t is also settled that the President is subject to judicial process in appropriate circumstances." Id. at 703, 117 S.Ct. 1636.

The narrower part of the judicial process that is at issue in this action -- i.e., responding to a subpoena -- has similarly been addressed by the Supreme Court. That Court squarely upheld the view first espoused by Chief Justice Marshall, who presided over the trial for treason of Vice President Aaron Burr while in office, that "a subpoena duces tecum could be directed to the President." Id. at 703-04, 117 S.Ct. 1636; accord Nixon, 418 U.S. at 706, 94 S.Ct. 3090 ("[N]either 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."); see also Nixon v. Sirica, 487 F.2d 700, 709-10 (D.C. Cir. 1973) ("The clear implication is that 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 prop-

erly sustained by judicial orders of compliance.") (en banc) (per curiam).

[32] And at least one President (Richard M. Nixon) has himself conceded that he, as President, was required to produce documents in response to a judicial subpoena: "He concedes that he, like every other citizen, is under a legal duty to produce relevant, non-privileged evidence when called upon to do so." Sirica, 487 F.2d at 713. If a subpoena may be directed to the President, it follows that a subpoena potentially implicating private conduct, records, or transactions of third persons and the President may lawfully be directed to a third-party.

The Court cannot square a vision of presidential immunity that would place the President above the law with the text of the Constitution, the historical record, the relevant case law, or even the DOJ Memos on which the President relies most heavily for support. The Court thus finds that the President has not demonstrated a likelihood of success on the merits and is accordingly not entitled to injunctive relief in this action. Contrary to the President's claims, the Court's conclusion today does not "upend our constitutional design." (Pl.'s Reply at 4.) Rather, the Court's decision upholds it.

d. Alternatives

[33, 34] The questions and concerns the DOJ Memos present, and that the President here embraces, need not inexorably lead to only one course, that of prescribing an absolute immunity rule. In fact, the Supreme Court has provided guidance to govern invocations of absolute immunity. In Clinton it declared that such claims should be resolved by a "functional" approach. Specifically, the Court counseled that "an official's absolute immunity should extend only to acts in performance of particular functions of his office." Clinton, 520 U.S. at 694, 117 S.Ct. 1636. The court further explained that "immunities are grounded in 'the nature of the function to be performed, not the identity of the actor who performed it.' " Id. at 695, 117 S.Ct. 1636 (quoting Forrester v. White, 484 U.S. 219, 229-30, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988)). Underscoring this point, the Court concluded that "we have never suggested that the President, or any other official, has an immunity that extends beyond the scope of any action taken in an official capacity." Clinton, 520 U.S. at 694, 117 S.Ct. 1636.

The DOJ Memos, while espousing a categorical presidential immunity rule, and perhaps seeming inconsistent on this point as well,[17] also recognize the applicability of such a method. The Dixon Memo, for instance, concludes that

> under our constitutional plan it cannot be said either that the courts have the same jurisdiction over the President as if he were an ordinary citizen or that the President is absolutely immune from the jurisdiction of the courts in regard to any kind of claim. The proper approach is to find the proper balance between the normal functions of the courts and the special responsibilities and function of the Presidency.

Dixon Memo at 24.

In the few instances in which the Supreme Court has addressed questions con-

17. The Dixon Memo, for example, though remarking that an alternative of permitting an indictment of a President and deferring trial until he is out of office is a course worthy of consideration, rejects the option in favor of a categorical rule. The Dixon Memo also admits to "certain drawbacks" of an absolute immunity doctrine. Similarly, the memo acknowledges the difficulties that a categorical rule presents because of issues such as the running of the statute of limitations and the involvement of co-conspirators, but again discounts those concerns to support a categorical rule. See Dixon Memo at 17, 32.

cerning the scope of the President's assertion of executive privilege and immunity from judicial process, albeit in varying contexts, several general principles and a functional framework emerge from the Court's pronouncements that should inform and guide adjudications of such claims. A synthesis of Burr, Nixon, Fitzgerald, and Clinton suggests that the Supreme Court would reject an interpretation and application of presidential powers and functions that would "sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances." Nixon, 418 U.S. at 706, 94 S.Ct. 3090. Rather than enunciating such a categorical rule, the Supreme Court's guidance suggests that courts take account of various circumstances that may bear upon a court's ultimate determination concerning the appropriateness of a claim of presidential immunity from judicial process relating to a criminal proceeding.

[35] Among the relevant considerations are: whether the events at issue involve conduct taken by the President in an a private or official capacity; whether the conduct at issue involved acts of the President, or of third parties, or both; whether the conduct of the President occurred while the President was in office, or before his tenure; whether the acts in dispute related to functions of the President's office; whether a subpoena for production of records was issued against the President directly or to a third person; whether the judicial process at issue involves federal or state judicial process; whether the proceedings pertain to a civil or criminal offense; whether the enforcement of the particular criminal process concerned would impose burdens and interferences on the President's ability to execute his constitutional duties and assigned functions; and whether the effect of the President's asserting immunity under the circumstances would be to place the President, or other persons, above the law.

[36] The analytic framework the Supreme Court counsels courts to employ requires a balancing of interests. The assessment would consider the interest of the President in protecting his office from undue burdens and interferences that could impair his ability to perform his official duties, and the interests of law enforcement officers and the judiciary in protecting and promoting the fair, full, and effective administration of justice.

The relevance of these multiple considerations in a determination of the appropriateness of presidential immunity from criminal process under such varying circumstances underscores the incompatibility of an unqualified, absolute doctrine, and, rather than a blanket application; points to a case-by-case approach in which a demonstration of sufficiently compelling conditions to justify presidential exemption is made by the courts.[18]

Here, the Court's weighing of the competing interests persuades it to reject the President's request for injunctive relief. The interest the President asserts in maintaining the confidentiality of certain personal financial and tax records that largely relate to a time before he assumed office, and that may involve unlawful conduct by third persons and possibly the President, is far outweighed by the interests of state

18. The Moss Memo mentions such a course in passing, reiterating its support for a categorical rule "rather than a doctrinal test that would require the court to assess whether a particular criminal proceeding is likely to impose serious burdens upon the President.") Moss Memo at 254. This point ignores that it was precisely this kind of assessment that the Supreme Court conducted in Nixon and Clinton, and that more generally courts routinely make in the course of performing their constitutional duties.

law enforcement officers and the federal courts in ensuring the full, fair, and effective administration of justice.

