IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM, UNITED STATES HOUSE OF REPRESENTATIVES, Plaintiff, v. ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States, Defendant.	)	Case No. 1:12-cv-1332 (ABJ)

REPLY IN SUPPORT
OF DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION

For over 220 years, political disputes have arisen between the Legislative and Executive Branches over access to information requested by Congress, including the type of information sought by the Committee here. *See* Mem. in Supp. at 22-24. Those disputes often have been contentious. Indeed, the process has even led to serious confrontations between the Branches, including threats of, and votes on, contempt. *See id*. Yet, over the course of that long history, the process of negotiation and accommodation has repeatedly worked without judicial intervention to enable effective congressional oversight while preserving essential Executive Branch interests in national security, ongoing law enforcement operations, and, most relevant to the current dispute, deliberations about how to respond to Congress.

Indeed, in this very case, that process resulted in the production of thousands of pages of documents, including sensitive law enforcement information, as well as hours of testimony and interviews with senior Department officials about Operation Fast and Furious. *See id*. at 11. In light of these and other accommodations, the dispute was narrowed to what the Committee has characterized as the "Obstruction Component" of its investigation. With respect to this specific component, the Department has never taken the position that the "Committee lacks authority to investigate." Opp'n at 2. To the contrary, the Department worked to accommodate the Committee, producing over 1,300 pages of documents in December 2011 to explain the source of an unintentionally inaccurate statement in a February 4, 2011, letter to Senator Grassley, providing numerous briefings, and then offering a further briefing and additional documents in the days before the Committee's vote on contempt. Moreover, the Attorney General referred the allegations about the Operation to the Department's Inspector General ("IG"). *See* Mem. in Supp. at 10, 14-15. After the Committee's Complaint was filed, the IG issued a 471-page report,

following an extensive investigation, addressing the very concerns that have been pursued by the Committee. In conjunction with the issuance of that report, the Department disclosed additional documents referenced in the report that relate directly to the Committee's asserted concerns, and permitted the IG to testify about the report to the Committee. *See id*. at 18.

Ignoring history, the Committee now claims that the constitutionally-based process of negotiation and accommodation threatens harm to the separation of powers and that, absent judicial intervention, the process provides the Committee "with no functional recourse" such that "the constitutional check afforded by congressional oversight disappears." Opp'n at 6. In other words, the Committee claims that because the process is taking longer than the Committee would like, and—as is the case with any process of negotiation and accommodation—has not yielded everything it sought, judicial intervention must be available when one side decides that it no longer wishes to participate in the process.

If validated, the Committee's approach would destabilize the process of negotiation and accommodation on which our constitutional separation of powers rests. Litigation is politically costless, and the lure of obtaining a judicial stamp of approval on one side of a political dispute will be overwhelming. If Congress or the Executive may seek judicial resolution of a dispute whenever either has determined that negotiations are inconvenient or inefficient, neither side will long endure the frustrations and compromises that are inherent in the process. The "implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation," a process that "affirmatively further[s] the constitutional scheme," *United States v. AT&T Co.*, 567 F.2d 121, 127, 130 (D.C. Cir. 1977), will become a historical relic. Indeed, the Court in *Miers* sent us down the wrong path, and it is undisputed that there have now been more suits brought by Congress against the

Executive to enforce a subpoena in the past five years than in the previous 220 years combined. Judicial resolution, not political accommodation, will become the norm.

Convenience, however, has never been a hallmark of the separation of powers. *See INS v. Chadha*, 462 U.S. 919, 944 (1983) ("Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government . . . ."). The Framers believed that the powers provided in the Constitution—messy though they may be in some circumstances when they are invoked—would allow the political Branches to check each other. The Judiciary has long understood the wisdom of letting that political process control, rather than inviting a flood of inter-Branch oversight disputes into Article III courts. And even Congress has understood that the process should be political, not judicial, as it has crafted careful jurisdictional statutes that exclude congressional subpoena enforcement actions against the Executive Branch from federal court. As the Supreme Court has noted, "[w]ith all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution." *Id*. at 959. For more than 220 years, the process of negotiation and accommodation, not judicial decree, has helped to preserve the balance of power between the Branches in this context.

This case, moreover, is a particularly inappropriate vehicle for abandoning course. Not only is the Department willing to provide additional accommodations that relate to the Committee's asserted interest in the matter, but the IG Report—released after the Committee's premature Complaint—has changed the landscape, releasing a vast amount of information and providing a comprehensive and independent assessment of the only remaining issues that are of purported interest to the Committee.

In short, nothing in the Committee's plea for convenience, nor anything in prior decisions, justifies replacing negotiation and accommodation with judicially-enforceable capitulation, to the detriment of our constitutional system.

ARGUMENT

I. ARTICLE III DOES NOT PERMIT JUDICIAL RESOLUTION OF THE COMMITTEE'S POLITICAL DISPUTE WITH THE EXECUTIVE BRANCH

A. Viewing the Present Case as a Typical "Subpoena Enforcement" Action Ignores the Fundamental Differences Inherent in Subpoena Disputes Between the Legislative and Executive Branches

1. The precedent cited by the Committee is inapplicable to disputes between the political Branches over subpoenaed information

The Committee asks this Court to treat its suit as it would any other subpoena dispute arising in ordinary litigation. That approach ignores the unique inter-Branch process contemplated under the Constitution and therefore the reality of disputes over subpoenas issued by Congress to obtain information from the Executive Branch. Indeed, the detailed set of precedent and rules that exist to govern subpoena use and enforcement in the criminal, civil, or administrative context stands in stark contrast to the lack of clear rules governing the Executive's response to subpoenas issued by Congress. *See* Mem. in Supp. at 32-33.

