UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

COMMITTEE ON THE JUDICIARY, UNITED STATES HOUSE OF REPRESENTATIVES, Plaintiff, v. HARRIET MIERS and JOSHUA BOLTEN, in his capacity as custodian of White House records, Defendants.	)	Civil Action No. 1:08cv00409 (JDB)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNTS I AND II

GREGORY G. KATSAS
Acting Assistant Attorney General

CARL J. NICHOLS
Principal Deputy Associate Attorney General

JOHN C. O'QUINN
Deputy Associate Attorney General

JOSEPH H. HUNT
Director, Federal Programs Branch

JOHN R. TYLER (D.C. Bar No. 297713)
JAMES J. GILLIGAN (D.C. Bar No. 422152)
NICHOLAS A. OLDHAM (D.C. Bar No. 484113)
HELEN H. HONG (CA SBN 235635)
STEPHEN J. BUCKINGHAM
Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch

ATTORNEYS FOR DEFENDANTS

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE(S)**

UNITED STATES CONSTITUTION

STATUTES

FEDERAL RULE OF CIVIL PROCEDURE

FEDERAL RULE OF CRIMINAL PROCEDURE

LEGISLATIVE MATERIAL

MISCELLANEOUS

PRELIMINARY STATEMENT

This lawsuit and the relief it seeks are unprecedented. Never in American history has a federal court ordered an Executive Branch official to testify before Congress, and never in American history has the Executive Branch been required by court order to produce documents or a privilege log to Congress. For over two hundred years, when disputes have arisen between the political branches concerning the testimony of Executive Branch witnesses before Congress, or the production of Executive Branch documents to Congress, the branches have engaged in negotiation and compromise and, when necessary, have exercised the panoply of political tools at their disposal to resolve their differences through mutual accommodations. Despite that history, Plaintiff Committee on the Judiciary of the U.S. House of Representatives ("Committee") asks this Court to place itself in the middle of such an inter-branch dispute. If permitted to continue, this suit would fundamentally upset the separation of powers by fixing judicially enforceable rules for a process governed by political accommodations for over two centuries.

Far from presenting any reason to depart from the longstanding practice of requiring Congress and the Executive Branch to resolve such inter-branch disputes without judicial involvement, this case demonstrates the necessity and wisdom of that practice. The Committee's demands strike at the heart of the President's ability to obtain candid advice from his most intimate advisers, and at the very core of his constitutional prerogatives. The Committee does not seek to compel the testimony of just any Executive Branch employee, or the production of just any Executive Branch documents; rather, the Committee seeks the testimony of the President's Counsel and documents from his immediate White House Office created in the exercise (by the President's staff) of a core, constitutional power. Nor has the Committee been stiff-armed by the Executive Branch: the Department of Justice already has produced or made

available to Congress nearly 12,000 pages of documents, and fourteen current or former Department of Justice officials have testified or have been interviewed for over 120 hours.

This case arises in a context in which the Committee's need for White House documents and testimony is at its nadir because the Department's response provided the Committee with extraordinary access to the Department's deliberations and communications with the White House regarding the removal of the U.S. Attorneys. For the Committee to seek White House documents and testimony on top of all of that goes beyond exercising its oversight authority concerning how an Executive Department has carried out statutory functions given to it by Congress. Instead, the Committee's inquest goes directly to the power to nominate and remove officers of the Executive Branch – a quintessentially executive function vested in the President, and the President alone, by Article II of the Constitution. Indeed, the role created for the Congress by the Constitution regarding the nomination and replacement of these officers is a narrow one granted to the Senate, not the House of Representatives. And the Legislative Branch may vindicate its interests without enlisting judicial support: Congress has a variety of other means by which it can exert pressure on the Executive Branch, such as the withholding of consent for Presidential nominations, reducing Executive Branch appropriations, and the exercise of other powers Congress has under the Constitution.

Nor can the Committee rely on mere assertions of wrongdoing by the President or his senior advisers to justify judicial intervention. Article II commits to the Executive the criminal investigative powers, while Congress's "legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events." Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 732 (D.C. Cir. 1974). If Congress believes Executive Branch

officials have broken the law, the Constitution makes clear that Congress cannot proceed to federal court on its own, but must refer those matters to the Executive Branch or exercise the ample powers it possesses under Article I of the Constitution.

In short, the Committee's claim for judicial relief ignores well-established constitutional limits on the Legislative Branch, as well as the judiciary, and would lead the courts into wholly uncharted waters. It is therefore not surprising that at least three separate and independent grounds support dismissal of the entire Complaint as a matter of law.

First, under Raines v. Byrd, 521 U.S. 811 (1997), the Court lacks Article III jurisdiction to entertain this suit. In holding that the plaintiff-Congressmen lacked standing in that case, Raines made clear that the consistent historical practice of resolving inter-branch disputes without resort to the federal courts is highly relevant to the Article III analysis, and that our constitutional regime "contemplates a more restricted role for Article III courts" with respect to disputes concerning the respective supremacy of the political Branches' powers. Id. at 828. As Justice Souter put it in his concurrence, "the fact that [this] dispute involve[s] only officials, and the official interests of those, who serve in the branches of the National Government, [lying] far from the model of the traditional common-law cause of action at the conceptual core of the case-or-controversy requirement," weighed decisively against plaintiffs' Article III standing. Id. at 833 (Souter, J., concurring). These principles apply with even greater force in this context – perhaps the prototypical example of a dispute left to the political branches – and make clear that the Court lacks Article III jurisdiction over this dispute.

The Committee attempts to establish its Article III standing, and therefore this Court's Article III jurisdiction, by claiming that it is suffering an "informational injury." But this Court already has rejected an effort to turn a congressional interest in information into an Article III

injury. In Walker v. Cheney, 230 F. Supp. 2d 51 (D.D.C. 2002), this Court held that the Comptroller General lacked Article III standing to compel the release of documents concerning the composition and conduct of the National Energy Policy Development Group chaired by the Vice President. The same result is required here. The Committee – like the Comptroller General in Walker – claims that it has been deprived of information to which it is entitled; contends that it seeks that information in order to "assess[ ] the need for and merits of future legislative changes"; and argues that the information is necessary to "assist Congress in the discharge of its legislating and oversight functions." Id. at 67 (internal citation omitted); Compl. ¶ 27; Pl's Mem. at 19-20. But the claimed injury here, as in Walker, is not the kind of private, individualized injury that Article III requires. Rather, the asserted injury is an "abstract dilution of institutional legislative power" – the kind of matter that is to be resolved in the give-and-take of the accommodation process, not in the Article III courts. Walker, 230 F. Supp. 2d at 67 (internal quotation marks and citation omitted). Indeed, the "informational injury" alleged by the Committee is one principally of its own creation, resulting from the Committee's decision to reject the White House's offer to make available for interviews numerous White House staff, including close advisers to the President such as the former Counsel to the President and the Deputy Chief of Staff and Senior Adviser to the President.

Second, the Complaint identifies no federal cause of action that authorizes this lawsuit. A plaintiff must have a cause of action; a bare grant of jurisdiction will not suffice. See Alexander v. Sandoval, 532 U.S. 275, 286 (2001). The only federal statute on which the Committee relies as its basis for relief is the Declaratory Judgment Act, which does not create a cause of action. See, e.g., Buck v. Am. Airlines, Inc., 476 F.3d 29, 33 n.3 (1st Cir. 2007)

("Although the plaintiffs style 'declaratory judgment' as a cause of action, the provision that they cite, 28 U.S.C. § 2201(a), creates a remedy, not a cause of action.").

Third, the remedy provided by the Declaratory Judgment Act is an equitable one, and the courts possess the discretion to withhold such a remedy. Avoiding a substantial reworking of the time-tested mechanism for resolving inter-branch disputes over documents and testimony is ample justification for withholding such relief.

Even if this Court somehow were to reach the merits of this case, Counts I and II – together with those portions of Counts III and IV that seek Defendant Miers's testimony – should still be dismissed as a matter of law. For fundamental separation-of-powers reasons, including the President's independence and autonomy from Congress, the President is absolutely immune from testimonial compulsion by Congress or any of its committees. These same principles require that senior presidential advisers like the Counsel to the President also have absolute immunity from such testimony. As Attorney General Reno stressed while advising President Clinton that the Counsel to the President is immune from compelled congressional testimony, "[s]ubjecting a senior presidential advisor to the congressional subpoena power would be akin to requiring the President himself to appear before Congress on matters relating to the performance of his constitutionally assigned executive functions." Assertion of Executive Privilege With Respect to Clemency Decision, 23 Op. O.L.C. 1, 5 (1999), Ex. 24. Absent immunity from such testimony, Congress could invade the President's autonomy and confidentiality by seeking to examine the President's advisers on any given subject in order to gain insight into the President's thinking or decisionmaking or possible future course of conduct. Congress could also attempt to influence the President's decisionmaking by inquiring into certain areas or by probing into matters that are sensitive and ongoing. That immunity is not

somehow lost because Defendant Miers no longer serves as Counsel to the President: the Committee seeks to compel Ms. Miers's testimony solely in relation to her responsibilities to the President as his Counsel and close adviser, not in any individual or private capacity, and the President's interest in protecting the autonomy and confidentiality of his Office concerning those matters continues to exist even though Ms. Miers no longer works in the White House.

The Court should also dismiss Count II as a matter of law. The Committee's claim that it has a legal entitlement to a privilege log with "an itemized description of the documents withheld," Pl.'s Mem. at 36, is without merit. The Committee can point to no statutory or constitutional source for this alleged entitlement because none exists, and the cases on which the Committee relies (involving Freedom of Information Act requests and Rule 26 discovery requests) have no bearing on the present context. Indeed, obligating the President and his senior advisers to provide to Congress detailed logs of their privileged communications any time Congress serves a subpoena on the White House would impose significant burdens and would violate the separation of powers. In a similar context, the Supreme Court rejected the notion that the Executive Branch at its highest level shall bear the initial burden in civil discovery "of invoking executive privilege with sufficient specificity and of making particularized objections" to discovery on a "line-by-line" basis in order to safeguard executive functions and maintain the separation of powers. Cheney v. U.S. Dist. Ct. for the Dist. of Columbia, 542 U.S. 367, 388 (2004).

Ultimately, consideration of the immunity and privilege log questions on the merits only underscores the importance of the threshold obstacles to this unprecedented lawsuit. A definitive judicial resolution of these sensitive separation-of-powers issues – in favor of either party – would forever alter the accommodation process that has served the Nation so well for over two

centuries. So too, a definitive judicial resolution of these issues would invite further judicial involvement in an area where it is well settled that courts should tread lightly, if at all. Such a resolution would be a precarious step toward what "is obviously not the regime that has obtained under our Constitution to date." Raines, 521 U.S. at 828.

For all of these reasons, explained more fully below, the Court should grant Defendants' Motion to Dismiss and deny the Committee's Motion for Partial Summary Judgment.

BACKGROUND

A. Congressional Demands for Executive Papers

Disputes over Congressional demands for information from the Executive Branch date back to the infancy of the United States. In 1792, for example, the House empowered a committee to "call for such persons, papers and records, as may be necessary to assist their" investigation into a failed military campaign by General St. Clair against Indian tribes in Ohio. See Nixon v. Sirica, 487 F.2d 700, 778 (D.C. Cir. 1973) (Wilkey, J., concurring in part and dissenting in part) (generally describing history of Congressional demands for documents from the Executive) (citing 3 ANNALS OF CONGRESS 493 (1972)). President Washington assembled a cabinet to advise him on how to respond to the legislative request for information, recognizing that his response to this first congressional demand would set a precedent and therefore should be well considered. As reflected in Thomas Jefferson's notes, the cabinet advised

> First, that the House was an inquest and therefore might institute inquiries. Second, that they might call for papers generally. Third, that the Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would endanger the public. Fourth, that neither the committee nor the House had a right to call on the Head of a department, who and whose papers were under the President alone, but that the committee should instruct their chairman to move the House to address the President.

Id. (citing 1 WRITINGS OF THOMAS JEFFERSON 189-90 (1905)). Although President Washington did not exercise his Executive prerogative in 1792 to maintain the information related to General St. Clair's campaign, he did determine in 1794 that diplomatic correspondence between the United States and France "should not be communicated," and he decided in 1796 that documents reflecting treaty negotiations with Great Britain should be withheld based on "a just regard to the constitution, and to the duty of my office." Id. (citing 5 J. Marshall, THE LIFE OF GEORGE WASHINGTON 200, 658 (1807)).