The Court is not persuaded that the burdens and interferences the President describes in this case would substantially impair the President's ability to perform his constitutional duties. See Clinton, 520 U.S. at 705, 117 S.Ct. 1636 ("The burden on the President's time and energy that is a mere byproduct of [judicial] review surely cannot be considered as onerous as the direct burden imposed by judicial review and the occasional invalidation of his official actions."). In the Court's view, frustration of the state criminal investigation under the facts presented here presents much greater concerns that overcome the President's grounds for not complying with the grand jury subpoena.

iii. The Public Interest

[37, 38] Given that the Court finds that the President would not suffer irreparable harm or succeed on the merits, it is unnecessary to consider whether the public interest would favor a preliminary injunction. Nevertheless, the Court notes that the public interest does not favor granting a preliminary injunction. As discussed above, grand juries are an essential component of our legal system and the public has an interest in their unimpeded operation. Manypenny, 451 U.S. at 243, 101 S.Ct. 1657; see also United States v. Dionisio, 410 U.S. 1, 17, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973) (referring to "the public's interest in the fair and expeditious administration of the criminal laws"); Branzburg v. Hayes, 408 U.S. 665, 688-90, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972) (in a First Amendment case, referring to "the public interest in law enforcement and in ensuring effective grand jury proceedings" and noting that the principle that the public is entitled to every person's evidence "is particularly applicable to grand jury proceedings"); In re Sealed Case, 794 F.2d 749, 751 n.3 (D.C. Cir. 1986) (per curiam) (referring to "the weighty public interest in the orderly functioning of grand juries and the judicial process").

III. ORDER

For the reasons described above, it is hereby

ORDERED that the amended complaint of plaintiff Donald J. Trump (Dkt. No. 27) is **DISMISSED** pursuant to the decision of the United States Supreme Court in Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

SO ORDERED.

Alfred VITALONE, Plaintiff,

v.

The CITY OF NEW YORK, et al., Defendants.

15 Civ. 8525 (GWG)

United States District Court, S.D. New York.

Signed September 12, 2019

Background: Arrestee brought § 1983 action against city and 17 police officers seeking relief for violations of his constitutional rights arising from his arrest after a traffic stop. Arrestee's initial attorney was terminated as counsel and successor attorneys took over the case, which settled pursuant to offer of judgment, which included award of $85,000 for costs and attorney fees. Initial and successor attorneys filed applications for attorney fees.

From: Gaeta, Joseph (OLA)
Subject: RE: Clarke<>Booker Today
To: Archie, Amahree (Booker); Serrano, Andrew (Booker); (b) (6) (OLA)
Cc: Giertz, Jeff (Booker); Smith, Daniel (Judiciary-Dem); Berger, Christine (Judiciary-Dem)
Sent: January 27, 2021 5:32 PM (UTC-05:00)
Attached: KClarke Bio.pdf

Here's a bio. Release looks fine. Thanks for checking and sorry for the delay.

From: Archie, Amahree (Booker) (b) (6)
Sent: Wednesday, January 27, 2021 3:17 PM
To: Serrano, Andrew (Booker) (b) (6) ; Gaeta, Joseph (OLA) (b) (6) (b) (6) (OLA) (b) (6)
Cc: Giertz, Jeff (Booker) (b) (6) ; Smith, Daniel (Judiciary-Dem) (b) (6) Berger, Christine (Judiciary-Dem) (b) (6)
Subject: RE: Clarke<>Booker Today

Hi Joe and (b) (6),
I hope you are doing well. Just sending over our press release for our meeting with Ms. Clarke today. Please send over any edits you or your team may have. Also could you all provide Ms. Clarke's bio? We typically got them from the transition website but it's no longer up. Thanks!
-Amahree A.

FOR IMMEDIATE RELEASE
January 27, 2021

CONTACT:
Thomas_Pietrykoski@booker.senate.gov

Booker Meets with Kristen Clarke, Nominee to Serve as Assistant Attorney General of the Civil Rights Division at the Department of Justice

WASHINGTON, D.C. – Today, U.S. Senator Cory Booker (D-NJ), a member of the Senate Judiciary Committee, met virtually with Kristen Clarke, President Joe Biden's nominee to serve as Assistant Attorney General of the Civil Rights Division at the Department of Justice.
Following their meeting, Senator Booker issued the following statement:
"Today, I had the opportunity to meet virtually with Kristen Clarke, who has been nominated lead the Civil Rights Division at the Department of Justice. In my meeting with Ms. Clarke, we discussed her background as a civil rights attorney and how the Division under her leadership will restore the enforcement of federal civil rights law as a priority for the Department. From leading the Civil Rights Bureau for the New York State Attorney General's Office to serving as the President and Executive Director of the Lawyers' Committee for Civil Rights Under Law, Ms. Clarke has devoted her career to advocating for civil rights and has the experience and skills needed to lead the Civil Rights Division at this critical time. I look forward to working with Ms. Clarke and the Biden administration to renew the federal government's commitment to combatting hatred and protecting Americans' civil rights."
BIO
Senator Booker has served on the Senate Judiciary Committee since 2018. He has been a leader in the Senate on criminal justice and policing reform. Since his election to the Senate in 2013, Booker has introduced numerous criminal justice reform proposals, including: the *Marijuana Justice Act*, the *Fair Chance Act*, the *CARERS Act*, the *MERCY Act*, the *Dignity for Incarcerated Women Act*, the *Second Look Act*, and most recently the *Justice in Policing Act*.
He was also a key architect of the most sweeping overhaul of the criminal justice system in decades, the *First Step Act*, which was signed into law in 2018.