That contrast is nowhere more evident than in the very cases cited by the Committee to support its unfounded assertion that this suit is a common occurrence. It is of course true that under certain circumstances federal courts "have reviewed the validity of congressional inquiries," but those inquiries plainly were not "similar to the one at issue here." Opp'n at 14. In contrast to the present case, which involves a political dispute between co-equal Branches of government over access to information, the cases cited by the Committee implicate the responses of *private parties* to congressional subpoenas. *See id*. (citing *McGrain v. Daugherty*, 273 U.S.

135 (1927); *Watkins v. United States*, 354 U.S. 178 (1957); *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491 (1975)). Such individuals, facing civil or criminal sanctions from noncompliance, lack political remedies to aid them in their disagreement with Congress. Suits in which private individuals seek to protect themselves against governmental overreach, as opposed to political disputes between co-equal Branches, are precisely the types of disputes that our Judiciary was intended to adjudicate. *See Raines v. Byrd*, 521 U.S. 811, 829 (1997).[1]

A similar body of precedent has arisen to permit review of subpoenas issued to the Executive Branch in criminal cases. *See* Opp'n at 14-15 (citing, *inter alia*, *United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807); *United States v. Nixon*, 418 U.S. 683 (1974); *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997)). Such cases do not involve inter-Branch disputes, and they are thought justiciable in light of the fact that they occur "in the regular course of a federal criminal prosecution," *Nixon*, 418 U.S. at 697, and therefore implicate the rights of individual defendants. As the D.C. Circuit has recognized, the criminal context provides a poor comparison to the "congressional–executive context," where "[t]he President's ability to withhold information from Congress implicates different constitutional considerations than the President's ability to withhold evidence in judicial proceedings." *In re Sealed Case*, 121 F.3d at 753.

The present case, where Congress seeks to use the Judiciary to subordinate the Executive Branch's confidentiality interests to its own oversight interests, poses fundamental separation of powers concerns that do not exist when individual interests are at stake. The resolution of the merits of the Committee's Complaint in favor of either Branch would establish

[1] Defendant's argument is in no way targeted at all "cases that . . . have political overtones." Opp'n at 13. Indeed, with the exception of *Miers*, and the D.C. Circuit's abrogated decision in *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974), the cases the Committee cites for the proposition that courts "have decided countless cases" with political repercussions involve individuals seeking to have their rights or interests vindicated by the courts. *See* Opp'n at 13 n.5.

a demarcation of political authority and, in so doing, elevate the Judiciary into a general oversight role for which it is ill-equipped. *See infra* at 10-11. Such harms are avoidable and unnecessary in the context of inter-Branch disputes, as Congress has political remedies that are unavailable to private individuals. While the Committee seeks to downplay those remedies here, their existence, and their potency, are unmistakable.

2. Unlike a private individual, Congress possesses extensive political remedies to leverage in negotiations with the Executive Branch

The Committee's Opposition attempts to portray a powerless Congress that lacks remedies, aside from judicial intervention, whenever it concludes that the Executive Branch has improperly withheld information. The Committee does not dispute the existence of its constitutional authorities to pressure the Executive Branch to turn over subpoenaed information. Rather, the Committee appears to view the remedies the Framers chose as simply not "practical" or "functional." Opp'n at 17. But the mere fact that Congress views any particular remedy as unpopular, or politically difficult to achieve in a dispute over documents, does not mean that the remedy should be discounted. *See, e.g.*, *Campbell v. Clinton*, 203 F.3d 19, 23 (D.C. Cir. 2000) (rejecting standing of legislators post-*Raines* to challenge the use of force in Yugoslavia and citing impeachment and withdrawal of appropriations as examples of available legislative remedies); *Ange v. Bush*, 752 F. Supp. 509, 514 (D.D.C. 1990) ("The court does not suggest that any of the above options are appropriate or necessary. Nor does the court suggest that any of them would be politically popular for legislators."). Whatever the difficulty inherent in such legislative remedies, it is undisputed that they have been used (or threatened)—with effect—for centuries to resolve inter-Branch conflicts without resort to the Judiciary. *See, e.g.*, Neal Devins, *Cong. - Exec. Info. Access Disputes: A Modest Proposal - Do Nothing*, 48 Admin. L. Rev. 109, 134 (1996) ("Congress' success is often a byproduct of the numerous weapons in its arsenal that

can be used to punish recalcitrant executive branch officials. . . . These congressional powers are potent."); *see also Nixon v. Sirica*, 487 F.2d 700, 778 (D.C. Cir. 1973) (Wilkey, J., dissenting) ("Congressional control over appropriations and legislation is an excellent guarantee that the executive will not lightly reject a congressional request for information . . . .").

The Committee's more specific concerns about the House's supposed lack of institutional power fare no better. The Committee, for example, seeks to downplay its power over the purse, *see* Opp'n at 18, a power that the Framers 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 (Madison). The Committee decries the use of the power because it would supposedly require, as with all legislation, the approval of both Houses and the signature of the President, or a veto override. Opp'n at 18. But it takes only one House (or even one Committee) to delay or refuse to pass annual appropriations, and appropriations legislation originates in the House. The power of the purse is a potent political remedy. *See Campbell*, 203 F.3d at 23 (noting that "Congress always retains appropriations authority and could have cut off funds for the American role in the conflict"); *see also Laird v. Tatum*, 408 U.S. 1, 15 (1972).