Successor administrations likewise undertook the Constitutional exercise of determining what information could be released "for the public good," and what information covered by Executive Privilege should be protected from legislative demands. When information was withheld, conflicts between the two branches would arise, but they consistently were resolved through negotiation and mutual deference and cooperation. For example, President Cleveland refused legislative commands to provide all Department of Justice records relating to the removal of a U.S. Attorney, declaring that his "oath to support and defend the Constitution" required him to "refuse compliance with these demands." 8 MESSAGES & PAPERS PRES. 381 (1898), Ex. 26. Although the Senate adopted a resolution condemning President Cleveland's refusal to produce information, it did not resort to judicial intervention for resolution of the inter-branch dispute. There is thus a longstanding and consistent history of inter-branch negotiation, cooperation, and accommodation with respect to congressional demands for Executive Branch documents and testimony.

"Negotiation between the two branches should thus be viewed as a dynamic process affirmatively furthering the constitutional scheme." United States v. AT&T Co., 567 F.2d 121, 131 (D.C. Cir. 1977); see also United States v. AT&T Co., 551 F.2d 384, 394 (D.C. Cir. 1976)

("A compromise worked out between the branches is most likely to meet their essential needs and the country's constitutional balance."). This process generally results in the provision to Congress of substantial information, but both branches must calibrate the relative importance of a request for information against the Executive's needs for autonomy and confidentiality. Moreover, both Branches must consider the strength of their own positions as the nature of the congressional requests and Executive refusals go from informal (*e.g.*, informal requests and informal declinations) to more formal (*e.g.*, subpoenas and invocation of privilege). Congress, of course, has a variety of means by which it can exert pressure on the Executive Branch, such as the withholding of consent for Presidential nominations, reducing Executive Branch appropriations, and the exercise of other powers Congress has under the Constitution. Ultimately, how much information is conveyed is the result of negotiations in which the two branches attempt to accommodate Congress's legitimate information needs in a manner consistent with the legitimate institutional interests of the Executive Branch. This inter-branch negotiation, cooperation and accommodation "positively promotes the functioning of our system [of government]." AT&T, 567 F.2d at 131.

At no time during the long history of interbranch negotiations and accommodations has a court ordered an Executive Branch official – let alone one of the President's senior advisers – to testify before Congress, nor has the Executive Branch been required by court order to produce documents or a privilege log to Congress. This uniform past practice also has been followed with respect to congressional demands that senior White House advisers appear before congressional committees to justify the President's decisions. Although such advisers have, from time-to-time, appeared before Congress, at no time in the Nation's history has a court ordered a senior White House adviser to testify as a result of a congressional subpoena.

B. Demands For Information And Inter-branch Accommodations During The 110th Congress

Majority control in both Houses changed in 2007 with the 110th Congress. During the last sixteen months, Congress has continued to conduct extensive oversight of, and investigations and inquiries concerning, the Executive Branch. In fact, by the end of July 2007, Congress had already conducted more than 300 investigations and inquiries directed at the Executive Branch; more than 550 Executive Branch employees had given congressional testimony or submitted to Congressional interviews; more than 600 oversight hearings had been held; and more than 430,000 pages of documents had been produced to Congress or made available for review. See Press Briefing by Tony Snow (July 25, 2007), available at www.whitehouse.gov/news/releases/2007/07/20070725-3.html (last visited May 9, 2008). Those activities have, of course, continued over the last nine months. In addition, there have been scores of less formal interactions between the branches, such as briefings for individual Members and staffers, responses to informal requests for assistance or information, and other ways in which the Executive Branch has assisted Congress in gathering information. Except for the present dispute, in none of the numerous inquiries and investigations directed to the White House in this Congress has the White House provided a privilege log detailing the documents sought by Congress. But when it has withheld materials from Congress, the White House has explained the nature of the documents withheld with a degree of detail suitable to the circumstances of the specific request.

Indeed, during this period, the Executive Branch has devoted significant energy to the accommodation process and, consistent with the Nation's longstanding history, has sought to resolve potential disputes through negotiations and cooperation. With the exception of the

present lawsuit, none of the hundreds of other inquiries made by this Congress has resulted in a suit filed by Congress.

C. The Committee's Investigation of the Dismissal of Nine U.S. Attorneys

It is against the backdrop of (or, more to the point, in the face of) two hundred years of Congressional forbearance from seeking judicial intervention, as well as the recent history of significant inter-branch efforts at accommodation, that the Committee brings the present suit. Just as the Senate in 1886 sought information from President Cleveland about the removal of a U.S. Attorney – a power in President Cleveland's view "vested in the President alone by the Constitution" and therefore inappropriate for legislative action or inquiry (8 MESSAGES & PAPERS PRES. 379, EX. 26.) – in this case the Committee issued sweeping demands for information related to the dismissals of nine U.S. Attorneys in 2006 as well as information related to subsequent Executive Branch deliberations about their replacements.

On March 6, 2007, the Committee's Subcommittee on Commercial and Administrative Law ("Subcommittee") held a hearing and commenced a months-long investigation into the dismissals. In order to accommodate the Committee's interests, the Executive has made available to Congress a very substantial number of witnesses and documents.

Beginning on March 6, 2007, the Executive Branch made then-Principal Associate Deputy Attorney General William Moschella available to Congress as a witness,[1] 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 United States Attorneys. In total,

[1] In addition to his testimony, Mr. Moschella provided private briefings to the Committee on February 28, 2007, and March 5, 2007.

these fourteen witnesses testified before or were interviewed by the Committee (or its staff) for over 120 hours. These witnesses and others also testified before the Senate Judiciary Committee. Among the other witnesses appearing before the Senate committee were Sara Taylor, former Deputy Assistant to the President and Director of Political Affairs; J. Scott Jennings, former Special Assistant to the President and Deputy Director of Political Affairs;[2] the former Associate Counsel to the Director of the Executive Office for U.S. Attorneys; and the Interim United States Attorney, Western District of Missouri.

The Executive Branch also has provided Congress with a substantial volume of documents regarding the removal of U.S. Attorneys. The Department of Justice has given 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.[3] The Department also has made available for the Committee's review another 3,750 pages of documents. The nearly 12,000 pages of documents produced or otherwise made available to the Committee have included both internal Departmental communications and communications between the Department and members of the President's staff. Thus, to the extent that the Committee asserts a need for information concerning the White House's communications and discussions with the Department of Justice, the Department already has given or made available

---

[2] Ms. Taylor and Mr. Jennings each cited the President's assertion of Executive Privilege in refusing to answer certain questions before the Senate Committee. See Testimony of Sara Taylor, S. Comm. on the Judiciary: Preserving Prosecutorial Independence (July 11, 2007); Testimony of J. Scott Jennings S. Comm. on the Judiciary: Preserving Prosecutorial Independence (August 2, 2007). The Senate has not formally challenged these invocations.

[3] The remaining documents were provided from the Office of the Associate Attorney General, Office of Legislative Affairs, Executive Office for United States Attorneys, Office of Public Affairs, Office of Legal Policy, and the Justice Management Division. See, e.g., Letter from Richard A. Hertling to John Conyers, Jr. and Patrick Leahy (April 13, 2007), Ex. 7.

to Congress the documents constituting such communications, and has made available for testimony and interviews many senior Department officials.

D. The President's Substantial Efforts To Accommodate Congress And Congress's Subpoenas

On March 9, 2007, two days after requesting documents from the Department of Justice, the Committee wrote to the Counsel to the President, Fred F. Fielding, requesting documents from and interviews with members of the President's staff regarding the dismissals of the U.S. Attorneys. Mr. Fielding responded on March 20, noting that, on behalf of the President, he had been working with the Committee to "accommodate [its] interests, while at the same time respecting the constitutional prerogatives of the Presidency," and continued to seek "a reasonable accommodation so as to provide [the] Committee[] the information [it is] seeking in a way that will allow this President, and future Presidents, to continue to discharge their constitutional responsibilities effectively." Letter from Fred F. Fielding to Patrick Leahy, John Conyers, Jr. and Arlen Specter (March 20, 2007), Ex. 3 at 1.

To that end, Mr. Fielding extended an offer to the Committee that was designed to provide the Committee with substantial information while protecting the President's constitutional prerogatives. In particular, Mr. Fielding extended the President's offer to make available for interviews several senior Presidential advisers: former Counsel to the President Harriet Miers; then-Deputy Chief of Staff and Senior Adviser Karl Rove; then-Deputy Counsel William Kelley; and J. Scott Jennings, Special Assistant in the Office of Political Affairs. Id. Pursuant to that offer of accommodation, the Committee would have been free to question these senior advisers about their communications with persons outside of the White House, including the Department of Justice and Members of Congress, concerning the dismissals of the United

States Attorneys. Id. at 1-2. The offer also provided that "[s]uch interviews would be private and conducted without the need for an oath, transcript, subsequent testimony, or the subsequent issuance of subpoenas." Id. at 2. In addition to interviews, the President offered to provide the Committee with two categories of documents concerning the dismissals of the United States Attorneys: (1) communications between the President's advisers and the Department, and (2) communications between the President's advisers and third parties, including Members of Congress or their staffs. Id.

Notwithstanding the extraordinary nature of the President's offer, and notwithstanding the fact that these interviews and documents would have provided the Committee with substantial information, the next day the Subcommittee voted to authorize the Committee Chairman to issue subpoenas for the testimony of Messrs. Rove, Kelley, and Jennings, and Ms. Miers, as well as for documents. See H.R. Rep. No. 110-423 at n.17 (2007). By letter the following day, the Committee formally rejected the President's accommodation proposal, Letter from John Conyers, Jr. and Linda T. Sánchez to Fred F. Fielding (March 22, 2007), Ex. 4, and on March 28, 2007, demanded production of the documents that Mr. Fielding had offered to provide as part of an accommodation while the parties continued to negotiate over the remaining documents and witnesses. Letter from Patrick Leahy and John Conyers, Jr. to Fred F. Fielding (March 28, 2007), Ex. 5. The Committee's position was that the White House should provide the Committee with information but that the Committee would not provide anything in return (such as a commitment not to continue to seek certain information). In response, Mr. Fielding noted that the President's accommodation proposal "reflects a series of balanced compromises designed to respect and accommodate [the Committee's] interests while also protecting the institution of the Presidency." Letter from Fred F. Fielding to Patrick Leahy and John Conyers,

Jr. (April 12, 2007), Ex. 6 at 1. He therefore declined the Committee's "suggestion to immediately produce the documents that [the President was] prepared to release as part of a carefully and thoughtfully considered package of accommodations designed to avoid shifting the dispute to ground on which [the parties] need not tread." Id. Mr. Fielding also observed that the Committee's "suggestion fails to credit fully the extraordinary nature of the disclosure" the President was prepared to authorize, "and might even prolong the dispute which the President is seeking to resolve in the most expeditious manner possible." Id.

After continued negotiations, the parties were not able to reach a compromise, and on June 13, 2007, the Committee issued two exceptionally broad subpoenas that seek documents created in the exercise (by the President's staff) of a core, constitutional power – the President's Article II power to nominate and remove officers of the United States – as well as testimony regarding the same matters. See Subpoena (Joshua Bolten), Ex. 19. The first subpoena was directed to the President's Chief of Staff, Joshua Bolten, or the appropriate custodian of records, and requested "any and all documents in the possession, custody, or control of the White House related to the Committee's investigation into the preservation of prosecutorial independence and the Department of Justice's politicization of the hiring and firing of United States Attorneys, including possible misrepresentations to Congress and other violations of Federal Law." Id. The subpoena listed the following five broad categories as examples of the documents included within the subpoena's scope:

a. Any and all documents the White House Counsel agreed in the March 20, 2007, letter of Fred F. Fielding, Counsel to the President, to Chairman Leahy, Chairman Conyers, Ranking Member Specter, Ranking Member Smith, and Congresswoman Sánchez to produce in conjunction with off-the-record interviews, including documents consisting of or relating to all communications between any official or employee of the White House and any official or

employee of the Department of Justice or any third party "concerning the request for resignations of the U.S. Attorneys in question."

b. Any and all documents related to the: 1) evaluation of or decision to dismiss former U.S. Attorneys David Iglesias, H.E. "Bud" Cummins, John McKay, Carol Lam, Daniel Bogden, Paul Charlton, Kevin Ryan, Margaret Chiara, Todd Graves, or any other U.S. Attorney(s) dismissed since President Bush's re-election (hereinafter "dismissed U.S. Attorneys"); 2) evaluation of any U.S. Attorney(s) considered for dismissal since President Bush's re-election (hereinafter "U.S. Attorneys considered for dismissal"); 3) the implementation of the dismissal and replacement of the dismissed U.S. Attorneys; and 4) the selection, discussion and evaluation of any possible replacement or interim or acting appointment to fill any vacancy with respect to dismissed U.S. Attorneys and U.S. Attorneys considered for dismissal.

c. Any and all documents related to the involvement of Karl Rove, Harriet E. Miers, William Kelley, J. Scott Jennings, Sara M. Taylor, or any other current or former White House employee or official, in matters set forth in paragraph b, above.

d. Any and all documents related to the testimony of any official at the Department of Justice to the United States Congress regarding any of the matters set forth in paragraph b, above.

e. Any and all documents related to the "reviews by White House staff" that led the President to conclude as of March 20, 2007 . . . that there was no wrongdoing in the mass firings and replacements of U.S. Attorneys since President Bush's re-election, including any information that has led the President to discount evidence obtained by the investigating committees in documents and hearing testimony.