###

From: Serrano, Andrew (Booker) (b) (6)
Sent: Wednesday, January 27, 2021 11:49 AM
To: Gaeta, Joseph (OLA) (b) (6) ; (b) (6) (OLA) (b) (6)
Cc: Archie, Amahree (Booker) (b) (6) ; Giertz, Jeff (Booker) (b) (6) ; Smith, Daniel (Judiciary-Dem) (b) (6) ; Berger, Christine (Judiciary-Dem) (b) (6)
Subject: Clarke<>Booker Today

Hey Joe and (b) (6) –

Adding a few members of our team in for the meeting today. Dan and Christine will be joining Senator Booker, along with our chief of staff, Veronica Duron.

Jeff and Amahree are from our comms shop and adding them here for any public releases regarding the meeting.

Thanks all! Senator Booker is looking forward to the 3pm meeting.

-Andrew

Kristen Clarke, nominee for Assistant Attorney General for the Civil Rights Division. Clarke has extensive law enforcement and civil rights experience, starting her career in civil rights as a career attorney in the Civil Rights Division at the Department of Justice. While at the Department, she was a federal prosecutor in the Criminal Section of the Division, responsible for cases of police misconduct, hate crimes, and human trafficking. Through the Division's Voting Section, she also worked on voting rights and redistricting cases.

Clarke currently serves as president and executive director of the National Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee). She has also served as the head of the Civil Rights Bureau for the New York State Attorney General's Office, where she successfully led landmark efforts to address discrimination in housing, the school-to-prison pipeline, and reforming practices and policies of police departments. Clarke served at the NAACP Legal Defense and Educational Fund, where she focused on voting rights and election law.

Clarke received her A.B. from Harvard University and her J.D. from Columbia Law School.

From: Foti, Riley (Durbin)
Subject: RE: Senator Durbin's Availability Request: Meeting with Incoming DOJ Civil Rights Division Nominee Kristen Clarke
To: (b) (6) (OLA); Reginald Babin; Gaeta, Joseph (OLA)
Cc: Payton, Rayshon (OLA); Howard Ou; Morgan Mohr
Sent: January 27, 2021 1:09 PM (UTC-05:00)

Great we will hold it.

From: (b) (6) (OLA) (b) (6)
Sent: Wednesday, January 27, 2021 1:01 PM
To: Reginald Babin (b)(6) (Biden-Harris Transition Team Email); Foti, Riley (Durbin) (b) (6); Gaeta, Joseph (OLA) (b) (6)
Cc: Payton, Rayshon (OLA) (b) (6); Howard Ou (b)(6) (Biden-Harris Transition Team Email); Morgan Mohr (b)(6) (Biden-Harris Transition Team Email)
Subject: RE: Senator Durbin's Availability Request: Meeting with Incoming DOJ Civil Rights Division Nominee Kristen Clarke

From: Seigle, Leah (Whitehouse)
Subject: RE: Senator Whitehouse's Availability Request: Meeting with Incoming DOJ Civil Rights Division Nominee Kristen Clarke
To: (b) (6) (OLA); Reginald Babin; Gaeta, Joseph (OLA)
Cc: Payton, Rayshon (OLA); Aronson, Alex (Judiciary-Dem); Smirniotopoulos, Amalea (Judiciary-Dem)
Sent: January 27, 2021 12:46 PM (UTC-05:00)

Sure!

Zoom link here:

(b) (6)

Meeting ID: (b) (6)
Passcode: (b) (6)

From: (b) (6) (OLA) (b) (6)
Sent: Wednesday, January 27, 2021 11:42 AM
To: Seigle, Leah (Whitehouse) (b) (6); Reginald Babin (b)(6) (Biden-Harris Transition Team Email); Gaeta, Joseph (OLA) (b) (6)
Cc: Payton, Rayshon (OLA) (b) (6); Aronson, Alex (Judiciary-Dem) (b) (6); Smirniotopoulos, Amalea (Judiciary-Dem) (b) (6)
Subject: RE: Senator Whitehouse's Availability Request: Meeting with Incoming DOJ Civil Rights Division Nominee Kristen Clarke

Hi Leah,

If your office is able to send a Zoom link, that would be much appreciated! DOJ technology has not yet adopted Zoom software…

Once we have the schedule finalized, I will loop back with an official confirmation and a staff list!

Thank you,

(b) (6)

From: Seigle, Leah (Whitehouse) (b) (6)
Sent: Wednesday, January 27, 2021 11:29 AM
To: (b) (6) (OLA) (b) (6); Reginald Babin (b)(6) (Biden-Harris Transition Team Email); Gaeta, Joseph (OLA) (b) (6)
Cc: Payton, Rayshon (OLA) (b) (6); Aronson, Alex (Judiciary-Dem) (b) (6); Smirniotopoulos, Amalea (Judiciary-Dem) (b) (6)
Subject: RE: Senator Whitehouse's Availability Request: Meeting with Incoming DOJ Civil Rights Division Nominee Kristen Clarke

Hi (b) (6),
Thanks so much – 1:30pm on 2/3 works perfectly.
Do you want me to send you a Zoom link?
On our side, Alex and Amalea will staff.
As we get closer, please share staff on your end, thanks!

From: (b) (6) (OLA) (b) (6)

Sent: Wednesday, January 27, 2021 10:48 AM
To: Reginald Babin [redacted]; Seigle, Leah (Whitehouse) [redacted]; Gaeta, Joseph (OLA) [redacted]
Cc: Payton, Rayshon (OLA) [redacted]; Aronson, Alex (Judiciary-Dem) [redacted] Smirniotopoulos, Amalea (Judiciary-Dem) [redacted]
Subject: RE: Senator Whitehouse's Availability Request: Meeting with Incoming DOJ Civil Rights Division Nominee Kristen Clarke

From: Vu, Jessica (Blackburn)
Subject: DOJ courtesy copy Sen. Blackburn Letter to EPA OIG & GAO
To: Gaeta, Joseph (OLA)
Sent: January 25, 2021 5:00 PM (UTC-05:00)
Attached: Blackburn Letter to EPA IG & GAO 01-25-21.pdf, EPA OGC Abeyance Letter to DOJ 01-21-20.pdf

Joseph,
Please see the attached letter and enclosures from Senator Blackburn to GAO Comptroller General Dodaro and EPA Inspector General O'Donnell, regarding EPA's memorandum to DOJ that Melissa Hoffer signed as EPA Acting General Counsel. Courtesy copies are provided to ENRD DAAGs Jean Williams and Bruce Gelber.