The Committee next suggests that the Department is "woeful[ly] ignoran[t] of the way Congress actually works," asserting that there is "no support whatsoever" for the notion that the "Senate would hold up nominations because the Executive has thwarted the constitutional prerogative of a House committee." Opp'n at 17. But such support is provided *by this very case*. Here, the Committee has worked closely with the Ranking Member of the Senate Judiciary Committee, Senator Grassley, throughout the investigation, and Senator Grassley expressly vowed *to block nominations* if the Department continued its refusal to turn over withheld

documents. *See* 157 Cong. Rec. S2475 (daily ed. Apr. 14, 2011) (statement of Sen. Grassley) ("I have not exercised my right to object to any unanimous consent request on nominations because of this issue yet. However, I want my colleagues and officials at the Justice Department to hear this loud and clear: If that is what it takes, then I will take those actions."); *see also* 157 Cong. Rec. S2765 (daily ed. May 9, 2011). While this power is subject to abuse and misuse, there can be no dispute that it was—whether appropriately or not—employed here.

Finally, the Committee rejects as a viable remedy its ability to put political pressure on the Executive Branch. *See* Opp'n at 19. But the facts of this case prove the contrary. The Committee routinely has issued public statements decrying the Department's response to the Committee's inquiry into Operation Fast and Furious, and Committee Members regularly appeared on television to advocate their position. *See, e.g.*, *Oversight Committee Outlines Case for Contempt over Fast and Furious* (May 3, 2012), *available at* http://oversight.house.gov/release/oversight-committee-outlines-case-for-contempt-over-fast-and-furious/; *see also Issa blasts Obama's '11th hour stunt' in 'Fast and Furious'* (June 20, 2012), *at* http://www.foxnews.com/on-air/on-the-record/2012/06/21/issa-blasts-obamas-11th-hour-stunt-fast-and-furious-hes-creating-executive-privilege-eith. And the Committee for the first time took the extraordinary (and unwarranted) step of holding a sitting cabinet member in contempt in order to make its case to the public. As the Supreme Court has noted, "[t]he Framers created a structure in which '[a] dependence on the people' would be the 'primary control on the government.'" *Free Enter. Fund v. Publ. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3157 (2010); *see also* Mem. in Supp. at 11 (describing Department's extensive production of documents and testimony to Congress). That the public has not responded here with the level of concern that the Committee might have liked suggests a lack of merit in the

Committee's position, not that the Framers were wrong to believe that public opinion would be a powerful check.

Moreover, there is no question in this case that Congress has obtained information that the Executive Branch deems to be highly sensitive, as well as offers to provide additional sensitive information. The fact that the Committee has not received everything it has asked for is not a sign that the process has failed. Indeed, many a successful negotiation leaves both sides unsatisfied.

Certainly the Committee is correct that political remedies do not function "'in a manner similar to a civil action for declaratory relief.'" Opp'n at 18 (quoting *Committee on Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 92-93, *stayed pending appeal*, 542 F.3d 909 (D.C. Cir. 2008) (per curiam)); *see also* Opp'n at 19 (arguing that political remedies would be "very time-consuming"). But that is the point. Because speed was not the Framers' paramount goal, and because the constitutionally-mandated process of negotiation and accommodation is inherently time-consuming and complex, it would be a mistake to require that the available political remedies function in a manner identical to a civil lawsuit. It is precisely because the process of negotiation and accommodation requires compromise, typically obtained through time and struggle, that it is to be favored over judicial resolution.

B. *Raines v. Byrd* Requires Dismissal of This Lawsuit

Questions regarding the proper role of the Judiciary in settling institutional disputes between the political Branches are not new. Such questions arose in this Circuit decades earlier, during the same period that the Circuit was confronting novel issues surrounding congressional subpoenas and Executive Privilege. *See Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974), *abrogation recognized by Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999); *United States v.*

AT&T Co., 551 F.2d 384 (D.C. Cir. 1976). At its root, the issue was the role of the Judiciary in deciding disputes between the political Branches over their institutional powers, with the D.C. Circuit frequently taking the view that an alleged injury to the legislative power of Congress, and thus to its Members, was cognizable under Article III, although the separation of powers concerns posed by such lawsuits often led to dismissal on prudential grounds. *See Kennedy*, 511 F.2d at 435-36 ("It seems to this court axiomatic that, to the extent that Congress' role in the government is thus diminished, so too must be the individual roles of each of its members."); *see also* Mem. in Supp. at 31. This view was strongly opposed by dissenters who envisioned a different role for the courts—one that avoided adjudicating disputes between the Branches, thereby preserving public confidence in the Judiciary and the separation of powers. *See Moore v. U.S. House of Representatives*, 733 F.2d 946 (D.C. Cir. 1984) (Scalia, J., concurring in result), *abrogation recognized by Chenoweth*, 181 F.3d 112; *Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1985) (Bork, J., dissenting), *vacated sub nom. Burke v. Barnes*, 479 U.S. 361 (1987).

In *Raines v. Byrd*, the Supreme Court sided squarely with the dissenters. After an extensive review of political history, which revealed that "in analogous confrontations between one or both Houses of Congress and the Executive Branch, no suit was brought on the basis of claimed injury to official authority or power," the Court explained that our political system was not one in which the Judiciary sat to adjudicate political disputes between the Branches, as "[o]ur regime contemplates a more restricted role for Article III courts":

> "'The irreplaceable value of the power articulated by Mr. Chief Justice Marshall [in *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803),] lies in the protection it has afforded the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action. It is this role, not some amorphous general supervision of the operations of government, that has maintained public esteem for the federal courts and has permitted the peaceful coexistence of the countermajoritarian implications of judicial review

> and the democratic principles upon which our Federal Government in the final analysis rests.'"