Id.

The second subpoena was directed to the former Counsel to the President Harriet Miers for testimony and documents in her possession, custody, or control regarding the same extremely broad general topics as the subpoena to Mr. Bolten. Subpoena (Harriet Miers), Ex. 20.

E. The President's Response To The Subpoenas

By letter dated June 28, 2007, Mr. Fielding informed the Committee that the President would assert Executive Privilege over the subpoenaed information, and therefore that no documents would be produced in response to the subpoena to Mr. Bolten. Letter from Fred F.

Fielding to Patrick Leahy and John Conyers, Jr. (June 28, 2007), Ex. 9 at 1. Mr. Fielding also informed the Committee that Ms. Miers had been directed by the President, based on his assertion of privilege, not to produce any documents. Id.

Mr. Fielding explained that the "President's assertion of Executive Privilege [was] not designed to shield information in a particular situation, but to help protect the ability of Presidents to ensure that decisions reflect and benefit from the exchange of informed and diverse viewpoints and open and frank deliberations." Id. at 3. "Presidents would not be able to fulfill their responsibilities," he observed, "if their advisers – on fear of being commanded to Capitol Hill to testify or having their documents produced to Congress – were reluctant to communicate openly and honestly in the course of rendering advice and reaching decisions." Id. at 2. Furthermore, he noted, "there [was] no demonstration that the documents and information [the Committee] seek[s] by subpoena are critically important to any legislative initiatives that [the Committee] may be pursuing or intending to pursue." Id. at 1-2. Mr. Fielding referred the Committee to the opinion of Solicitor General and Acting Attorney General Paul Clement that the documents gathered by the Counsel's Office as responsive to the subpoena fell within the scope of Executive Privilege, and that Congress's interests in the documents and related testimony would not be sufficient to override a privilege claim. See Letter from Paul D. Clement to the President (June 27, 2007), Ex. 8.

The Acting Attorney General's opinion provides the Committee with significant information regarding the documents and testimony over which the President had asserted executive privilege. For example, the opinion states that the "initial category of subpoenaed documents and testimony consists of internal White House communications about the possible dismissal and replacement of U.S. Attorneys," and that, among other things, "these

communications discuss the wisdom of such a proposal, specific U.S. Attorneys who could be removed, potential replacement candidates, and possible responses to congressional and media inquires about the dismissals." Id. at 2. The opinion also provides descriptions of the other two categories of documents and testimony over which the President asserted executive privilege: "communications between White House officials and individuals outside the Executive Branch, including with individuals in the Legislative Branch, concerning the possible dismissal and replacement of U.S. Attorneys, and possible responses to congressional and media inquiries about the dismissals"; and "communications between the Department of Justice and the White House concerning proposals to dismiss and replace U.S. Attorneys and possible responses to congressional and media inquiries about the U.S. Attorney resignations." Id. at 5-6.

On July 9, 2007, the Counsel to the President further informed the Committee that the "President [felt] compelled to assert Executive Privilege with respect to the testimony sought from Harriet E. Miers," Letter from Fred F. Fielding to Patrick Leahy and John Conyers, Jr. (July 9, 2007), Ex. 10 at 2, and informed Ms. Miers, through her counsel, that "the President has directed [her] not to provide [the requested] testimony" to the Committee. Letter from Fred F. Fielding to George T. Manning (July 9, 2007), Ex. 11. Notwithstanding the Committee's unwillingness to offer any significant compromise from its position, and notwithstanding the Committee's issuance of the subpoenas, Mr. Fielding again renewed the President's offer to the Committee to provide documents and make available senior Presidential advisers for interviews. Letter from Fred F. Fielding to Patrick Leahy and John Conyers, Jr. (July 9, 2007), Ex. 10 at 2

The following day Mr. Fielding informed Ms. Miers, by letter to her counsel, "that the President has directed her not to appear at the House Judiciary Committee hearing on Thursday, July 12, 2007," based on the advice from the Department of Justice that Ms. Miers "has absolute

immunity from compelled Congressional testimony as to matters occurring while she was a senior adviser to the President." Letter from Fred F. Fielding to George T. Manning (July 10, 2007), Ex. 13. He attached the Department's legal opinion to his letter, which reiterated the Department's long-standing view that the "President and his immediate advisers are absolutely immune from testimonial compulsion by a Congressional committee" because "[s]ubjecting a senior presidential adviser to the congressional subpoena power would be akin to requiring the President himself to appear before Congress on matters relating to his constitutionally assigned functions." See Immunity of Former Counsel to the President From Compelled Congressional Testimony, 31 Op. O.L.C. 1, Ex. 25 at 1-2 (internal quotation marks and citations omitted). The opinion also explained that Ms. Miers's status as the former Counsel to the President did not change the analysis: "Separation of powers principles dictate that former Presidents and former senior presidential advisers remain immune from compelled congressional testimony about official matters that occurred during their time as President or senior presidential advisers." Id. at 3.

F. Ms. Miers's Response To The Subpoena Directed To Her

Ms. Miers, through her counsel, informed the Committee on July 9 and 10, 2007, that "in light of the President's assertion of Executive Privilege, Ms. Miers cannot provide the documents and testimony that the Committee seeks," Letter from George T. Manning to John Conyers, Jr. and Lamar S. Smith (July 9, 2007), Ex. 12, and that, on direction of the President, Ms. Miers would not appear before the Committee. Letter from George T. Manning to John Conyers, Jr. and Linda T. Sánchez (July 10, 2007), Ex. 14. On July 17, 2007, Ms. Miers's counsel explained in more detail that, "[w]hile Ms. Miers of course respects the authority and prerogatives of the Subcommittee, the Committee, and the United States House of

Representatives, she is the former Counsel to the President of the United States and has been specifically directed by him not to appear, not to produce documents in response to the subpoena, and not to provide testimony." Letter from George T. Manning to John Conyers, Jr. (July 17, 2007), Ex. 15 at 1. Thus, "it cannot reasonably be asserted that 'Ms. Miers . . . made her own decision to disregard' the Committee's subpoena." Id. (citation omitted).

G. The Committee's Civil Action

On July 25, 2007, the Committee voted to hold Mr. Bolten and Ms. Miers in contempt and, over three months later, on November 5, 2007, formally reported the contempt resolution to the full House. H.R. Rep. No. 423, 110th Cong., 1st Sess. (2007). Also on November 5, 2007, the Committee sent a letter to the White House setting forth what it termed a "specific proposal." Letter from John Conyers, Jr. to Fred F. Fielding (Nov. 5, 2007), Ex. 16. Again, however, the Committee's offer did not include any compromise on its behalf. Instead, under the Committee's proposal the President would "initially" provide the Committee with copies of documents reflecting communications between his advisers and persons outside the White House relating to the dismissal of the United States Attorneys, make available for Committee review all internal communications among his advisers covering the same topic, and consent to on-the-record interviews of present and former members of his staff. Id. at 1-2. The Committee made no commitment concerning what would happen after these "initial[ ]" steps.

Mr. Fielding responded on November 9, 2007, that, beginning in March 2007, the Committed had "reject[ed] outright the President's . . . proposal of accommodation without offering any proposal in response . . . instead mak[ing] . . . unqualified request[s] for *all documents* sought by the Committee." Letter from Fred F. Fielding to John Conyers, Jr. (Nov. 9, 2007), Ex. 17. Mr. Fielding also pointed out that in the Committee's prior correspondence

purporting to "suggest avenues for further consideration, the proposals ha[d] been substantially the same and one-sided: they propose[d] 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 . . . by, for example, agreeing to limit the scope of the Committee's demands or by forswearing an intention to insist on something less than total acquiescence with the Committee's original demands." Id. at 2. Finally, Mr. Fielding observed that the proposal in the Committee's November 5 letter, like its prior proposals, demanded "that the White House unilaterally commence an open-ended process" of providing the information "without limitation, and without any recognition or regard to the legitimate Executive Branch interests at stake in the controversy." Id. For these reasons, Mr. Fielding explained, the President was unable to accept the Committee's November 5 "specific proposal." Id.

Despite the President's efforts to reach an accommodation, after waiting another three months the full House voted to hold Mr. Bolten and Ms. Miers in contempt of Congress on February 14, 2008. See H. Res. 979, 982 (Feb. 14, 2008), Ex. 21. On February 28, pursuant to 2 U.S.C. § 194, the Speaker of the House certified the report of contempt to the United States Attorney for the District of Columbia. However, the following day, the Attorney General advised the Speaker that 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." Letter from Michael B. Mukasey to Nancy Pelosi (Feb. 29, 2007), Ex. 18. The Department's response was consistent with its long-established position that the criminal contempt statute is inapplicable, and therefore that it will not pursue criminal contempt prosecutions, where an Executive Branch official in good faith relies on the President's assertion of Executive Privilege and testimonial

immunity. E.g., Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege, 8 Op. O.L.C. 101 (1984), Ex. 23.

On March 10, 2008, over a year after the Subcommittee held its first hearing on the dismissals of the United States Attorneys and four months after the parties' last correspondence, and having been provided with access to almost 12,000 pages of documents and the testimony and interviews of fourteen Executive Branch officials, the Committee filed this lawsuit pursuant to House Resolution 980. See H. Res. 980 (Feb. 14, 2008), Ex. 22.

ARGUMENT

The Committee asserts an unprecedented and virtually unbounded authority to seek information from the Executive Branch concerning deliberations among the President's closest advisers and to invoke the jurisdiction of federal courts to compel the production of such information to Congress. Under longstanding precedent, however, Article III jurisdiction does not extend to judicial adjudication of inter-branch disputes concerning Congress's right to information held by the Executive Branch at its highest level. Such disputes have historically been resolved through political accommodation and without judicial involvement, and the Committee's attempted invocation of this Court's jurisdiction goes beyond well-established limits on the judiciary's Article III authority. In addition, even if the Court has Article III jurisdiction, the only statute on which the Committee relies as its basis for relief – the Declaratory Judgment Act – lacks any indication, let alone a clear indication, that the Act was intended to provide the Committee (and thus the House) with a cause of action to enforce subpoenas served on the Executive Branch. And this case is surely an appropriate one in which to exercise the Court's discretion to withhold the equitable remedy under that Act.

Even if the Committee's claims could go forward, the Court should dismiss Counts I and II of the Complaint, as well as those portions of Counts III and IV that seek to compel Defendant Miers's testimony before the Committee. Just as the President himself is absolutely immune from testimonial compulsion by a congressional committee, so too are his immediate advisers, including the Counsel to the President. This immunity is constitutionally based on separation-of-powers principles and is necessary to protect the President's rights to autonomy and confidentiality in the performance of his functions and in his Office. As to Count II, as the Committee implicitly recognizes, no statute, Federal Rule of Civil Procedure or congressional rule having the force or effect of law grants Congress an entitlement to a privilege log whenever it serves a subpoena on the Executive Branch. Nor is there any reason to create such an entitlement. Permitting Congress to exercise such authority over the Executive Branch at its highest level would violate the separation of powers by intruding upon the autonomy and confidentiality of the President's Office.

I. THE COMMITTEE LACKS ARTICLE III STANDING TO BRING THIS SUIT.

This Court lacks Article III jurisdiction over this suit. For over two hundred years, inter-branch struggles have been resolved outside the scope of judicial review under Article III by the political branches exercising the political tools at their disposal to reach accommodation. See, e.g., Raines, 521 U.S. at 826-28. Because this case represents an effort to "judicialize" a "struggle between the branches that is historically unprecedented and that transcends both the specific information sought and the political identity of the Legislative and Executive Branch players involved," Walker, 230 F. Supp. 2d at 52-53, this lawsuit "has no place in the law courts." Moore v. U.S. House of Representatives, 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia, J., concurring in result). Courts sit "neither to supervise the internal workings of the executive and

legislative branches nor to umpire disputes between those branches regarding their respective powers." Id. The Committee has the burden of establishing that it has Article III standing to maintain this extraordinary action. And it cannot satisfy that burden under Raines with respect to the constitutional questions laid before the Court because it does not assert an injury of the kind traditionally capable of vindication through the judicial process. "[F]undamental separation of powers concerns relating to the restricted role of the Article III courts in our constitutional system of government ordain the outcome here." Walker, 230 F. Supp. 2d at 53.