Thanks,
Jessica

Jessica Vu
Chief Counsel
Senator Marsha Blackburn
(b) (6)

MARSHA BLACKBURN
TENNESSEE
http://www.blackburn.senate.gov/

United States Senate

357 DIRKSEN SENATE OFFICE BUILDING
WASHINGTON, DC 20510
(202) 224-3344
FAX: (202) 228-0566

COMMITTEES:
ARMED SERVICES
COMMERCE, SCIENCE, AND TRANSPORTATION
JUDICIARY
VETERANS' AFFAIRS

January 25, 2021

VIA ELECTRONIC TRANSMISSION

The Honorable Sean O'Donnell
Inspector General
U.S. Environmental Protection Agency
1301 Constitution Avenue N.W.
Washington, DC 20460

The Honorable Gene L. Dodaro
Comptroller General
U.S. Government Accountability Office
441 G Street N.W.
Washington, DC 20548

Dear Inspector General O'Donnell and Comptroller General Dodaro,

I write to ask that the Environmental Protection Agency Office of the Inspector General (EPA OIG) and the Government Accountability Office (GAO) open an investigation into potential violations of the Federal Vacancies Reform Act of 1998 (FVRA) and other potential violations of ethics rules resulting from the actions of EPA's Principal Deputy General Counsel Melissa Hoffer's recent memorandum to toll all pending EPA cases.

On her first day on the job, Ms. Hoffer swiftly sent a memorandum to the U.S. Department of Justice requesting that the Department's Environment and Natural Resources Division attorneys "seek and obtain abeyances or stays of proceedings in pending litigation seeking judicial review of any EPA regulation promulgated between January 20, 2017, and January 20, 2021."[1] Ms. Hoffer electronically signed the letter in her purported capacity as EPA's Acting General Counsel. In her haste to deliver her message, Ms. Hoffer neglected to acknowledge that the Acting General Counsel role is vacant and she only serves in the inferior role of Principal Deputy General Counsel—as confirmed by EPA's current organizational chart.[2]

This is potentially a violation of the FVRA and the Appointments Clause of the U.S. Constitution.[3] The FVRA grants the President—and only the President—the limited authority to appoint acting officials while preserving the Senate's advice and consent power. The only individuals who may perform the functions and duties of EPA General Counsel in an acting capacity are: (1) the first assistant to the vacant office;[4] (2) an individual already serving in a Senate confirmed office who is directed by the President to serve as the acting officer;[5] or (3) a senior officer or employee already serving at EPA who is directed by the President to serve as an acting officer.[6] But if Ms. Hoffer is indeed the EPA Acting General Counsel, it does not appear she can hold the position through any of these three paths. She was not the "first assistant" when the vacancy arose; she had not been serving in a Senate-confirmed office; and she had not been employed by any other EPA component in the year prior to the vacancy.[7] And, if the President has not directed Ms. Hoffer to serve as the Acting General Counsel under one of these scenarios, she may not take it upon herself to install herself into a position the Senate has not confirmed.

Secondly, there are conflict of interest concerns posed by Ms. Hoffer's self-appointment, which places her in a position to supervise the litigation of multiple cases where she previously appeared as opposing counsel against the agency. Pursuant to 5 C.F.R. 2635.502, employees must take appropriate steps to avoid the appearance of having their impartiality questioned in the performance of their official duties. According to Justice Department ethics guidelines, an employee is normally recused for a one-year period from a matter in which their former employer whom they provided services to within the previous year is a party or represents a party.[8] Previously, Ms. Hoffer served in the Massachusetts Attorney General's Office as the Chief of the Energy and Environment Bureau. Recent court filings reveal that she appeared as the attorney of record for the state of Massachusetts in at least two lawsuits challenging the enforceability of EPA regulations in the past year.[9] Ms. Hoffer should therefore be recused from all of the matters in which Massachusetts is a party.

American workers, farmers and business owners deserve certainty over any new rules, regulations or directives Ms. Hoffer may attempt to issue—especially considering her urgency to undo the regulatory reform success of the previous Administration. Until the new Administration clarifies the real authority belying Ms. Hoffer's position, she should be prohibited from holding herself out to the public and to other agencies as the EPA's Acting General Counsel. Any commands she issues as the purported Acting General Counsel circumvent the FVRA's requirements and the separation of powers. After all, under the FVRA, "[a]n action taken by any person who is not acting" lawfully "shall have no force or effect."[10] At a minimum, Ms. Hoffer should be recused from any matter in which she served as opposing counsel against EPA. Otherwise, the conflict of interest posed by Ms. Hoffer's appointment casts a cloud over anything she and EPA do to reshape the nation's environmental regulatory policy.

Thank you for your attention to this important matter. I look forward to your response.

Sincerely,

Marsha Blackburn
United States Senator

cc: Jean E. Williams and Bruce S. Gelber
Deputy Assistant Attorneys General
U.S. Department of Justice
Environment and Natural Resources Division

Thomas Armstrong
General Counsel
U.S. Government Accountability Office

Jennifer Kaplan
Deputy Assistant Inspector General for Congressional and Public Affairs
U.S. Environmental Protection Agency Office