521 U.S. at 828-29 (quoting *United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring)); *see also Walker v. Cheney*, 230 F. Supp. 2d 51, 72 n.18 (D.D.C. 2002); *Campbell v. Clinton*, 52 F. Supp. 2d 34, 40 (D.D.C. 1999), *aff'd* 203 F.3d 19 (D.C. Cir. 2000).

Unsatisfied with this result, the Committee would have this Court return to the era prior to *Raines* in which an individual Member with authorization from Congress had standing to sue. But none of the Committee's reasons for doing so has merit.

1. The Committee argues first that *Raines* is irrelevant, because the lynchpin of *Raines* was that the individual legislators who filed suit lacked authorization from a House of Congress. Opp'n at 28-29 (citing 521 U.S. at 829); *see also Miers*, 558 F. Supp. 2d at 70-71. But that is a dramatic and unwarranted narrowing of *Raines*.

To be sure, the Court noted that it "attach[ed] some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in this action." *Raines*, 521 U.S. at 829. But the Committee's reading of that statement as the sole, or even the primary, basis for the Court's opinion would render the first eleven pages of the Court's legal and historical analysis largely irrelevant.

Indeed, the remainder of the opinion makes clear that *Raines* is not so easily dismissed. First, the Court in *Raines* assumed that the injury claimed by the individual Members as a result of the passage of the Line Item Veto Act was "a type of institutional injury (the diminution of legislative power), which necessarily damages all Members of Congress and both Houses of Congress equally." *Id.* at 821. The injury asserted by the Members as individual plaintiffs cannot be distinguished from the injury that would be suffered by Congress as a whole. *See Barnes*, 759 F.2d at 69 (Bork, J., dissenting) ("[I]f Congress may sue under these circumstances,

it should follow that a congressional plaintiff may sue whenever he plausibly alleges an actual impairment of his lawmaking powers. The harm, in each case, is of the same kind – an injury to lawmaking powers."). Thus, *Raines* stands for the proposition that the institutional injuries of coordinate political Branches are not appropriately resolved via Article III actions in the absence of personal, private injury. Yet that is precisely the sort of injury the Committee asserts here.

Second, the Court's historical analysis was not limited to lawsuits brought by individual Members of Congress against the Executive Branch. 521 U.S. at 826. The Court noted, for example, that plaintiffs' theory of standing premised on a diminution of political power would apply equally to officials of the Executive Branch, such as the President, who would be able to sue Congress to challenge perceived limitations on the President's institutional authority in a host of areas, including suits seeking to invalidate statutes that purportedly limited the President's ability to remove Executive officials. *See, e.g.*, *id.* at 828 ("If the appellees in the present case have standing, presumably President Wilson, or Presidents Grant and Cleveland before him, would likewise have had standing, and could have challenged the law preventing the removal of a Presidential appointee without the consent of Congress."). Lack of authorization within the Executive Branch cannot explain the Court's concern there, because the President could always "authorize" himself to sue Congress for perceived violations of his Article II authority. The Court's refusal to allow such suits to proceed thus arose not from concerns about "authorization," but rather from concern about the proper, and "more restricted," role of Article III courts in our Federal system. *Id.*

Finally, even if authorization were the test, it is unclear whether authorization from a single House of Congress would suffice to establish standing to sue. Indeed, if authorization from a single House of Congress were sufficient to permit judicial suit, then the House could, for

example, authorize suit against the Senate for filibustering legislation that had passed the House. But judicial intervention into such a plainly political dispute is precisely the result that the Court in *Raines* sought to avoid. *Id*.; *see also Buckley v. Valeo*, 424 U.S. 1, 138, 140 (1976).

2. The Committee next asserts that the holding of *Raines* is limited to suits that entail "essentially *intra-branch* disputes," such that a legislator's dispute is with the Members of Congress who oppose his or her position. Opp'n at 31. This reading again collides with the analysis in *Raines*, where the Court examined historical practice to determine whether suits were brought in "analogous confrontations between one or *both Houses of Congress* and the Executive Branch" and thought it important that our judicial system equally foreclosed lawsuits brought by the Executive against Congress. 521 U.S. at 826 (emphasis added). It is of course true that Congress's political remedies, such as the repeal of legislation, often depend on a Member of Congress obtaining the support of fellow Members to remedy the asserted institutional injury. But that same issue arises in connection with the present case, where the Committee might, as it repeatedly complains in its Opposition, need to levy broader support in Congress to apply pressure on the Executive Branch to achieve its ends. *See supra* at 6-9.

3. The Committee cites to *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974), and *AT&T*, suggesting that those cases, rather than *Raines*, should govern. Of course, as the latest pronouncement from the Supreme Court, *Raines*, not *Senate Select* or *AT&T*, controls this Court's decision. But in any event, neither case can bear the weight the Committee seeks to place on it. In *Senate Select*, the Court never addressed the jurisdictional issue presented here, and the Supreme Court has made clear repeatedly that jurisdictional principles are not established *sub silentio*. *See, e.g., United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952). And *AT&T* is even less on point on this issue, as it did

not involve a suit by the Legislative Branch at all. Although the court characterized the case as a "clash of the powers of the legislative and executive branches," the suit was brought by the Executive Branch against a private entity concerning the latter's "legal duty" as the recipient of a congressional subpoena. 551 F.2d at 389. The existence of a private entity seeking to define its legal obligations pursuant to a congressional subpoena raises issues about the "adjudication of individual rights" that do not exist in the present case. *Cf. Barnes*, 759 F.2d at 67 (Bork, J., dissenting) ("There was, in *Chadha* as in the cases the Court cited, an aggrieved individual who sought relief that ran only against the Executive Branch: that satisfied the injury-in-fact, causation, and redressability requirements of article III.").