A. The Committee Does Not Raise a Dispute of the Kind Traditionally Thought to be Capable of Judicial Resolution.

"The judicial power of the United States . . . is not an unconditioned authority to determine the constitutionality of legislative or executive acts," but is limited by Article III of the Constitution "to the resolution of 'cases' and controversies.'" Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 471 (1982). "No principle is more fundamental to the judiciary's proper role in our system of government," Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 37 (1976), because "[t]he 'case or controversy' requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded." Allen v. Wright, 468 U.S. 737, 750 (1984). That requirement assumes particular importance in ensuring that the Federal Judiciary respects the "'proper – and properly limited – role of the courts in a democratic society.'" DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 341 (2006) (quoting Allen, 468 U.S. at 737). And it therefore has particular salience in this case, where the Committee asks the Court to disregard the political accommodation process that has been followed for centuries in resolving inter-branch disputes over requests for information and the like without involving the courts.

Among the required elements of an Article III case or controversy, a plaintiff's standing to sue "is perhaps the most important." Allen, 468 U.S. at 750. Standing is "an essential and unchanging part of the case-or-controversy requirement," Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992), assuring that the dispute is of a kind "traditionally thought to be capable of resolution through the judicial process." Allen, 468 U.S. at 752 (internal quotation omitted).

To meet "the irreducible constitutional minimum of standing," Lujan, 504 U.S. at 560, the injury alleged must be "legally and judicially cognizable." Raines, 521 U.S. at 819. "This requires, among other things, that the plaintiff have suffered an invasion of a legally protected interest" and that the dispute be one "*traditionally thought to be capable of resolution through the judicial process*." Id. (emphasis added) (internal quotation marks omitted) (citing, *inter alia*, Lujan, 504 U.S. at 560); see Walker, 230 F. Supp. 2d at 63-64. Injury that does not give rise to a case or controversy "of the sort traditionally amenable to, and resolved by, the judicial process," Vt. Agency of Nat. Res. v. United States ex rel. Stevens, 529 U.S. 765, 774 (2000) (internal quotation marks and citations omitted), as shown by "historical experience," Walker, 230 F. Supp. 2d at 65 (quoting Raines, 521 U.S. at 829), is not judicially cognizable.

"[T]he fact that [this] dispute involve[s] only officials, and the official interests of those, who serve in the branches of the National Government [lying] far from the model of the traditional common-law cause of action at the conceptual core of the case-or-controversy requirement," weighs decisively against any argument that the Committee has standing to maintain this action. Raines, 521 U.S. at 832-34 (Souter, J., concurring in the judgment); see id. at 827-28; Walker, 230 F. Supp. 2d at 740. As the Supreme Court observed in Raines, "[t]he 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 (emphasis added) (quoting United States v. Richardson, 418 U.S. 166, 192 (1974) (Powell, J., concurring)). This is not a suit "between two individuals regarding action taken by them in their private capacities; nor a suit between an individual and an officer of one or another Branch of government regarding the effect of a governmental act or decree upon the individual's private activities." Moore, 733 F.2d at 957 (Scalia, J., concurring in result). Rather, the Committee requests the "direct intermediation of the courts in disputes between the President and the Congress." Barnes v. Kline, 759 F.2d 21, 41 (D.C. Cir. 1985) (Bork, J., dissenting).[4]

Such judicial intervention has been virtually unknown in American jurisprudence and was rejected by the founders as a proper role for courts to play under this understanding of the separation of powers, see id. at 54-57; Raines, 521 U.S. at 828 ("There would be nothing irrational about a system that granted standing in these cases; some European constitutional courts operate under one or another variant of such a regime. *But it is obviously not the regime that has obtained under our Constitution to date. Our regime contemplates a more restricted*

[4]As this Court observed in Walker, "views that the role of the judiciary is properly limited to the adjudication of individual rights were expressed many years ago by two judges questioning this Circuit's now-defunct legislative standing doctrines." 230 F. Supp. 2d at 72 n.18 (citing Barnes, 759 F.2d at 42 (Bork, J., dissenting); Moore, 733 F.2d at 959 (Scalia, J., concurring in result)). Those views were subsequently vindicated by the Supreme Court in Raines. See, e.g., Chenoweth v. Clinton, 181 F.3d 112, 115-16 (D.C. Cir.1999) ("Consequently, the portions of our legislative standing cases upon which the current plaintiffs rely are untenable in the light of Raines.").

role for Article III courts . . . .") (emphasis added; citations omitted). In Raines, the Supreme Court observed that "historical practice appear[ed] to cut against" any notion that inter-branch disputes are of a kind traditionally regarded as falling within the purview of Article III. Id. at 826. In light of the history of "analogous confrontations" between the Legislative and Executive Branches where "no suit was brought on the basis of claimed injury to official authority or power," in Raines the Court concluded that our constitutional regime "contemplates a more restricted role for Article III courts" that does not encompass disputes between the political branches concerning the respective supremacy of their powers. 521 U.S. at 826-, 828; see also id. at 833 (Souter, J., concurring in the judgment) (contrasting "interbranch controvers[ies] about calibrating the legislative and executive powers" with the traditional concept of a case or controversy); Chenoweth v. Clinton, 181 F.3d 112, 113-14 (D.C. Cir. 1999) ("Historically, political disputes between Members of the Legislative and the Executive Branches were resolved without resort to the courts."); Walker, 230 F. Supp. 2d at 72-73.

Here, too, whether viewed as a case about "informational injury" to Congress, as it is cast by the Committee, or simply the impairment of Congress's ability to legislate, "the paucity of evidence that [such a] lawsuit is of the sort traditionally amenable to, and resolved by, the judicial process" demonstrates that the Committee lacks standing to litigate the highly important constitutional questions presented by this case. Id. at 73 (internal quotation omitted); Raines, 521 U.S. at 819. Disputes between the Legislative and Executive Branches concerning access to the records of the Executive Branch are perhaps the paradigmatic example of disputes that have been resolved without resort to judicial process. They have been recurrent since the earliest days of the Republic, see Walker, 230 F. Supp. 2d at 70-71, yet the political Branches have traditionally resolved their differences over access to information through negotiation,

accommodation, and compromise – without involving the Judiciary. Consequently, "few executive-congressional disputes over access to information have ended up in the courts," and the courts, for their part, have been "reluctan[t] to interfere in [such] political battles," In re Sealed Case, 121 F.3d 729, 739 (D.C. Cir. 1997), considering the "nerve-center constitutional questions" raised by these inter-branch disputes. United States v. AT&T, 551 F.2d 384, 394 (D.C. Cir. 1976). As the Court observed in Walker, in no case has the Executive Branch ever been required by court order to produce a document to Congress or its agents. 230 F. Supp. 2d at 70. The same is true with respect to testimony of Executive Branch officials. This case presents no occasion to overturn 200-plus years of constitutional tradition by permitting the Committee to proceed with a suit that could forever upset the separation of powers.

B. The Committee Has Not Demonstrated That It Has Suffered The Kind Of Injury Traditionally Redressed By Article III Courts.

The Supreme Court "ha[s] always insisted on strict compliance with this jurisdictional standing requirement," Raines, 521 U.S. at 819, but as this Court recognized in Walker, the standing inquiry must be "'especially rigorous' [when] reaching the merits of [the] dispute could require deciding whether an action taken by one of the other branches of government was unconstitutional." 230 F. Supp. 2d at 65 (quoting Raines, 521 U.S. at 819); see also Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541-42 (1986); Valley Forge, 454 U.S. at 471. Indeed, the Supreme Court has emphasized repeatedly that a core purpose of Article III's standing doctrine is to safeguard the proper separation of powers by preventing courts from wading into disputes that are better resolved by the political branches of government. See Valley Forge, 454 U.S. at 474 (the judiciary must "refrain from passing upon the constitutionality of an act [of the representative branches] unless *obliged* to do so in the proper performance of [the]

judicial function, when the question is raised by a party whose interests entitle him to raise it") (quotation and alteration omitted) (emphasis added).

The Committee's assertion of standing does not come close to withstanding the "especially rigorous" scrutiny required under the extraordinary circumstances of this case. The Committee maintains that it (and, by extension, the entire House of Representatives) has suffered an "informational injury" that is sufficiently concrete and particularized to satisfy Article III requirements, because it has been denied information that it believes to be "critical to its lawful Investigation." Pl.'s Mem. at 19. The Supreme Court's decision in Raines, and this Court's decision in Walker, demonstrate that this claim is insufficient to establish standing.

As an initial matter, whether cast as an "informational injury" or as an injury to its legislative functions, the Committee lacks the traditional type of "personal injury" required under Article III. Historically, "personal rights" for the purposes of Article III did not attach to "officers of the United States, of whatever Branch, [for they do not] exercise their governmental powers as personal prerogatives in which they have a judicially cognizable private interest. They wield those powers not as private citizens but only through the public office which they hold." Moore, 733 F.2d at 959 (Scalia, J. concurring in result); see also Raines, 521 U.S. at 827-28. The Committee here similarly maintains no personal right, but instead pursues an official, "governmental right," purportedly to vindicate Congress's interest in Article I. Nor does Congress have the constitutional authority to "take care that the laws be faithfully executed" and thereby vindicate "governmental rights" in court, which is assigned to the Executive in Article II, Section 3. Thus, Congress's purported interest does not satisfy Article III. See Raines, 521 U.S. at 821; see also Braxton Cty. Ct. v. West Virginia ex rel. Dillon, 208 U.S. 192, 198 (1908) ("[T]he interest of [a party seeking relief] in this court should be a personal, and not an official,

interest.") (internal quotation omitted). Further, the absence of a personal injury is not overcome merely because an entire Committee – or for that matter an entire House – seeks to vindicate its interests in court. "The constitutional problems would seem to be identical." Barnes, 759 F.2d at 42 n.1 (Bork, J., dissenting) ("No reason appears why the Executive should oppose standing for individual legislators but concede as to a House."). That the committee itself – as opposed to either an individual Member or the House as a whole – is seeking judicial resolution of the dispute, see Pl's Mot. at 20, does not make its official need for information any more "personal" in the constitutional sense. See, e.g., Walker, 230 F. Supp. 2d at 72 n.18.

Moreover, this Court has already rejected an effort to transform such an institutional informational injury into a personal injury sufficient to satisfy Article III. In Walker, the Comptroller General, exercising his broad statutory authority to "carry out investigations and evaluations for the benefit of Congress," id. at 53, brought suit to compel the release of documents concerning the composition and conduct of the National Energy Policy Development Group chaired by the Vice President. Id. at 58. Applying the analysis required by Raines, the Court held that the Comptroller General, acting on behalf of Congress, lacked standing because he had suffered no personal injury (his interests being "solely institutional"), and because his "institutional injury" was "insufficient to confer standing." Id. at 66. The Court concluded that, because the Comptroller General sought the records at issue to "assist Congress in determining whether and to what extent future legislation" concerning energy policy or open government "may be appropriate," and in "conducting oversight of the executive branch's administration of existing laws," the alleged harm amounted at most to an impairment of Congress's general interest in lawmaking and oversight, an "abstract dilution of institutional legislative power"

which was "too vague and amorphous to confer standing." Id. at 67-68 (quoting Raines, 521 U.S. at 821) (other internal quotations omitted).

The Committee alleges the same kind of injury. The Committee – much like the Comptroller General in Walker – claims that it has been deprived of information to which it is entitled; contends that it seeks that information in order to "assess[ ] the need for and merits of future legislative changes," id. at 67; argues that the information is necessary to "assist Congress in the discharge of its legislating and oversight functions"; and identifies various kinds of legislation the Committee might want to consider. See Compl. ¶ 27. Indeed, just as the Committee does here, in Walker the Comptroller General asserted harm to Congress's ability to consider specific "future legislative changes." Walker, 230 F. Supp. 2d at 67. But here, as in Walker, that purported injury is nothing more than an "abstract dilution of institutional legislative power," not the kind of "concrete injury" that is sufficiently "distinct and palpable" to establish plaintiff's standing. Id. at 67-68 (internal quotation marks and citation omitted); see also Raines, 521 U.S. at 826. To be sure, in this case, unlike in Walker, the Committee has served subpoenas and the House has authorized this suit. But while those facts may make the dispute here *riper* than in Walker, they do not change the nature of the *injury* alleged by the Committee which, as in Walker, is a claimed impairment to the legislative power.