Enclosures

[1] Letter from Melissa Hoffer, Acting General Counsel, U.S. Environmental Protection Agency, to Jean Williams and Bruce Gelber, Deputy Assistant Attorneys General, Environment and Natural Resources Division, U.S. Department of Justice (Jan. 21, 2021).
[2] About the Office of General Counsel, U.S. Environmental Protection Agency (Jan. 21, 2021). https://www.epa.gov/aboutepa/about-office-general-counsel-ogc (last accessed on Jan. 25, 2021).
[3] 5 U.S.C. § 3345 et seq.; U.S. Const. art. II, § 2, cl. 2.
[4] 5 U.S.C. § 3345(a)(1).
[5] *Id.* § 3345(a)(2).
[6] *Id.* § 3345(a)(3) (the employee must be serving at the agency at the GS-15 rate of pay for not less than 90 days during the year prior to the vacancy).
[7] The GAO has determined that an individual must be "the first assistant to the General Counsel when the vacancy arose" in order to be eligible to serve as the Acting General Counsel of the Department of Health and Human Services. Letter from Susan Poling, General Counsel, GAO, to White House, No. B-318244 (June 28, 2014), https://www.gao.gov/products/D10659. Two OLC opinions have issued conflicting guidance. 23 Op. O.L.C. 60, 64 (1999) (the FVRA does require "that you must be the first assistant when the vacancy occurs in order to be the acting officer by virtue of being the first assistant."); *but see* 25 Op. O.L.C. 177 (2001) ("an individual need not be the first assistant when the vacancy occurs in order to be the acting officer by virtue of being the first assistant."). While the Supreme Court has not decided the issue, the D.C. Circuit noted the FVRA "may refer to the person who is serving as first assistant when the vacancy occurs," *SW Gen., Inc. v. N.L.R.B.*, 796 F.3d 67, 76 (D.C. Cir. 2015).
[8] Government Ethics Outline, U.S. Department of Justice (Jul. 5, 2017). https://www.justice.gov/jmd/government-ethics-outline (last accessed on Jan. 25, 2021).
[9] *Massachusetts, et al v. EPA, et al*, No. 20-1265 (D.C. Cir. 2020), petition for rev. filed Jul. 20, 2020, https://www.mass.gov/doc/mats-petition-for-review/download; *California, et al v. EPA, et al,* No. 20-1357 (D.C. Cir. 2020), petition for rev. filed Sep. 20, 2020, https://oag.ca.gov/sites/default/files/CA%20v.%20Wheeler%20-%20Methane%20Rescission%20DC%20Cir%20No.%2020-1357.pdf
[10] 5 U.S.C. § 3348.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

OFFICE OF
GENERAL COUNSEL

January 21, 2021

Jean E. Williams
Bruce S. Gelber
Deputy Assistant Attorneys General
Environment and Natural Resources Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001
transmitted electronically

Re: Abeyances in EPA Rule Cases

Dear Jean and Bruce:

In conformance with President Biden's *Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis* issued January 20, 2021, (Health and Environment EO), this will confirm my request on behalf of the U.S. Environmental Protection Agency (EPA) that the U.S. Department of Justice (DOJ) seek and obtain abeyances or stays of proceedings in pending litigation seeking judicial review of any EPA regulation promulgated between January 20, 2017, and January 20, 2021, or seeking to establish a deadline for EPA to promulgate a regulation in connection with the subject of any such regulation, in order to provide an opportunity for new Agency leadership to review the underlying rule or matter. *See Health and Environment EO* at Section 2; *see also Memorandum for the Heads of Executive Departments and Agencies: Regulatory Freeze Pending Review*, January 20, 2021. For a case where an abeyance or stay of proceedings is not feasible, we request that DOJ seek extensions of time that are of sufficient duration to allow this review. While these rule cases are a particularly high priority, we also anticipate that a similar request may apply for additional cases in a defensive posture. For any case that you believe merits separate consideration, or for which you believe an abeyance, stay of proceedings, or sufficient extension is not feasible, please promptly notify us and the involved EPA Office of General Counsel's Associate General Counsel for a discussion.

The EPA Office of General Counsel will work with DOJ to help carry out this request. If there are questions, feel free to contact me, Jim Payne, payne.james@epa.gov, 202-672-3727, or the

Associate General Counsel for the case. Thank you.

Sincerely,

Melissa A. Hoffer
Acting General Counsel

Cc: Jim Payne

From: Munk, Raija Churchill (Judiciary-Rep)
Subject: RE: Nachmanoff Follow-Up
To: Kingo, Lola A. (OLP); Brest, Phillip (Judiciary-Dem); Bauer, Sarah (Judiciary-Dem); Kenny, Gabrielle (Judiciary-Rep)
Sent: July 21, 2021 2:09 PM (UTC-04:00)

Thank you, Lola.

Raija

From: Kingo, Lola A. (OLP) (b) (6)
Sent: Wednesday, July 21, 2021 11:40 AM
To: Brest, Phillip (Judiciary-Dem) (b) (6) ; Bauer, Sarah (Judiciary-Dem) (b) (6) ; Munk, Raija Churchill (Judiciary-Rep) (b) (6) Kenny, Gabrielle (Judiciary-Rep) (b) (6)
Subject: Nachmanoff Follow-Up

This is a secure message.

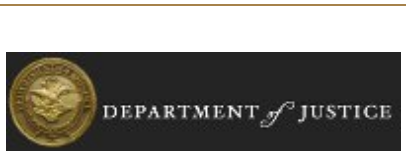
Click here by 2021-07-31 15:40 UTC to read your message.
After that, open the attachment.

More Info

From: Munk, Raija Churchill (Judiciary-Rep)
Subject: RE: Nagala Follow-Up
To: Kingo, Lola A. (OLP); Brest, Phillip (Judiciary-Dem); Bauer, Sarah (Judiciary-Dem); Kenny, Gabrielle (Judiciary-Rep)
Sent: July 21, 2021 2:08 PM (UTC-04:00)

Thank you, Lola.

From: Kingo, Lola A. (OLP) (b) (6)
Sent: Wednesday, July 21, 2021 10:35 AM
To: Brest, Phillip (Judiciary-Dem) (b) (6) ; Bauer, Sarah (Judiciary-Dem) (b) (6) ; Munk, Raija Churchill (Judiciary-Rep) (b) (6) ; Kenny, Gabrielle (Judiciary-Rep) (b) (6)
Subject: Nagala Follow-Up



This is a secure message.

Click here by 2021-07-31 14:35 UTC to read your message.
After that, open the attachment.