4. Finally, the Committee asserts that, based on *Miers* and *United States House of Representatives v. United States Department of Commerce*, 11 F. Supp. 2d 76 (D.D.C. 1998), it has suffered an "informational injury." Opp'n at 24-27. As an initial matter, it is difficult to understand why, pursuant to *Raines*, the nature of the institutional injury asserted by a political body is relevant to the jurisdictional inquiry. The Committee could not plausibly assert that the individual Members in *Raines*, had they asserted harm to their official power from an inability to obtain information from the Executive Branch, would have been any more successful in obtaining review of their political dispute.

Even assuming that the label applied to the Committee's institutional injury is somehow relevant to the *Raines* analysis, the Committee's focus on its authority to investigate the Department misses the point. The Department has never disputed, and does not dispute here, that Congress may conduct oversight of the Executive Branch, but it does dispute the notion that Congress has any *judicially enforceable* "right," as found in the cases upon which the Committee relies, to the particular information sought in the course of its oversight. In other words, unlike

information to which an individual is entitled to by law, *see FEC v. Akins*, 524 U.S. 11 (1998), the Committee's asserted "right" to obtain information from the Department is countered by the Executive's "right," embodied in the assertion of Executive Privilege, to confidentiality.[2] *See* Mem. in Supp. at 34. Moreover, if Congress were able to create standing for individual Members or the body as a whole by simply providing statutory authorization for such lawsuits, then the constitutional limitations embodied in *Raines* would be meaningless.

II. THE COURT LACKS STATUTORY SUBJECT MATTER JURISDICTION OVER THIS SUIT AND THE COMMITTEE LACKS A CAUSE OF ACTION UNDER WHICH ITS CLAIMS MAY PROCEED

A. This Court Lacks Statutory Subject Matter Jurisdiction

Consistent with this constitutional framework, Congress itself has enacted a statutory framework that denies this Court subject-matter jurisdiction here.

1. Section 1331 does not provide jurisdiction

The Committee asserts erroneously that jurisdiction over congressional subpoena enforcement actions against Executive Branch officials has existed since 1976 under 28 U.S.C. § 1331. *See* Opp'n at 50. That argument would render the text of 28 U.S.C. § 1365 nonsensical, and it is at odds with decades of congressional understanding of Sections 1331 and 1365.

It is undisputed that, prior to 1976, Section 1331 did not provide the federal courts with subject matter jurisdiction over actions such as the one here. In 1976, Congress removed the $10,000 amount-in-controversy requirement for actions "brought against the United States, any

[2] The Committee also asserts in passing that the possibility that no private party exists to challenge the actions of the Executive mandates review. *See* Opp'n at 29. However, that "is not a reason to find standing." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974) ("Our system of government leaves many crucial decisions to the political process. The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing."); *see also Walker*, 230 F. Supp. 2d at 69 n.14.

agency thereof, or any officer or employee thereof in his official capacity." Pub. L. No. 94-574, § 2, 90 Stat. 2721 (1976); *see also Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 366 F. Supp. 51, 59 (D.D.C. 1973). The Committee contends that subject matter jurisdiction over actions to enforce congressional subpoenas against Executive Branch officials was thus vested in this Court. But the Committee is wrong.

First, the Committee misunderstands the purpose of the 1976 amendment to Section 1331. That amendment was intended to remove a "technical barrier[] to the consideration on the merits of citizens' complaints against the Federal Government," H.R. Rep. No. 94-1656, at 3 (1976); *see* S. Rep. No. 94-996, at 2 (1976), and reflected a concern that "aggrieved private persons" could not bring their claims, H.R. Rep. No. 94-1656, at 15; *see* S. Rep. No. 94-996, at 15. Neither of the reports accompanying the legislation discussed congressional subpoena enforcement actions, or even mentioned *Senate Select*, to which the Committee claims the amendment is responsive. *See* H.R. Rep. No. 94-1656; S. Rep. No. 94-996.[3]

Second, the Committee's argument is inconsistent with the text and history of Section 1365. In 1978, Congress passed Section 1365, which sought to give this Court jurisdiction over Senate subpoena enforcement actions against "any entity acting or purporting to act under color or authority of State law [or] any natural person," but explicitly excluded from that jurisdictional grant suits brought against "an officer or employee of the Federal Government acting within his official capacity." Pub. L. No. 95-521, § 705, 92 Stat. 1824 (1978) (codified as amended at 28 U.S.C. § 1365). Indeed, in a report accompanying Section 1365, the Senate Committee on Governmental Affairs made clear that federal courts lack subject matter jurisdiction over

[3] In fact, a previous version of the bill (eliminating the amount-in-controversy requirement) had been introduced in 1970, three years before *Senate Select*. *See* S. Rep. No. 94-996, at 3.

congressional subpoena enforcement actions. *See* S. Rep. No. 95-170, at 16 (1977) ("Presently, Congress can seek to enforce a subpena only by use of criminal proceedings or by the impractical procedure of conducting its own trial."); *see also In re Application of the U.S. Senate Permanent Subcomm. on Investigations*, 655 F.2d 1232, 1238 (D.C. Cir. 1981) ("Prior to 1978 Congress had only two means of enforcing compliance with its subpoenas: a statutory criminal contempt mechanism and the inherent congressional contempt power." (footnotes omitted)); *id.* at 1238 & n.28 (explaining that the Act creating § 1365 is "relatively simple" and "does not . . . include civil enforcement of subpoenas by the House of Representatives"); Cong. Research Serv., Cong.'s Contempt Power and the Enforcement of Cong. Subpoenas 23 (2012) ("Although the Senate has existing statutory authority to pursue such an action, there is no corresponding provision applicable to the House."). That report also made clear that "a future statute" might be needed to "specifically give the courts jurisdiction to hear a civil legal action brought by Congress to enforce a subpena against an executive branch official." S. Rep. No. 95-170, at 89.