Additionally, the Committee's asserted "informational" interest is both attenuated and at its constitutional nadir in this case. The Executive Branch has already produced or otherwise made available to Congress nearly 12,000 pages of documents – including both internal Departmental communications and communications between the Department and members of the President's staff – and fourteen Executive Branch officials have testified and been interviewed by the Committee and others. In addition, the President offered to make available to

the Committee for interviews several senior Presidential advisers and to provide the Committee with written communications between the President's advisers and the Department and communications between the President's advisers and third parties, including Members of Congress or their staffs. Thus, to the extent that the Committee claims a need for information concerning the White House's communications and discussions with the Department of Justice regarding the removal of U.S. Attorneys, the Department already has produced or made available to Congress documents in its possession reflecting such communications and has made available for testimony and interviews many senior officials, while the President offered to provide the Committee with substantial amounts of White House information concerning those communications. In a significant sense, then, the Committee's injury has been caused by its own unwillingness to accept the White House's offer of additional information.

Moreover, the subpoenas the Committee seeks to enforce do not seek just any information from any Executive Branch official; rather, the Committee seeks to probe the President's inner-most circle of advisers for information pertaining to his exercise of his Article II powers of nomination and removal. Whatever informational injury Congress might be able to assert in the abstract, its asserted interests in obtaining testimony and documents from the President's senior-most advisers is far too attenuated to support standing in this case.

The Committee's attempt to rely on "informational injury" cases such as FEC v. Akins, 524 U.S. 11 (1998), Public Citizen v. U.S. Dep't of Justice, 491 U.S. 440 (1989), and Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982), for the proposition that any plaintiff that has been deprived of information has suffered an injury sufficient to satisfy Article III, is unavailing. Indeed, this Court has already rejected an effort to rely on these cases to transform official injury into the kind of traditional private injury that Article III requires. See Walker, 230 F. Supp. 2d at

66 n.10. In those cases Congress had enacted statutes providing private plaintiffs with unqualified legal rights to information – regardless of 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 Akin, 524 U.S. at 21; Public Citizen, 491 U.S. at 449; Havens Realty, 455 U.S. at 373-74. These statutes and cases thus hew closely to the traditional common-law model of suits by individuals vindicating personal interests. See Raines, 521 U.S. at 832-34 (Souter, J., concurring in the judgment); cf. Barnes, 759 F.2d at 49 n.8 (Bork, J., dissenting) ("what is a sufficient injury in fact when asserted against a private defendant may, for reasons of separation of powers and federalism, be deemed insufficient to confer standing against a branch of the federal government. It is precisely these reasons of separation of powers and federalism that compel the parallel conclusion that injury to governmental powers does not constitute an injury in fact or a judicially cognizable injury, as the Supreme Court has elaborated those terms in connection with the article III standing requirements."); see also Raines, 521 U.S. at 829; Moore, 733 F.2d at 957 (Scalia, J., concurring in result).

Here, of course, the Committee does not predicate its standing on a statutorily created personal right, but the power bestowed by Article I "to investigate matters . . . within Congress's legislative jurisdiction." Compl., ¶ 20. But it is well-settled that Congress is not invested by Article I "with general power to inquire into private affairs and compel disclosures"; instead Congress possesses only "such limited power of inquiry" as is necessary and appropriate "in aid of [its] legislative function." McGrain v. Dougherty, 273 U.S. 135, 173-75 (1927). Congress, therefore, has no freestanding right to information unrelated to the performance of its legislative duties, see Barenblatt v. United States, 360 U.S. 109, 111-12 (1959), and thus its injury should

not be understood as a deprivation of information, but as an alleged impairment of its ability to evaluate the need for and to formulate legislation. See Pl.'s Mem. at 2-3 ("[t]he Congress . . . cannot fulfill its legislative . . . functions if its subpoenas" are not enforced). Indeed that is precisely how this Court construed the plaintiff's claimed injury in Walker, where the Comptroller General's inability to access documents – an informational injury – was nonetheless "too vague and amorphous to confer standing" when tied to Congress's legislative and oversight functions. Walker, 230 F. Supp. 2d at 67. The Committee's alleged injury here, of course, is precisely the type of injury that this Court held insufficient for Article III standing in Walker.

C. The Committee Cites No Authority That Supports Its Assertion of Standing in Light of Raines.

The Committee boldly asserts that "this Circuit has repeatedly recognized that a House of Congress, or its authorized agent, has standing to bring suit to enforce a duly authorized and issued subpoena." Pl.'s Mem. at 18. But the Committee fails to recognize that those cases have limited viability, at best, in light of the Supreme Court's more recent decision in Raines. See Chenoweth, 181 F.3d at 114-15. For example, although AT&T, 551 F.2d at 391, did assert that "'the House as a whole has standing to assert its investigatory power,'" Pl.'s Mem. at 19, it contained no substantive analysis of the issue, and its conclusion cannot stand in light of Raines. See Chenoweth, 181 F.3d at 115. Moreover, in AT&T, the suit was also brought by the Executive Branch, not Congress, to prevent a private third party from disclosing information harmful to the national security, and it therefore has no bearing on the Committee's standing to initiate a suit to redress an asserted informational injury.

Similarly, Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974), was decided long before Raines, and never addressed the question of the plaintiff's Article III standing. "[I]t is well settled that cases in which jurisdiction is assumed

sub silentio are not binding authority for the proposition that jurisdiction exists." John Doe, Inc. v. DEA, 484 F.3d 561, 569 n.5 (D.C. Cir. 2007) (quotation omitted); see also Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 119 (1984); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 91 (1998) (describing unrefined jurisdictional dispositions as "drive-by jurisdictional rulings" that should be accorded "no precedential effect"). And U.S. House of Representatives v. U.S. Dep't of Commerce, 11 F. Supp. 2d 76 (D.D.C. 1998), appeal dismissed, 525 U.S. 316, 344 (1999), is "readily distinguishable," as this Court concluded in Walker, 230 F. Supp. 2d at 73 n.19, because the Court found that the House of Representatives had suffered a personal, concrete, and particularized injury because it had been denied census data without which it could not perform a constitutionally mandated function (apportionment of its members among the States) that would determine the composition of the House itself. See id.; House of Representatives, 11 F. Supp. 2d at 85-90. Here, by contrast, the injury allegedly suffered as a result of the Committee's inability to obtain further information from the defendants is a claimed impairment of Congress's legislative function, an "abstract dilution of institutional legislative power" that will not support plaintiff's standing to sue in this instance. Raines, 521 U.S. at 826.

Finally, the Committee argues that "declin[ing] to rule on the merits of this suit" would "sanction, and make unreviewable . . . unilateral claims of executive power." Pl.'s Mem. at 4. That argument proves too much. The Committee's argument could be made in every case challenging executive action or a federal statute (and often is), but it is well-settled that the possibility that certain actions might not be reviewed by an Article III court is no reason to dispense with Article III's limitations. See Valley Forge, 454 U.S. at 471. The argument also ignores the reality that during the 110th Congress alone, there have been hundreds of requests for information in which Congress and the Executive Branch have reached consensus through

traditional, political means of accommodation. See supra at pp. 9-10. What makes this case aberrational is the Committee's unprecedented attempt to probe the President's exercise of his own constitutional authority by means of his closest advisers. That the Committee lacks standing to obtain judicial review of Executive exercise of core constitutional powers simply does not mean that Congress lacks the power necessary to exercise effective oversight.

The Committee is wrong to imply that, absent judicial intervention, Congress would be left with no remedy when its demands for information are met by Executive claims of privilege. Especially in this context, the absence of a *judicial* remedy cannot be equated with the absence of a remedy or recourse. Congress has a variety of means at its disposal – including powers of legislation, appropriation, and advice and consent – through which it can work its will on the Executive Branch. See Guerrero v. Clinton, 157 F.3d 1190, 1196 (9th Cir. 1998) ("It scarcely bears more than passing mention that the most representative branch is not powerless to vindicate its interests or ensure Executive fidelity to Legislative directives."). With these tools at its disposal, for more than two centuries Congress has been able to resolve its differences with the Executive Branch over access to information through traditional methods of negotiation and compromise. See Walker, 230 F. Supp. 2d at 68 n.12.[5] The fact that "this is exactly the way matters have been for [219] years of our history, and the Republic still stands," goes to show that the "practical capacity" of the political Branches "to adjust to each other" without judicial intervention has been a "sufficient guide[ ] to responsible action" by both Branches. Nixon v. Sirica, 487 F.2d 700, 799 (D.C. Cir. 1973) (Wilkey, J., dissenting); see also Raines, 521 U.S. at 829.

[5] It is no doubt true that in the Constitution's allocation of appointment-related power, the Senate has more tools than the House. But that fact hardly strengthens the House's claim to standing. Rather, it only underscores the aberrational nature of this lawsuit.

The Committee thus has it completely backwards when it argues that the Court "must reach and decide the merits of the Committee's suit" because of the "critical constitutional principles at stake." Pl.'s Mem. at 25-26. To the contrary, as this Court recognized in Walker, this is precisely the kind of case in which the Supreme Court "has required an 'especially rigorous' standing inquiry." Walker, 230 F. Supp. 2d at 74 (quoting Raines, 521 U.S. at 819). Article III's "command to guard jealously and exercise rarely [the] power to make constitutional pronouncements requires strictest adherence when matters of great national significance are at stake." Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11 (2004). Rather than strain to reach the merits of a case with the constitutional ramifications of this one, the Court should properly recognize the limits of jurisdiction imposed by Article III and hold that the Committee's asserted "injury" is not the kind traditionally capable of vindication through the judicial process, and thus that the Committee lacks Article III standing.

II. THE COMPLAINT MUST BE DISMISSED BECAUSE THE COMMITTEE DOES NOT HAVE A CAUSE OF ACTION THAT AUTHORIZES THIS SUIT.

Even if this Court had Article III jurisdiction, the Complaint must be dismissed for a separate and independent reason: the Complaint identifies no cause of action that authorizes this lawsuit. It is axiomatic that to pursue relief in federal court, a plaintiff must have a cause of action. See Alexander v. Sandoval, 532 U.S. 275, 286-87 (2001) (rejecting plaintiff's claims because they did not have a cause of action to pursue their claims, and noting that absent statutory intent to create a cause of action, one "does not exist and courts might not create one, no matter how desirable that may be as a policy matter"); see also, e.g., Stoneridge Inv. Partners v. Scientific-Atlanta, Inc., 128 S.Ct. 761, 774 (2008) (holding that there is no private right of action against "secondary actors" under § 10(b) of the Securities Exchange Act of 1934, even though secondary actors are subject to that Act's substantive prohibitions). Whether a plaintiff

has a cause of action is a "question of whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court." Davis v. Passman, 442 U.S. 228, 239 n. 18 (1979).

The Committee's Brief does not even address whether it has a cause of action to pursue its claims, although the Committee appears to rely on 28 U.S.C. § 1331, the general federal-question statute, as creating a cause of action. See Pl.'s Mem. at 14-16. Defendants do not dispute that the Court has statutory subject-matter jurisdiction under 28 U.S.C. § 1331.[6] But whether a court has subject-matter jurisdiction is a distinct question from whether a plaintiff has a cause of action, see, e.g., Califano v. Sanders, 430 U.S. 99, 104-07 (1977); Wheeldin v. Wheeler, 373 U.S. 647, 649 (1963), and 28 U.S.C. § 1331 does not create a cause of action. See Cale v. City of Covington, 586 F.2d 311, 313 (4th Cir. 1978); see also Texas Indus. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981) ("vesting of jurisdiction in the federal courts" does not create a cause of action).[7] The Committee's reliance on 28 U.S.C. § 1331 does not, therefore, establish that it has a cause of action to bring this suit.

Although it is not mentioned in the Committee's Brief, the Complaint asserts that the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202 ("Act"), is the basis for the relief sought by the Committee. That Act, however, also does not create a cause of action. See, e.g., Buck v.

---

[6] Because statutory subject-matter jurisdiction exists under 28 U.S.C. § 1331, the Court need not address the Committee's alternative contention that this lawsuit qualifies as one "commenced by the United States" within the meaning of 28 U.S.C. § 1345. However, we note that the Committee's proposed construction of Section 1345 – under which congressional committees would have seemingly unlimited power to litigate on behalf of the United States – raises grave separation-of-powers concerns. See, e.g., Buckley v. Valeo, 424 U.S. 1, 138 (1976).