More Info

From: Kingo, Lola A. (OLP)
Subject: [encrypt] Nachmanoff Follow-Up
To: Brest, Phillip (Judiciary-Dem); Bauer, Sarah (Judiciary-Dem); Munk, Raija Churchill (Judiciary-Rep); Kenny, Gabrielle (Judiciary-Rep)
Sent: July 21, 2021 11:40 AM (UTC-04:00)
Attached: Nachmanoff77N.LIMITED.pdf

CONFIDENTIAL

Good morning,

Attached are additional serials in connection with Michael Nachmanoff's BI. Thank you.

_____

Lola A. Kingo
Chief Nominations Counsel
Office of Legal Policy (OLP)
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Room 4239
Washington, D.C. 20530
(b) (6)

From: Palmer, Bryan (Judiciary)
Subject: Notice of Senate Judiciary Committee Hearing on Wednesday, July 28, 2021 at 10:00 a.m.
To: Judic-Dem; JudicBlackburn; JudicCornyn; JudicCotton; JudicCruz; JudicGraham; JudicGrassley; JudicHawley; JudicKennedy; JudicLee; JudicSasse; JudicTillis; JudRep Other; Adams, Stan (Ossoff); Ahmed, Danniyal (Blumenthal); Allen, Susan (Judiciary-Rep); Anderson, Collin (Blumenthal); Berger, Christine (Hirono); Bradlow, Adam (Blumenthal); Cayea, Devan (Padilla); Cha, Jefferson (Blackburn); Cooksey, Sean (Hawley); Costello, Colleen (Whitehouse); Divine, Josh (Hawley); Ehrett, John (Hawley); Farrar, Elizabeth (Klobuchar); Fraher, Hannah (Kennedy); Hantson, Jeff (Hirono); Harding, Andrew (Kennedy); Lawrence, Noah (Blumenthal); Pang, Jasmine (Hirono); Patrie, Aparna (Blumenthal); Ruben, Elizabeth (Blumenthal); Schwartz, Leah (Padilla); Smith, Symonne (Padilla); Steitz, John (Kennedy); Stokes, David (Kennedy); Vu, Jessica (Blackburn); Watts, Brad (Tillis); Alderson Reporting Info; (b)(6) Amy Wise (OLP); Loughlin, Ann (OLP); Babcock, Christine (Cruz); Babcock, Christine (Cruz); Babin, Reginald (Schumer); Becker, Bob (SAA); Wilson, Benjamin (OLP); Borba, Andre (Feinstein); Bowes, David (Coons); Burch, Grace (Blackburn); Busse, Carolyn (Cruz); Cannon, Kate (Lee); Carle, David (Leahy); Chabot, Erica (Leahy); Chris Gaskill (Contact); Colmore, Wendy (SAA); D'Ercole, Jed (Hirono); Douglas, Danielle E. (OLA) (b) (6)); Dowd, John (Leahy); Escalona, Prim (USAALN); Ferguson, Andrew (McConnell); Fincher, Sydney (Tillis); Flaherty, Rachel (Whitehouse); Foord, Chesna (Feinstein); Ford, Natalie (Hawley); Foti, Riley (Durbin); Gagliardone, Lucia (Leahy); Garcia, Casey (Whitehouse); Ge,Tiffany (McConnell); Gilsdorf, Andrea (Sasse); Heins, Jennifer (Grassley); Hill, Audra (Coons); Ho, Andy (Lee); Jackson, Karl (SAA); James, Alice (L. Graham); James, Ellen (Hawley); Johnston, Joseph (Secretary); Josh Fanning (Contact); Kelsey, Joel (Blumenthal); Kimura, Christie (Hirono); Kirchner, Mary (Kennedy); Kuskowski, Jennifer (McConnell); Lawson, Michael (Blumenthal); Kingo, Lola A. (OLP); Long, Sydnie (Cruz); Lovell, Paige (Cornyn); Mallin, Blair (Klobuchar); Downer, Matthew (OLP); McDonald, Kevin (Leahy); Mead, Scott (SAA); Mentzer, Tom (Feinstein); Moser, Chelsea (Coons); Nolan, Blaine (Hirono); OGrady, Mimi (Cruz); Ott, Andrew (Secretary); Packer, Megan (Cruz); Mehta, Hemen (DPCC); Peer, Sarah (Sasse); Photo (SAA); SAA Police Ops; Pollard, Beatrice (Schumer); Reema Dodin; Reeves, Nikki (Hawley); Reuschel, Claire (Durbin); Rice, Kelicia (Sasse); Rotering, Charles (Durbin); Russell, Adam (Feinstein); SAA SRS Hearings; Sanchez, Jeff (Coons); Saunders, Chris (Leahy); Scheduler (Booker); Scheduler (Booker); Schulze, Angela (Tillis); Schwartz, Charlotte (Blumenthal); Seigle, Leah (Whitehouse); Serrano, Andrew (Booker); Shirley, Raven (Sasse); Slevin, Chris (Booker); Suric, Stefan (Booker); Swanner, Bob (SAA); Teetsel, Eric (Hawley); Temple, Courtney (Tillis); Tomlinson, Elliott (Tillis); Toomajian, Kathryn (Leahy); Tratos, Elizabeth (Secretary); Wait, Mark (Lee); Wiesenberg, Jane (Booker); Williford, Seth (Tillis); Blau, Zachary (OLP); Ziegler, Emily (Cornyn)
Sent: July 21, 2021 10:58 AM (UTC-04:00)

July 21, 2021

NOTICE OF COMMITTEE HEARING

The Senate Committee on the Judiciary has scheduled a hearing entitled "Nominations" for Wednesday, July 28, 2021 at 10:00 a.m. in Room 226 of the Dirksen Senate Office Building.

By order of the Chair.

Bryan Palmer
Hearing Clerk | Senate Judiciary Committee
(b) (6)
http://judiciary.senate.gov

From: Kingo, Lola A. (OLP)
Subject: [encrypt] Nagala Follow-Up
To: Brest, Phillip (Judiciary-Dem); Bauer, Sarah (Judiciary-Dem); Munk, Raija Churchill (Judiciary-Rep); Kenny, Gabrielle (Judiciary-Rep)
Sent: July 21, 2021 10:35 AM (UTC-04:00)
Attached: Nagala77N.LIMITED.pdf

CONFIDENTIAL

Good morning,

Attached are additional serials in connection with Sarala Nagala's BI. Thank you.