Third, the text of the 1996 amendments to Section 1365 further undermines the Committee's interpretation. In those amendments, Congress sought to provide this Court with jurisdiction over Senate subpoena enforcement suits brought against Executive officials whose "refusal to comply is based on the assertion of a personal privilege or objection," while retaining the exclusion for suits brought in the face of an authorized assertion of "governmental privilege." Pub. L. No. 104-292, § 4, 110 Stat. 3459 (1996); *see also* H.R. Rep. No. 100-1040, at 2 (1988) (Section 1365 was crafted "to assure that the courts would not become the forum for resolving disputes between the President and the Senate over whether executive privilege can be asserted").

In sum, following the amendment of Section 1331 in 1976, Congress acted in 1978 and 1996 to provide statutory jurisdiction over subpoena enforcement actions, but expressly prohibited, or limited, such jurisdiction with respect to officials of the Executive Branch. Thus, Section 1365, as it exists today, provides for jurisdiction only with respect to Senate enforcement suits brought against officials whose refusal is based on a personal objection or privilege. If, as the Committee asserts, this language does not in fact limit such jurisdiction, because the 1976 amendment to Section 1331 provided for jurisdiction with respect to all Executive Branch officials, then Congress's subsequent actions and the current limiting language of Section 1365 would be meaningless. That would be an incorrect construction of the applicable statutes. *See United States v. Project on Gov't Oversight*, 616 F.3d 544, 561 (D.C. Cir. 2010).[4]

2. Section 1345 does not provide jurisdiction

Section 1345 gives courts jurisdiction over suits prosecuted by the United States "to prevent interference with the means it adopts to exercise its powers of government and to carry into effect its policies." *United States v. Hill*, 694 F.2d 258, 267 n.34 (D.C. Cir. 1982) (citation and emphasis omitted). The Committee argues that Congress is "part of the United States," Opp'n at 51, and that district courts therefore have jurisdiction under 28 U.S.C. § 1345 over suits commenced by congressional committees, *see* Opp'n at 51-53. This argument fails.

Congress lacks the ability under the Constitution to exercise the Executive authority conferred by Section 1345. *See Buckley*, 424 U.S. at 138 ("[I]t is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be

[4] *United States v. AT&T* is not to the contrary. In *AT&T*, the court exercised jurisdiction over a suit brought by the Executive Branch against a private party, holding that the amount-in-controversy requirement had been met. 551 F.2d at 389. The case did not hold that courts have jurisdiction over congressional subpoena enforcement actions brought against Executive Branch officials; it just explained the recent amendment to Section 1331. *See id.* at 389 n.7.

faithfully executed.'" (quoting U.S. Const. art. II, § 3)). It is not the role of the Legislative Branch to assert the sovereign interests of the United States in court; indeed, those who are not Officers of the United States may not constitutionally "conduct[] civil litigation in the courts of the United States for vindicating public rights." *Id.* at 140. The Committee simply lacks the constitutional ability to file suit "for a breach of the law." *Id.* at 138; *see Watkins*, 354 U.S. at 187 ("Congress [is not] a law enforcement or trial agency.").

Moreover, the Committee's reading of Section 1345, like its reading of Section 1331, is at odds with any sensible approach to statutory construction. As the Committee could have it, the federal courts have had jurisdiction over congressional subpoena actions since 1948, when Section 1345 was enacted. But if that were the case, then Congress's enactment of Section 1365 was a meaningless and redundant act. In short, despite the Committee's strained reading to the contrary, Section 1345 "is simply inapplicable." *Senate Select*, 366 F. Supp. at 57.[5]

B. The Committee Lacks a Cause of Action Under Which its Claims May Proceed

A "cause of action is a necessary element" of any claim. *Davis v. Passman*, 442 U.S. 228, 239 (1979). In its Complaint, the Committee cites the Declaratory Judgment Act ("DJA"),

[5] The Committee's approach is also at odds with 28 U.S.C. § 516, which provides that litigation "in which the United States . . . is a party, or is interested" is reserved to the Department, 28 U.S.C. § 516, absent "an express congressional directive to the contrary," *Marshall v. Gibson's Prods., Inc. of Plano*, 584 F.2d 668, 676 n.11 (5th Cir. 1978); *see Mehle v. Am. Mgmt. Sys., Inc.*, 172 F. Supp. 2d 203, 205 (D.D.C. 2001) (requiring "explicit statutory language vesting independent litigation authority"). The Committee has not and cannot identify any such directive. It cites 2 U.S.C. § 130f, but that provision only allows House Counsel to appear in federal court "without having to comply" with local rules, and even then only "to carry out counsel functions." *Orta Rivera v. Cong. of U.S. of Am.*, 338 F. Supp. 2d 272, 275 (D.P.R. 2004). Such language is obviously insufficient. *See Marshall*, 584 F.2d at 676-77; *Mehle*, 172 F. Supp. 2d at 206; *see also FEC v. NRA Political Victory Fund*, 513 U.S. 88, 92-98 (1994). The Committee also offers as authority House Rules and resolutions, but these do not provide the requisite authorization either. *See Chadha*, 462 U.S. at 955; *Senate Select*, 366 F. Supp. at 56 n.8.