[7] Indeed, if 28 U.S.C. § 1331 created a cause of action, there would have been no need in cases like Sandoval and Stoneridge, in which there was indisputably subject-matter jurisdiction, for the Court to have considered whether a cause of action existed under other statutes.

Am. Airlines, Inc., 476 F.3d 29, 33 n.3 (1st Cir. 2007) ("Although the plaintiffs style 'declaratory judgment' as a cause of action, the provision that they cite, 28 U.S.C. § 2201(a), creates a remedy, *not a cause of action.*") (emphasis added); Okpalobi v. Foster, 244 F.3d 405, 423 n.31 (5th Cir. 2001) (en banc) ("[T]he law makes clear that – although the Declaratory Judgment Act provides a *remedy* different from an injunction – *it does not provide an additional cause of action with respect to the underlying claim.*") (second emphasis added); see also Schnapper v. Foley, 667 F.2d 102, 116 (D.C. Cir. 1981) (affirming denial of declaratory as well as injunctive relief under Public Broadcasting Act "because that statute provides no private right of action").

Nor can the Court infer a cause of action to permit this subpoena enforcement action, under the Declaratory Judgment Act or otherwise. "Like substantive law itself, private rights of action to enforce federal law must be created by Congress." Sandoval, 532 U.S. at 286. The existence of an implied cause of action thus depends on whether Congress has somehow manifested an intent to create such a cause of action, see, e.g., id.; Texas Industries, 451 U.S. at 639, and that question is "'definitively answered in the negative' where a 'statute by its terms grants no private rights to any identifiable class.'" Gonzaga v. Doe, 536 U.S. 273, 283-84 (2002) (quoting Touche Ross & Co. v. Redington, 442 U.S. 560, 576 (1979)); see also Sandoval, 532 U.S. at 288 (no implied cause of action absent "'rights-creating' language" in an applicable substantive statute). Moreover, because the existence of a cause of action to enforce congressional subpoenas against high-ranking presidential advisers would effect "a significant alteration in the balance of power between Congress and the President," the courts must find particularly "clear statements from Congress" before recognizing – much less inferring – any such cause of action. See Roeder v. Islamic Republic of Iran, 333 F.3d 228, 237-38 (D.C. Cir.

2003) (citing Armstrong v. Bush, 924 F.2d 282, 289 (D.C. Cir. 1991) (no clear statement to subject close presidential advisers to the Freedom of Information Act)). And because the existence of any such cause of action would give rise to a slew of grave constitutional concerns (as explained in detail above and below), courts must avoid construing applicable law, if "fairly possibl[e]," to create such an action expressly or by implication. See, e.g., Zadvydas v. Davis, 533 U.S. 678, 689 (2001). Needless to say, it is fairly possible to avoid finding a cause of action lurking in a statute that does not provide one expressly.

No provision of law gives rise to an implied right of action under these standards, and plaintiffs do not even attempt to contend otherwise. By its terms, the Declaratory Judgment Act simply authorizes the federal courts to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). The Act thus provides a remedy to enforce rights arising under *other* provisions of law. It contains no rights-*creating* language to support an implied right of action at all, much less the kind of clear statement that would be necessary for Congress to upset the balance of power between the political branches, and thereby create constitutional questions, by permitting its own committees to pursue subpoena enforcement actions in federal court against top presidential advisers. Moreover, other provisions of law affirmatively foreclose any contention that *House* committees may bring such actions by implication. In particular, 2 U.S.C. § 288d(a) purports to authorize the Office of *Senate* Legal Counsel to "bring a civil action . . . to enforce . . . any subpoena or order issued by the Senate or a committee or a subcommittee" thereof. 2 U.S.C. § 288d(a). That provision confirms that Congress knows how to create not only rights of action in general, but also rights of action to enforce congressional subpoenas in

particular.[8] Congress's striking refusal to extend that cause of action to the House – or to any of its committees or counsel – reinforces the absence of any such right of action by implication. See Texas Indus., 451 U.S. at 639 n.11 (rejecting implied right of action for contribution under the Clayton Act: "[t]hat Congress knows how to define a right to contribution is shown by the express actions for contribution" under other statutes).[9]

Legislative history further confirms that the Committee has no express or implied cause of action to enforce subpoenas against presidential advisers in federal court. Nothing in the legislative history of the Declaratory Judgment Act even remotely suggests the existence of, or an intent to create, such a remarkable and unprecedented cause of action. Such silence is itself significant. See, e.g., Jones v. United States, 526 U.S. 227, 234 (1999) ("Congress is unlikely to intend any radical departures from past practice without making a point of saying so."); Chisolm v. Roemer, 501 U.S. 380, 396 n.23 (1991) ("Congress' silence in this regard can be likened to the dog that did not bark."). Moreover, the legislative history of 2 U.S.C. § 288d affirmatively confirms that no such cause of action exists. In enacting that provision, Congress made clear its view that, absent the kind of express "civil enforcement action" ultimately enacted for the Senate Legal Counsel, there were only "two existing methods" for the enforcement of congressional subpoenas – either criminal contempt proceedings under 2 U.S.C. § 192, or a "trial before the bar

---

[8] Whether the Senate would have Article III standing for an action brought pursuant to 2 U.S.C. § 288 is, of course, a separate question.

[9] Similarly, 28 U.S.C. § 1365 is an express grant of subject-matter jurisdiction for actions "brought by the Senate or any authorized committee or subcommittee of the Senate to enforce" subpoenas or orders issued by the Senate or its committees or subcommittees. That statute thus further demonstrates that Congress knows how to legislate expressly in this area when it chooses to do so. But even 28 U.S.C. § 1365 is inapplicable where, as here, "the refusal to comply is . . . based on a governmental privilege or objection the assertion of which has been authorized by the executive branch of the Federal Government."

of Congress." S. Rep. No. 170, 95th Cong., 1st Sess. 89, 96 (1977), 1978 U.S.C.C.A.N. 4216, 4313. Individual members of Congress reiterated that understanding in deliberations over the proposed Congressional Right to Information Act, S. 2432, § 343, 93rd Cong., 1st Sess. (1973), which would have created a cause of action against the Executive Branch on behalf of any "committee of the Congress" to enforce its own subpoenas. See, e.g., U.S. Senate. Statements on Introduced Bills and Joint Resolutions S.2170. Cong. Rec. 94th Cong., 1st Sess., 1975, 121, no. 19 (July 24, 1975) 24597-24600 ("If this bill becomes law, *we will have, for the first time in our history*, an expeditious and equitable judicial procedure for Congress to obtain information it needs without punishing individuals either through contempt of Congress or some other alternative.") (emphasis added)); id. ("some remedy short of the drastic alternatives of contempt of Congress or the power of the purse is necessary for proper congressional access to information"). If this Committee somehow has an implied cause of action to enforce its own subpoenas against the Executive Branch, those understandings would be incorrect, and both the actual Section 288d and the proposed Congressional Right to Information Act would have been wholly superfluous. The Committee does not, and could not, cite anything remotely supporting those startling conclusions.

Finally, Supreme Court precedent counsels strongly against the recognition or implication of any cause of action to enforce congressional subpoenas. In Reed v. County Commissioners of Delaware County, Pa., 277 U.S. 376 (1928), a Senate committee charged with investigating allegedly improper influence on Senate candidates attempted to enforce its subpoenas in court. The committee had been authorized by resolution to issue subpoenas "and to do such other acts as may be necessary in the matter of [its] investigation." Id. at 387. Despite the breadth of that residual provision, and even assuming *arguendo* that a Senate resolution

could itself create a cause of action, the Supreme Court held that the committee at issue had neither an express nor an implied cause of action to enforce its subpoena in federal court. The Court stressed that the governing resolution did not "specifically grant[]" the power to institute suit. Id. at 388. Moreover, the Court refused to imply such a cause of action given the "established practice" of congressional committees to rely on their own process for enforcing subpoenas, id. at 388-89 (citing 2 U.S.C. §§ 192, 194), and given the dramatic differences between those existing processes and enforcement through civil actions brought by congressional entities. Id. ("[T]he Senate may not reasonably be held to have intended to depart from its established usage. Authority to exert the powers of the Senate to compel production of evidence differs widely from authority to invoke judicial power for that purpose."). If a sweeping authorization "to do such other acts as may be necessary" to aid an investigation does not support the existence of a cause of action, then neither does any provision of law even arguably applicable here.

For all of these reasons, the Committee lacks a cause of action to enforce its subpoenas in this case. The Complaint accordingly must be dismissed in its entirety.

III. THE COURT SHOULD DECLINE TO EXERCISE ANY JURISDICTION IT MAY HAVE UNDER THE DECLARATORY JUDGMENT ACT.

Even if this Court had Article III jurisdiction, and even if the Committee somehow had a cause of action, the Court should exercise its discretion under the Act and decline to reach the merits of the Committee's claims.

The Declaratory Judgment Act provides merely that a court "*may* declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a) (emphasis added). It does not require courts to issue declaratory judgments; rather, it "confers a discretion on the courts rather than an absolute right upon the litigant." Wilton v. Seven Falls

Co., 515 U.S. 277, 287 (1995); see also Rooney v. Sec'y of Army, 293 F. Supp. 2d 111, 121 (D.D.C. 2003) ("Even where an action satisfies the jurisdictional prerequisites for declaratory judgment, the decision to entertain a claim under the DJA is committed to the discretion of the district court.") (citing Wilton, 515 U.S. at 287). "[T]he propriety of declaratory relief in a particular case will depend upon a circumspect sense of its fitness informed by the teachings and experience concerning the functions and extent of federal judicial power." Public Serv. Comm'n of Utah v. Wycoff Co., 344 U.S. 237, 243 (1952). As the Supreme Court has explained, "the statute's textual commitment to discretion, and the breadth of leeway [it] . . . suggest[s], distinguish the declaratory judgment context from other areas of the law in which concepts of discretion surface." Wilton, 515 U.S. at 286-87. Although there is no rigid list of criteria a court must consider in exercising this discretion, a court will consider whether "the use of a declaratory judgment would increase friction between sovereign legal systems or improperly encroach on the domain of a state or foreign court," Dow Jones & Co., Inc. v. Harrods, Ltd., 346 F.3d 357, 359-60 (2d Cir. 2003), "whether other remedies are available," and the equity of the plaintiff's conduct. Jackson v. Culinary Sch. of Washington, Ltd., 27 F.3d 573, 580 (D.C. Cir. 1994).

Avoiding a substantial reworking of the time-tested mechanism for resolving inter-branch disputes over documents and testimony is ample justification to withhold such relief. As we have noted, for over 200 years the Executive and Legislative Branches have worked through the political process to accommodate requests such as those at issue here; "[t]he legislative and executive branches have a long history of settlement of disputes that seemed irreconcilable." AT&T, 551 F.2d at 394. Replacing the informal, political process of accommodation with hard and fast judicial rules concerning sensitive separation-of-powers issues would forever alter the

accommodation process. Instead of the accommodation and compromise that has occurred since our Nation's founding, and that has in the past sixteen months alone occurred with respect to hundreds of requests from the 110th Congress to the Executive Branch, see supra at pp. 9-10, rigid default rules would make such accommodation much more difficult, and it would be expected that both branches would increasingly turn to the judiciary to manage their disputes.[10] That "is obviously not the regime that has obtained under our Constitution to date," Raines, 521 U.S. at 828, and the Declaratory Judgment Act gives the Court the discretion to avoid creating such a regime.

Indeed, it was the existence and availability of the longstanding process of inter-branch accommodation that caused the court in United States v. House of Representatives of the United States, 556 F. Supp. 150 (D.D.C. 1983), to dismiss a suit filed by the Executive Branch seeking a declaratory judgment that it could validly assert privilege in response to congressional demands for documents. The court observed that "[c]ompromise and cooperation, rather than confrontation, should be the aim of the parties," and therefore found "that to entertain this declaratory judgment action would be an improper exercise of the discretion granted by the Declaratory Judgment Act." Id. at 153.

Likewise, in Moore v. U.S. House of Representatives, the Court of Appeals recognized that "the doctrine of remedial discretion permits the court to exercise judicial self-restraint in particular matters intruding upon a coordinate branch of government" and that the "exercise of this judicial discretion in actions by congressional plaintiffs for declaratory relief has given the courts the needed flexibility to consider separation-of-powers concerns in determining whether

[10] Moreover, even without a multiplication of litigation, definitive resolution of the kinds of issues raised here, such as immunity from legislative process, would forever alter the accommodation process.

relief properly should be granted." 733 F.2d 946, 954-55 (D.C. Cir. 1984). So too here. A definitive judicial resolution of these separation of powers issues – whatever the outcome – would forever and irrevocably alter the accommodations process under which the branches have operated since George Washington first occupied the presidency. It is for precisely this reason that the Court of Appeals has admonished that "[a] compromise worked out between the branches is most likely to meet their essential needs *and the country's constitutional balance*." AT&T, 551 F.2d at 394 (emphasis added).