_____

Lola A. Kingo
Chief Nominations Counsel
Office of Legal Policy (OLP)
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Room 4239
Washington, D.C. 20530
(b) (6)

From: Brest, Phillip (Judiciary-Dem)
Subject: RE: Williams Follow-Up
To: Munk, Raija Churchill (Judiciary-Rep); Kingo, Lola A. (OLP)
Cc: Kenny, Gabrielle (Judiciary-Rep)
Sent: July 20, 2021 5:00 PM (UTC-04:00)

Yes, thank you Lola. We'll call Judge Williams then.

From: Munk, Raija Churchill (Judiciary-Rep) (b) (6)
Sent: Tuesday, July 20, 2021 4:49 PM
To: Kingo, Lola A. (OLP) (b) (6) ; Brest, Phillip (Judiciary-Dem) (b) (6)
Cc: Kenny, Gabrielle (Judiciary-Rep) (b) (6)
Subject: RE: Williams Follow-Up

Thank you, Lola.

Raija

From: Kingo, Lola A. (OLP) (b) (6)
Sent: Tuesday, July 20, 2021 4:48 PM
To: Munk, Raija Churchill (Judiciary-Rep) (b) (6) ; Brest, Phillip (Judiciary-Dem) (b) (6)
Cc: Kenny, Gabrielle (Judiciary-Rep) (b) (6)
Subject: RE: Williams Follow-Up

Confirming that 5:30 PM works for Judge Williams. Thank you.

From: Munk, Raija Churchill (Judiciary-Rep) (b) (6)
Sent: Tuesday, July 20, 2021 4:25 PM
To: Brest, Phillip (Judiciary-Dem) (b) (6) ; Kingo, Lola A. (OLP) (b) (6)
Cc: Kenny, Gabrielle (Judiciary-Rep) (b) (6)
Subject: RE: Williams Follow-Up

I have a short meeting scheduled at 5 pm today. I could talk at 5:30 today or any time tomorrow afternoon.

From: Brest, Phillip (Judiciary-Dem) (b) (6)
Sent: Tuesday, July 20, 2021 4:16 PM
To: Kingo, Lola A. (OLP) (b) (6) ; Munk, Raija Churchill (Judiciary-Rep) (b) (6)
Cc: Kenny, Gabrielle (Judiciary-Rep) (b) (6)
Subject: RE: Williams Follow-Up

Works for me if works for others and would be great to get the call out of the way today

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From: Kingo, Lola A. (OLP) (b) (6)
Sent: Tuesday, July 20, 2021 4:14 PM
To: Brest, Phillip (Judiciary-Dem) (b) (6) ; Munk, Raija Churchill (Judiciary-Rep) (b) (6)
Subject: Williams Follow-Up

CONFIDENTIAL

Good afternoon, Phil and Raija,

Judge Omar Williams is available for a call this afternoon at 5:00 PM and can be reached at (b) (6) . Thank you.

_____

Lola A. Kingo
Chief Nominations Counsel
Office of Legal Policy (OLP)
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Room 4239
Washington, D.C. 20530
(b) (6)

From: Munk, Raija Churchill (Judiciary-Rep)
Subject: RE: Nachmanoff Follow-Up
To: Kingo, Lola A. (OLP); Brest, Phillip (Judiciary-Dem)
Sent: July 19, 2021 4:37 PM (UTC-04:00)

Thank you, Lola.

Raija

From: Kingo, Lola A. (OLP) (b) (6)
Sent: Monday, July 19, 2021 2:45 PM
To: Brest, Phillip (Judiciary-Dem) (b) (6) ; Munk, Raija Churchill (Judiciary-Rep) (b) (6)
Subject: Nachmanoff Follow-Up

This is a secure message.

Click here by 2021-07-29 18:45 UTC to read your message.
After that, open the attachment.

More Info

From: Munk, Raija Churchill (Judiciary-Rep)
Subject: RE: Giles Follow-Up
To: Kingo, Lola A. (OLP); Brest, Phillip (Judiciary-Dem)
Sent: July 19, 2021 4:35 PM (UTC-04:00)

Lola, thank you for confirming this.

Raija

From: Kingo, Lola A. (OLP) (b) (6)
Sent: Monday, July 19, 2021 11:54 AM
To: Brest, Phillip (Judiciary-Dem) (b) (6) ; Munk, Raija Churchill (Judiciary-Rep) (b) (6)
Subject: Giles Follow-Up

CONFIDENTIAL

Good morning, Phil and Raija,

In response to your question regarding Patricia Giles bar memberships, Ms. Giles has confirmed she is not a member of the D.C. Bar. Thank you.

_____

Lola A. Kingo
Chief Nominations Counsel
Office of Legal Policy (OLP)
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Room 4239
Washington, D.C. 20530
(b) (6)

From: Munk, Raija Churchill (Judiciary-Rep)
Subject: RE: Heytens Follow-Up
To: Kingo, Lola A. (OLP); Brest, Phillip (Judiciary-Dem); Bauer, Sarah (Judiciary-Dem); Kenny, Gabrielle (Judiciary-Rep)
Sent: July 19, 2021 4:33 PM (UTC-04:00)

Thank you, Lola.

Raija

From: Kingo, Lola A. (OLP) (b) (6)
Sent: Monday, July 19, 2021 11:10 AM
To: Brest, Phillip (Judiciary-Dem) (b) (6) ; Bauer, Sarah (Judiciary-Dem) (b) (6) ; Munk, Raija Churchill (Judiciary-Rep) (b) (6) ; Kenny, Gabrielle (Judiciary-Rep) (b) (6)
Subject: Heytens Follow-Up

This is a secure message.

Click here by 2021-07-29 15:10 UTC to read your message.
After that, open the attachment.