28 U.S.C. §§ 2201, 2202, as its sole cause of action, *see* Compl. ¶ 22. In its opposition to the Motion to Dismiss, the Committee argues as well that it has a cause of action directly under the Constitution. Opp'n at 32. The Committee's claims may not proceed under either theory.

1. The Declaratory Judgment Act does not provide a cause of action

The DJA does not create a cause of action, it creates a remedy. *Buck v. Am. Airlines, Inc.*, 476 F.3d 29, 33 n.3 (1st Cir. 2007). Although the Committee disputes this conclusion, in each of the Supreme Court cases on which the Committee relies, the Court merely determined that relief could be available under the DJA in the context of an underlying (contractual) right. *See Skelly Oil Co. v. Phillips Petro. Co.*, 339 U.S. 667, 670-71 (1950); *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 274 (1941); *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 242 (1937).[6] The Committee argues as well that the plain language of the DJA supports its interpretation. The language of the statute is not plain, however, and even if it were, it still would not control. *See C&E Servs., Inc. of Wash. v. D.C. Water & Sewer Auth.*, 310 F.3d 197, 202 (D.C. Cir. 2002) (holding that plaintiff could not proceed under DJA even though it met textual requirements of DJA).

The Committee then claims that relief is unavailable under the DJA only when a separate statute expressly *proscribes* such relief. *See* Opp'n at 36-37. But courts have made clear that relief is available under the DJA only when a litigant "first ha[s] a cognizable cause of action under" a separate source of law. *Superlease Rent-A-Car, Inc. v. Budget Rent-A-Car, Inc.*, No. 89-0300, 1989 WL 39393, at *3 (D.D.C. Apr. 13, 1989); *see also Schnapper v. Foley*, 667 F.2d

[6] Other cases cited by the Committee either held that relief was unavailable under the DJA, *see Schilling v. Rogers*, 363 U.S. 666, 677 (1960); *Coffman v. Breeze Corp.*, 323 U.S. 316, 324-25 (1945), or did not discuss whether the DJA provides an independent cause of action, *see AT&T*, 551 F.2d 384 (not mentioning the DJA); *United States v. House of Representatives*, 556 F. Supp. 150, 153 (D.D.C. 1983) (holding that it would not consider an action brought under the DJA).

102, 116 (D.C. Cir. 1981) (holding that separate statute "provide[d] no private right of action that [wa]s available" to plaintiffs); *Seized Prop. Recovery, Corp. v. U.S. Customs & Border Protection*, 502 F. Supp. 2d 50, 64 (D.D.C. 2007) (Kay, Magistrate J.) (holding that plaintiff had not "specif[ied] any cause of action *through which* the Court" could "grant declaratory relief"); *Buck*, 476 F.3d at 34 (holding that plaintiffs "[l]ack[ed] a federal-law cause of action").

The Committee also quotes from a portion of *Miers* in which the Court, analogizing a congressional subpoena enforcement action to an anticipatory patent infringement case,[7] concluded that the issues it faced were better considered under the DJA than in the habeas action that would, in the Court's view, inevitably follow dismissal of the suit. *See* 558 F. Supp. 2d at 83. This reasoning is unpersuasive: a habeas action was not inevitable there, and it is most certainly not inevitable here, where the dispute relates to the Committee's access to Executive Branch documents. Should this Court dismiss the case, the next logical step for the Committee would be negotiation, not arrest and detention.

2. The Committee has no cause of action under the Constitution

On this issue, the parties appear to be in limited agreement: courts should not find implied rights of action in the Constitution if the party to be benefited can substantially achieve its ends without the implied cause of action. *See* Mem. in Supp. at 40-41; Opp'n at 38. Indeed, the Committee notes that its contempt power "*rests solely upon the right of self-preservation*," and argues that the "same constitutional logic" allows Congress to sue to enforce its subpoenas. Opp'n at 38 (citation omitted). Thus, the Committee concedes that the Court should find an

[7] The Committee analogizes itself to a litigant seeking pre-enforcement review of a criminal statute. *See* Opp'n at 35-36. This analogy fails. The Committee is affirmatively seeking documents, not trying to avoid future civil liability or prosecution.

implied cause of action in the Constitution for Congress to sue to enforce its subpoenas[8] only if needed "*to enable the public powers given to be exerted*." *Id.* (citation omitted).

But there is no such need here. Even though congressional committees may not "invoke judicial power" to obtain enforcement of their subpoenas,[9] *Reed v. Cnty. Comm'rs of Del. Cnty., Pa.*, 277 U.S. 376, 389 (1928), congressional committees have for two centuries proceeded "[b]y means of [their] own process," *id.* at 388, and have provided effective oversight of the Executive Branch. *See also supra* at 6-9 (discussing Congress's political remedies). Because congressional committees can obtain "meaningful redress" without judicial assistance—and indeed because the House Committee has done so here, *see Hearing Before the H. Comm. on Oversight and Gov't Reform*, 112th Cong. (2012) (attached to Mem. in Supp. as Ex. F at 1) (statement of Chairman Issa) ("[W]e can help participate in making sure it never happens again.")—this Court should not "fashion a new, judicially crafted cause of action," *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001); *see Minneci v. Pollard*, 132 S. Ct. 617, 626 (2012); *Wilkie v. Robbins*, 551 U.S. 537, 562 (2007); *Schweiker v. Chilicky*, 487 U.S. 412, 429 (1988); *United States v. Stanley*, 483 U.S. 669, 683 (1987); *Bush v. Lucas*, 462 U.S. 367, 388 (1983).