The Court should also decline to reach the merits of this dispute because the hardship asserted by the Committee is attenuated relative to the kinds of injuries to private parties typically contemplated in the Court's exercise of jurisdiction under the Declaratory Judgment Act. See Abbott Labs. v. Gardner, 387 U.S. 136, 148-49 (1967) (weighing "hardship to the parties of withholding court consideration"). As the Court recognized in Raines, the judicial role does not extend to "*some amorphous general supervision of the operations of government.*" 521 U.S. at 829 (emphasis added) (quoting Richardson, 418 U.S. at 192 (Powell, J., concurring)). Yet the "amorphous general supervision of the operations of government" is the very role that the Committee asks the Court to perform.[11]

There is another reason for the Court to exercise its discretion and decline to reach the merits. It is well established that it is appropriate to decline to exercise jurisdiction when "other remedies are available" to the plaintiff. Jackson, 27 F.3d at 580. Here, of course, Congress has a

[11] The Committee's alleged informational injury also is belied by the thousands of pages and one hundred-plus hours of testimony already obtained by the Committee directly from the Department of Justice, as well as the offers of accommodation extended by the President, pursuant to which the Committee would have received substantial numbers of documents and several witness interviews. That the Committee has rejected these accommodations undermines its assertion that it is aggrieved by a lack of "information."

variety of other means by which it can exert pressure on the Executive Branch through the exercise of powers it has under the Constitution. The availability of those means, as well as the political and institutional constraints that operate on them, counsel in favor of judicial restraint, not against it.

IV. MS. MIERS IS ABSOLUTELY IMMUNE FROM THE COMPELLED TESTIMONY SOUGHT BY THE COMMITTEE.

For the foregoing reasons, the Committee lacks Article III standing and a statutory cause of action to pursue its claims and the Court should exercise its discretion not to hear this suit. Even if the Court were to disagree, however, Count I of the Complaint – together with those portions of Counts III and IV that seek Defendant Miers's testimony – must be dismissed for a separate and independent reason: as a senior adviser to the President, Defendant Miers is absolutely immune from compelled congressional testimony. For fundamental separation-of-powers reasons – including the President's independence and autonomy from Congress – the President is absolutely immune from testimonial compulsion by Congress or any of its committees relating to the President's actions while in Office. These same principles require that senior presidential advisers like the Counsel to the President also have absolute immunity from such testimony. As Attorney General Reno stressed, "[s]ubjecting a senior presidential advisor to the congressional subpoena power would be akin to requiring the President himself to appear before Congress on matters relating to the performance of his constitutionally assigned executive functions." Assertion of Executive Privilege With Respect to Clemency Decision, 23 Op. O.L.C. 1, 5 (1999), Ex. 24. That immunity is not somehow lost because Defendant Miers no longer serves as the Counsel to the President: the Committee seeks to compel her testimony solely in relation to her official responsibilities to the President as his Counsel and close adviser, and the President's interest in protecting the autonomy and confidentiality of his Office

concerning those matters continues to exist even though she no longer works in the White House.

A. The President's Senior Advisers Are Absolutely Immune From Compelled Congressional Testimony.

The Committee does not argue that a President may be compelled to testify before Congress or a congressional committee concerning his official duties and for good reason: the Supreme Court has long recognized "the singularly unique role under Art. II of a President's communications and activities, related to the performance of duties under that Article," United States v. Nixon, 418 U.S. at 715, and has long held that separation-of-powers principles require the safeguarding of the President's autonomy and confidentiality. "The essential purpose of the separation of powers is to allow for independent functioning of each coequal branch of government within its assigned sphere of responsibility, free from the risk of control, interference, or intimidation by other branches." Nixon v. Fitzgerald, 457 U.S. at 760-761.

These separation-of-powers principles do not mean that the "President is above the law." United States v. Nixon, 418 U.S. at 715. Rather, they simply acknowledge that "special considerations control when the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated." Cheney, 542 U.S. at 385. The President is therefore constitutionally entitled to autonomy and confidentiality in the performance of his "'responsibilities'" and "'his office,'" and "'in the process of shaping policies and making decisions.'" Nixon v. Admin. of Gen. Servs., 433 U.S. 425, 449 (1977) (quoting United States v. Nixon, 418 U.S. at 708). That autonomy, it is clear, must be safeguarded from intrusion by the other Branches: "Even when a branch does not arrogate power to itself, . . . the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties." Loving v. United States, 517 U.S. 748, 757 (1996).

For these reasons, the Supreme Court held in Nixon v. Fitzgerald that a President is absolutely immune from civil actions arising from his official duties. As the Court recognized, "[b]ecause of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government," 457 U.S. at 751, and "the need to prevent large-scale invasion of the Executive function by the Judiciary far outweighs the need to vindicate the private claims." Id. at 762. This conclusion, the Court held, was consistent with its prior holding that "Members of both Houses of Congress – and their aides – must be totally free from judicial scrutiny for legislative acts; the public interest, in other words, outweighs the need for private redress of one claiming injury from legislative acts of a Member or aide of a Member." Id. (citing Gravel v. United States, 408 U.S. 606 (1972)).

For these same reasons, the President is absolutely immune from testimonial compulsion by Congress or any of its committees. If a congressional committee could force the President's appearance, these fundamental separation-of-powers principles – including the President's independence and autonomy from Congress – would be threatened. Indeed, the Constitution recognizes a limited obligation to report to Congress in Art. II, § 3, which contemplates that the President will "from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient." Subjecting the President to compelled congressional testimony would be inconsistent with both separation-of-powers principles and Art. II, § 3. Accordingly, administrations of both parties have long taken the position that the President is absolutely immune from testimonial compulsion by Congress. See generally Immunity of Former Counsel to the President From Compelled Congressional Testimony, 31 Op. O.L.C. 1, 1 (2007), Ex. 25.

The same separation-of-powers principles that protect a President from compelled congressional testimony regarding acts while in Office also apply to senior presidential advisers like the Counsel to the President, and therefore those advisers are also absolutely immune from such testimony. Given the numerous demands of his Office and in order to exercise the "executive Power" vested in him by Article II, the President must rely upon senior advisers. Senior White House advisers like the Counsel to the President have no operational authority. They do not issue executive orders or regulations, or prosecute or investigate wrongdoing. Rather, their sole function is to advise the President in the exercise of his constitutional responsibilities. That is why Presidents of both political parties have consistently maintained that "the few individuals whose sole duty is to advise the President should never be required to testify because all of their duties are protected by executive privilege." CRS Report for Congress, Presidential Advisers Testimony Before Congressional Committees: An Overview (April 14, 2004), at 27.

As Attorney General Reno explained while advising President Clinton that the Counsel to the President is immune from compelled congressional testimony, "in many respects, a senior adviser to the President functions as the President's alter ego, assisting him on a daily basis in the formulation of executive policy and resolution of matters affecting the military, foreign affairs, and national security and other aspects of his discharge of his constitutional responsibilities." 23 Op. O.L.C. at 5, Ex. 24. Unique among Executive Branch personnel, the President's immediate advisers enjoy unparalleled access to the President because they "provide assistance of the most intimate sort to the President in carrying out the responsibilities of his office." John R. Steelman & H. Dewayne Kreager, The Executive Office as Administrative Coordinator, 21 L. & Contemp. Probs. 688, 689 (1956). Presidents have long relied on

confidential White House advisers, even more than the members of their Cabinet or other agency heads, to receive advice and assistance.[12] See, e.g., In Re Sealed Case, 121 F.3d at 750 ("The President himself must make decisions relying substantially, if not entirely, on the information and analysis supplied by advisers."). Thus, compelling the testimony of the President's closest White House advisers is tantamount to compelling the testimony of the President himself.

Because of the important role played by the President's senior advisers, it is well established that the ability of the President to consult with those advisers confidentially "is surely an important condition to the exercise of executive power." Ass'n of Amer. Physicians & Surgeons v. Clinton, 997 F.2d 898, 909 (D.C. Cir. 1993). Without such confidentiality, "the President's performance of any of his duties – textually explicit or implicit in Article II's grant of executive power – would be made more difficult. In designing the Constitution, the Framers vested the executive power in one man for the very reason that he might maintain secrecy in executive operations." Id. The Court of Appeals has made clear that:

> the critical role that confidentiality plays in ensuring an adequate exploration of alternatives cannot be gainsaid. If presidential advisers must assume they will be held to account publicly for all approaches that were advanced, considered but ultimately rejected, they will almost inevitably be inclined to avoid serious considerations of novel or controversial approaches to presidential problems.

In re Sealed Case, 121 F.3d at 750.

---

[12] Harold C. Relyea, The Executive Office of the President: A Historical, Biographical, and Bibliographical Guide 6 (Harold C. Relyea, ed. 1997). Upon enactment of the Reorganization Act of 1939, one of the components of the newly created Executive Office of the President was the "White House Office," also known as the "Office of the President," which was intended "to serve the President in an intimate capacity in the performance of the many detailed activities incident to his immediate office." 4 Fed. Reg. 3864, Exec. Order No. 8248 (Sept. 8, 1939). The President's advisers within the Office of the President – including the Counsel to the President – continue to serve in this capacity.

As Attorney General Reno stressed, "[s]ubjecting a senior presidential advisor to the congressional subpoena power would be akin to requiring the President himself to appear before Congress on matters relating to the performance of his constitutionally assigned executive functions." 23 Op. O.L.C. at 5, Ex. 24. Absent immunity from such testimony, Congress could invade the President's autonomy and confidentiality by seeking to examine the President's advisers on any given subject in order possibly to gain insight on the President's thinking or decisionmaking and possible future course of conduct. Congress could also attempt to influence the President's decisionmaking by inquiries into certain subject areas or by exposing, through the questions posed, matters that are sensitive and ongoing. If Congress could compel the attendance before it of the President's immediate advisers, it could effectively command the President, through the testimony of his advisers, to "justify" or explain executive actions, or to give an accounting of executive decisions. Allowing a coequal branch of government such authority or power of compulsion over another branch would clearly violate separation-of-powers principles.

For precisely these same considerations, the Supreme Court has extended immunity to congressional aides under the Speech or Debate Clause, Art. I, § 6, cl. 1 of the Constitution, even though the Clause mentions only "Senators and Representatives." Gravel, 408 U.S. at 616-17. As recognized by the Court, "the day-to-day work of such aides is so critical to the Member's performance that they must be treated as the latter's alter egos; and that if they are not so recognized, the central role of the Speech or Debate Clause – to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary – will inevitably be diminished and frustrated." Id. (citation omitted); see also id. at 616 ("it is literally impossible, in view of the complexities of the modern legislative process, with Congress almost

constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants").

The President's immediate advisers, by virtue of their proximity to the President, are identified with him in a manner that his Cabinet officers and other inferior executive officials are not. Moreover, while there are 535 members of Congress and over 1,000 federal judges nationwide, there is only one President and he is an "easily identifiable target" for congressional inquiry due to his visibility and the vast area of responsibilities. Nixon v. Fitzgerald, 457 U.S. at 753. If Congress could compel the attendance before it of the President's close advisers in order to demand an "accountability" of executive actions and decisions, Gravel, 408 U.S. at 616, it could harass the President and frustrate his ability to perform his functions.[13] For these reasons and others, since at least the 1940s, administrations of both political parties have taken the position that the "'President *and his immediate advisers* are absolutely immune from testimonial compulsion by a Congressional committee.'" 23 Op. O.L.C. at 4, Ex. 24 (quoting Mem. From John M. Harmon, Assistant Attorney General, Office of Legal Counsel, Re: Executive Privilege at 5 (May 23, 1977)) (emphasis added)).[14]

---

[13] This proximity to the President distinguishes the Counsel to the President from Sara M. Taylor, who served at one time as the White House Political Director. As the Committee points out (Pl.'s Mem. at 32 n.17), immunity was not asserted on behalf of Ms. Taylor who, as a result, appeared before the Senate Committee on the Judiciary in connection with its inquiry into the resignations of the U.S. Attorneys and testified on a limited number of matters not covered by the President's assertion of Executive Privilege. Ms. Taylor was not a close adviser to the President, did not meet with him on a regular basis, and was not immediately responsible to the President in regard to the performance of his executive functions and constitutional responsibilities.