More Info

From: Brest, Phillip (Judiciary-Dem)
Subject: RE: Nachmanoff Follow-Up
To: Kingo, Lola A. (OLP); Munk, Raija Churchill (Judiciary-Rep)
Sent: July 19, 2021 2:56 PM (UTC-04:00)

Thank you Lola

From: Kingo, Lola A. (OLP) (b) (6)
Sent: Monday, July 19, 2021 2:45 PM
To: Brest, Phillip (Judiciary-Dem) (b) (6) ; Munk, Raija Churchill (Judiciary-Rep) (b) (6)
Subject: Nachmanoff Follow-Up

This is a secure message.

Click here by 2021-07-29 18:45 UTC to read your message.
After that, open the attachment.

More Info

From: Kingo, Lola A. (OLP)
Subject: [encrypt] Nachmanoff Follow-Up
To: Brest, Phillip (Judiciary-Dem); Munk, Raija Churchill (Judiciary-Rep)
Sent: July 19, 2021 2:45 PM (UTC-04:00)

CONFIDENTIAL

Good afternoon,

The (b) (6) you flagged as potentially responsive to Michael Nachmanoff's SJQ were disclosed in the Confidential SJQ:

1. (b) (6)
2. (b) (6)

Thank you.

_____

Lola A. Kingo
Chief Nominations Counsel
Office of Legal Policy (OLP)
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Room 4239
Washington, D.C. 20530
(b) (6)

From: Munk, Raija Churchill (Judiciary-Rep)
Subject: RE: Nachmanoff Follow-Up
To: Brest, Phillip (Judiciary-Dem); Kingo, Lola A. (OLP)
Sent: July 19, 2021 1:59 PM (UTC-04:00)

Yes, I can talk tomorrow at 3:30 pm. Thank you both.

Raija

From: Brest, Phillip (Judiciary-Dem) (b) (6)
Sent: Monday, July 19, 2021 1:52 PM
To: Kingo, Lola A. (OLP) (b) (6) ; Munk, Raija Churchill (Judiciary-Rep) (b) (6)
Subject: RE: Nachmanoff Follow-Up

Thanks Lola. 3:30 tomorrow should work for me.

Raija does that work for you, as well?

From: Kingo, Lola A. (OLP) (b) (6)
Sent: Monday, July 19, 2021 1:48 PM
To: Brest, Phillip (Judiciary-Dem) (b) (6) Munk, Raija Churchill (Judiciary-Rep) (b) (6)
Subject: Nachmanoff Follow-Up

CONFIDENTIAL

Good afternoon, Phil and Raija,

Michael Nachmanoff is available for a call tomorrow afternoon at 3:30 PM and can be reached at (b) (6) . Thank you.

_____

Lola A. Kingo
Chief Nominations Counsel
Office of Legal Policy (OLP)
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Room 4239
Washington, D.C. 20530
(b) (6)

From: Brest, Phillip (Judiciary-Dem)
Subject: RE: Senate Questionnaire for Jane Beckering (WD MI)
To: Blau, Zachary (OLP)
Sent: July 19, 2021 1:58 PM (UTC-04:00)

Okay thanks

From: Blau, Zachary (OLP) (b) (6)
Sent: Monday, July 19, 2021 1:56 PM
To: Brest, Phillip (Judiciary-Dem) (b) (6)
Subject: RE: Senate Questionnaire for Jane Beckering (WD MI)

12e had been missing. It's about 100 new pages, starting on p. 1755.

From: Brest, Phillip (Judiciary-Dem) (b) (6)
Sent: Monday, July 19, 2021 1:56 PM
To: Blau, Zachary (OLP) (b) (6)
Subject: RE: Senate Questionnaire for Jane Beckering (WD MI)

What's the correction?

From: Blau, Zachary (OLP) (b) (6)
Sent: Monday, July 19, 2021 1:54 PM
To: Brest, Phillip (Judiciary-Dem) (b) (6) ; Fragoso, Michael (Judiciary-Rep) (b) (6)
Cc: Zubrensky, Michael A (OLP) (b) (6) ; Kingo, Lola A. (OLP) (b) (6) ; McCabe, Shannon (OLP) (b) (6)
Subject: RE: Senate Questionnaire for Jane Beckering (WD MI)

A corrected version of Judge Beckering's attachments, including 12e, has been uploaded to JEFS.

From: Blau, Zachary (OLP)
Sent: Wednesday, July 14, 2021 7:18 PM
To: Brest, Phillip (Judiciary-Dem (b) (6) Kader, Gabe (Judiciary-Dem (b) (6) ; Bauer, Sarah (Judiciary-Dem (b) (6) ; (b)(6) Lane Giardina (Judiciary-Dem) ; Hopkins, Maggie (Judiciary-Dem (b) (6) ; Fragoso, Michael (Judiciary-Rep (b) (6) ; Mehler, Lauren (Judiciary-Rep (b) (6) ; Rodriguez, Tim (Judiciary-Rep (b) (6)
Cc: Zubrensky, Michael A (OLP) (b) (6) ; Kingo, Lola A. (OLP) (b) (6) ; McCabe, Shannon (OLP) (b) (6)
Subject: Senate Questionnaire for Jane Beckering (WD MI)

Good Evening,

Attached is the public portion of the Senate Questionnaire for the following nominee:

Jane M. Beckering, of Michigan, to be United States District Judge for the Western District of Michigan, vice Janet T. Neff, retired.

The confidential portion of the Senate Questionnaire and attachments have been uploaded to JEFS.

Thank you,
Zach

Zachary Blau
Senior Counsel
Office of Legal Policy (OLP)
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530
(b) (6)

From: Kingo, Lola A. (OLP)
Subject: [encrypt] Heytens Follow-Up
To: Brest, Phillip (Judiciary-Dem); Bauer, Sarah (Judiciary-Dem); Munk, Raija Churchill (Judiciary-Rep); Kenny, Gabrielle (Judiciary-Rep)
Sent: July 19, 2021 11:10 AM (UTC-04:00)
Attached: Heytens_Toby_LIMITED_INQUIRY_CLOSING_TRANSMITAL_07_09_2021.pdf

Good morning,

Attached are additional serials in connection with Toby Heyten's BI. Also, Mr. Heyten's confirmed that he has never been a member of the New York Bar. Thank you.

_____

Lola A. Kingo
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(b) (6)