III. IN ANY EVENT, THIS COURT SHOULD NOT EXERCISE JURISDICTION TO ADJUDICATE THIS POLITICAL DISPUTE BETWEEN THE BRANCHES

For centuries, the political Branches have resolved their disputes over information through a process of negotiation and accommodation rather than litigation. That fact is a product

[8] The Constitution does not itself oblige those in receipt of congressional subpoenas to respond; this is a suit to enforce a subpoena, not to enforce the Constitution.

[9] Citing *McGrain*, the Committee emphasizes its "constitutionally implied right to compel the production of documents." Opp'n at 37. But *McGrain* was a habeas action brought by a subpoenaed witness and thus said nothing about Congress's ability to seek judicial enforcement of its subpoenas.

of the constitutional structure created by the Framers, designed to preserve the separation of powers, and the process thus "affirmatively further[s] the constitutional scheme." *AT&T*, 567 F.2d at 130. The D.C. Circuit has made clear that this constitutionally-grounded process of "compromise" is to be preferred over "historic confrontation." *AT&T*, 551 F.2d at 394; *see also id.* (declining to intervene in inter-Branch informational dispute and stating that "compromise worked out between the branches is most likely to meet their essential needs and the country's constitutional balance"). Accordingly, even if this Court had jurisdiction, it should not exercise it here.

The Committee does not dispute that this Court retains the discretion to allow the constitutionally-mandated negotiation and accommodation process to continue. Instead, the Committee takes the opposite approach, recommending that the Court expressly exercise that discretion in order to resolve definitively the issues of "great public importance" that are presented by this case. Opp'n at 44. According to the Committee, that result is justified by the value of "convenience," *id.* at 45, as a judicial decision would "terminate . . . uncertainty" around the issues of Executive Privilege and the competing needs of the political Branches with respect to the information at issue, *id.* at 43-44 (quotation mark and citation omitted).

Although convenience and avoiding legal uncertainty may motivate courts to exercise discretion over the typical civil action, *see id.* at 43 (citing *Nat'l R.R. Passenger Corp. v. Consol. Rail Corp.*, 670 F. Supp. 424 (D.D.C. 1987)), this is not such a case. Indeed, the very factors relied upon by the Committee, including the all-or-nothing result imposed by judicial resolution and the "public importance" of the issues at stake, are the reasons that courts should not intervene in this type of dispute. *See AT&T*, 551 F.2d at 394 ("A court decision selects a victor, and tends thereafter to tilt the scales."); *see also Winpisinger v. Watson*, 628 F.2d 133, 140 (D.C.

Cir. 1980) (holding that prudential barriers justify dismissal of lawsuit, explaining that "[i]n the most basic sense, prudential barriers developed as an adjunct to standing to restrict the courts to their appropriate ambit," a concern that "is sharpened when it would bring two coordinate branches of the government into conflict"). Delay and struggle may be an inconvenient aspect of the negotiation and accommodation process, but that is an intentional, and integral, part of the constitutional system of checks and balances. *See Barnes*, 759 F.2d at 55 (Bork, J., dissenting).

In addition, whatever need might be postulated for the exercise of jurisdiction in some other case, there is no need for such intervention here. Although the Committee claims to have tried unsuccessfully "for many months" to reach an accommodation, Opp'n at 18, the Department has provided the Committee with extensive documents and testimony during that time, and the Committee responded by narrowing the category of documents sought, *see* Mem. in Supp. at 44-45. Yet rather than accept an additional offer of accommodation on the remaining issues, or continue the negotiation, the Committee rushed forward with a contempt vote and with this suit.

The release of the IG Report in September 2012 confirms both the prematurity of the Committee's suit and the lack of need for judicial intervention here. The 471-page IG Report—generated after full access to documents withheld from the Committee—provided an independent and comprehensive examination of the issues that are purportedly the subject of the Committee's interests. The report did not find that the Department intentionally misled Congress. Indeed, the report and additional documents released in conjunction with the report, along with testimony of the IG before the Committee, have comprehensively addressed the Department's response to congressional inquiries, which the Committee has identified as "[t]he outstanding issue in the Committee's investigation." Opp'n at 7.

Despite the release of the IG Report, there has been no recalibration of the Committee's Complaint. Indeed, the Committee goes further, suggesting that the "IG Report is not relevant to the Motion to Dismiss." *Id.* at 45 n.16. But that is clearly incorrect. Regardless of when the Inspector General's investigation began, or whether Congress has independent investigatory authority, or whether the Committee agrees that the information and documents released with the IG Report were privileged, *see id.*, the fact remains that the IG Report gave the Committee and the public a comprehensive independent assessment of the events at issue here, and that it discloses vast amounts of information that the Committee purported to seek in its Complaint.

Given all of that, no matter what motivated the precipitous move towards contempt and litigation, there is no reason now to risk the harm to the negotiation and accommodation process, and the attendant harm to the separation of powers, through judicial intervention under the circumstances here. *See AT&T*, 551 F.2d at 394.

CONCLUSION

For the foregoing reasons, this suit should be dismissed.

Dated: December 17, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2012, I caused a true and correct copy of the foregoing Reply to be served on plaintiff's counsel electronically by means of the Court's ECF system.

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