[14] The Committee relies on Townsend v. United States, 95 F.2d 352 (D.C. Cir. 1938), for the proposition that a congressional witness must first attend a legislative hearing and then claim privilege. Pl.'s Mem. at 31. But that case did not involve an Executive Branch official, and the court held only that a witness subject to a legislative subpoena cannot be excused from appearing just because privilege might apply to certain questions that would be asked. That holding is

The Committee argues that there have been instances since World War II in which close Presidential advisers, including Counsels and Special Assistants, have testified before congressional committees. Pl.'s Mem. at 32. But the Committee has identified no time in the Nation's history in which a senior presidential adviser has been forced to testify as the result of a congressional subpoena enforced by an Article III court. Instead, each of the circumstances identified by the Committee was the result of a voluntary inter-branch accommodation, which has been the traditional method by which the Legislative and Executive Branches have resolved these disputes. Indeed, certain Presidents – including Presidents Lincoln and Ford – have testified before Congress, and such voluntary testimony certainly does not mean that Congress could compel a President's testimony.

The inability adequately to protect the President and his advisers from "vexatious and unnecessary [legislative] subpoenas," United States v. Nixon, 418 U.S. at 714, also supports absolute immunity from testimonial compulsion for the President's most senior advisers. In the criminal justice system, if a subpoena *duces tecum* has been directed to the President, there are multiple means by which the President's constitutional interests of autonomy and confidentiality can be protected short of granting him absolute immunity. But presiding judges are not present in committee hearings to hear objections to potentially vexatious or oppressive questions, and the President would not otherwise be able to move for a protective order on behalf of his advisers to protect them, and in turn his own constitutional interests, "from annoyance, embarrassment, [or] oppression," as is possible in civil litigation under Fed. R. Civ. P. 26(c). A potentially hostile

---

irrelevant to the question of whether a President's immediate adviser enjoys constitutional *immunity* from compelled testimony. The Committee also relies on United States v. Tobin, 195 F. Supp. 588 (D.D.C. 1961), rev'd, 306 F.2d 270 (D.C. Cir. 1962), but that case concerned a contempt prosecution of a state employee for failure to comply with a legislative subpoena duces tecum, and thus has no bearing at all on the immunity issue.

legislative committee or any of its constituent members must be expected to assert a freedom to pursue questioning as the Committee deems fit.

Finally, the Committee appears to argue that compelled congressional testimony of senior Presidential advisers does not raise serious concerns because Executive Privilege can be asserted on a question-by-question basis. As an initial matter, the President's right to confidentiality and autonomy in "his office," in the performance of his "responsibilities," and "'in the process of shaping policies and making decisions,'" Nixon v. Admin. of Gen. Servs., 433 U.S. at 449 (quoting United States v. Nixon, 418 U.S. at 708, 711, 713), extends beyond the four corners of matters covered by Executive Privilege. More important, the Supreme Court and the Court of Appeals have made clear on several occasions that the ability of the President to invoke Executive Privilege does *not* mitigate constitutional concerns. Indeed, the likelihood of repeated invocations of Executive Privilege signals the presence, not the absence, of acute separation-of-powers concerns. In Cheney, for example, the Court rejected the argument that mandamus relief to consider petitioners' "claim of discovery immunity" was premature because "the Executive Branch can invoke executive privilege to maintain the separation of powers." 5423 U.S. at 383. Similarly, in Armstrong v. Executive Office of the President, 1 F.3d 1274, 1292 (D.C. Cir. 1993), relying in part on these separation of powers concerns, the Court of Appeals held that the Freedom of Information Act does not apply to certain components of the Executive Office of the President, even though FOIA expressly permits the invocation of Executive Privilege (through Exemption 5, See 5 U.S.C. § 552(b)(5)). See also Ryan, 617 F.2d at 788 n.19 (D.C. Cir. 1980) (noting that "[f]ailure to exempt presidential staff from the FOIA would raise a constitutional issue of separation of powers"). Indeed, the Supreme Court has made clear that assertion of

Executive Privilege should be the *last* resort because "[o]nce executive privilege is asserted, coequal branches of the Government are set on a collision course." Cheney, 542 U.S. at 389.

B. Ms. Miers Is Immune from Compelled Testimony Even Though She No Longer Serves As The President's Counsel.

The Committee's primary argument seems to be that even if the President's *current* close advisers are absolutely immune from compelled congressional testimony, Ms. Miers has lost that immunity because she no longer serves as the Counsel to the President. According to the Committee, because she is no longer employed as the Counsel to the President, Ms. Miers must appear before the Committee, answer questions, and assert executive privilege on a question-by-question basis. Pl.'s Mem. at 30-35. That argument is plainly wrong.

As an initial matter, the Committee misunderstands the Executive's position, which is not that Ms. Miers is immune from congressional testimony merely because the President directed her not to appear. See Pl.'s Mem. at 27 (arguing that the "President has no power to require Ms. Miers not to appear"). Instead, our argument is that Ms. Miers holds a constitutional immunity from compelled congressional testimony based on her position as the Counsel to the President; that immunity, without more, makes the Committee's subpoena unenforceable against Ms. Miers.

More important, the Committee is wrong that the immunity held by Ms. Miers when she was the Counsel to the President is lost because she no longer serves in that position. The Committee seeks to compel Ms. Miers's testimony solely in relation to her responsibilities to the President as his Counsel and close adviser, not in any individual or private capacity. The President's interest in protecting the autonomy and confidentiality of his Office applies even though Ms. Miers no longer serves as his close adviser. Any compulsion of testimony from Ms. Miers concerning her duties on behalf of the President would invade the President's

constitutional prerogatives, the performance of his functions, and the process by which information is gathered on his behalf and decisions are made to the same degree as it would if she were still the Counsel to the President.

It has long been recognized that the need to protect these constitutional prerogatives extends beyond the term of a senior adviser's employment. President Truman, having left office, explained the need for continuing immunity in November 1953, when he refused to comply with a subpoena directing him to appear before the House Committee on Un-American Activities. In a letter to that committee, the former President warned that "if the doctrine of separation of powers and the independence of the Presidency is to have any validity at all, it must be equally applicable to a President after his term of office has expired when he is sought to be examined with respect to any acts occurring while he is President." Texts of Truman Letter and Velde Reply, N.Y. Times, Nov. 13, 1953, at 14 (reprinting Nov. 12, 1953 letter by President Truman), Ex. 27. "The doctrine would be shattered, and the President, contrary to our fundamental theory of constitutional government, would become a mere arm of the Legislative Branch of the Government if he would feel during his term of office that his every act might be subject to official inquiry and possible distortion for political purposes." Id. These same concerns apply on behalf of a current President with respect to his close advisers even after they retire from public service. Indeed, the very purposes of testimonial immunity would be eviscerated if it disappeared as soon as a senior Presidential adviser left office.

Pointing to Clinton v. Jones, 520 U.S. 680 (1997), and to portions of a 1971 Office of Legal Counsel opinion authored by William Rehnquist, the Committee argues that a former senior adviser does not have immunity from compelled congressional testimony because there is no need for former advisers to be "available to the President 24 hours a day." Pl.'s Mem. at 34

(quoting Rehnquist Mem.). This argument again misunderstands the constitutional underpinnings of Ms. Miers's immunity, which is not based on the need for a former senior adviser to be available to the President at all times – such a position would be illogical – but on the President's need for autonomy and confidentiality in his exercise of his constitutional duties.

The Committee's heavy reliance on Clinton v. Jones is similarly misplaced. There, the Supreme Court held that the President does not have temporary immunity from the burdens of private litigation arising from events occurring *before the President assumed office*. In contrast to Nixon v. Fitzgerald, 457 U.S. 731 (1982), which held that a sitting President is absolutely immune from civil actions arising from his official duties – even civil actions filed long after he has left office – the Court in Clinton found "no support for an immunity for *unofficial* conduct," explaining 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." 520 U.S. at 694. The Court thus concluded that, "[w]hatever the outcome of this case, there is no possibility that the decision will curtail the scope of the *official powers* of the Executive Branch" because the "litigation of questions that relate *entirely to the unofficial conduct of the individual who happens to be the President imposes no perceptible risk of misallocation of either judicial power or executive power.*" Id. (emphases added).

Here, in contrast, the Committee seeks to compel the testimony of the Counsel to the President concerning official matters that are committed to the President's exclusive authority, *viz.*, the removal of Executive Branch employees. See Myers v. United States, 272 U.S. 52, 122 (1926) ("The power of removal is incident to the power of appointment."). For the reasons demonstrated above, any such compulsion of the attendance and testimony of the President's immediate advisers before a congressional committee regarding the functions of the Executive

Branch at its highest level would directly infringe upon the President's interest in maintaining the autonomy and confidentiality of his Office, and would unnecessarily ensnare the judiciary in an inter-branch dispute of the kind that has historically resolved itself by other means.

C. The Committee Does Not Have A Fundamental Or Comprehensive Need For The Compelled Testimony Of The President's Immediate Advisers.

The Committee lacks a fundamental or comprehensive need for the compelled testimony of the President's immediate advisers that might overcome the President's paramount interest in the autonomy and confidentiality of his Office and the performance of his responsibilities. See Nixon v. Fitzgerald, 457 U.S. at 754 (before exercising jurisdiction over the President, the courts "must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch"). This case, in this respect, is immediately distinguishable from United States v. Nixon, in which the Supreme Court determined that "[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." 418 U.S. at 707.

At issue in United States v. Nixon was a motion by the President to quash a subpoena issued by the United States District Court for the District of Columbia pursuant to Federal Rule of Criminal Procedure 17(c), directing the President to produce certain tape recordings and documents relating to his conversations with aides and advisers. The Supreme Court rejected the President's claim of absolute privilege with respect to the tape recordings and documents, finding that recognition of such a privilege on behalf of the President with respect to "a subpoena essential to enforcement of criminal statutes . . . would upset the constitutional balance of 'a workable government' and gravely impair the role of the courts under Art. III." Id. The Court

went on to address the issue of privilege within the context of "our historic commitment to the rule of law," id. at 708, explaining that:

> This is nowhere more profoundly manifest than in our view that 'the twofold aim (of criminal justice) is that guilt shall not escape or innocence suffer. * * * The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

Id. at 708-09.

None of these factors applies here. As an initial matter, never in the Country's history has a close adviser of a President been judicially compelled to testify before a legislative committee, much less regarding the exercise of a core Article II prerogative. This fact alone belies any notion that "it is *imperative* to the function of [the legislature] that compulsory [judicial] process be available for the production of evidence" from the President's immediate advisers before a legislative committee or subcommittee. Id. (emphasis added).

This is also not a criminal proceeding. The Supreme Court in Nixon stressed the "fundamental" and "comprehensive" need for "every man's evidence" in the criminal justice system, 418 U.S. at 709, making clear that "[w]e are not here concerned with the balance between the President's generalized interest in confidentiality and the need for relevant evidence in civil litigation, nor with that between the [President's] confidentiality interest and congressional demands for information . . . ." Id. at 712 n.19. More recently in Cheney, the Supreme Court again underscored this point when distinguishing situations like this from criminal proceedings, explaining that "[w]ithholding materials from a tribunal in an ongoing criminal case when the information is necessary to the court in carrying out its tasks 'conflict[s]

with the function of the courts under Art. III.'" 542 U.S. at 384 (quoting in part United States v. Nixon, 418 U.S. at 707).

Moreover, in contrast to the "infrequent occasions" in which the President's "conversations will be called for in the context of a criminal prosecution," 418 U.S. at 712, legislative hearings inquiring into executive departments and actions are frequent and ongoing. It is hardly unreasonable to expect that an adversarial Congress might choose to exercise a power to compel the testimony of the President's immediate advisers regarding such matters on more than "infrequent occasions," thereby imposing great burdens on the President's Office.

Nor can Congress demonstrate a "fundamental" need for testimony from the President's immediate advisers that is "essential" to its legislative functions. United States v. Nixon, 418 U.S. at 707, 709. Congress, of course, has the power inherent "in the legislative process" to conduct inquiries "concerning the administration of existing laws as well as proposed or possibly needed statutes" and to probe into government agencies "to expose corruption, inefficiency or waste." Watkins v. United States, 354 U.S. 178, 187 (1957). Congress, however, is not "a law enforcement or trial agency." Id. As the Court of Appeals has explained, "[t]here is a clear difference between Congress's legislative tasks and the responsibility of a grand jury." Senate Select Comm., 498 F.2d at 732.

> While fact-finding by a legislative committee is undeniably a part of its task, legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events; Congress frequently legislates on the basis of conflicting information provided in its hearings. In contrast, the responsibility of the grand jury turns entirely on its ability to determine whether there is probable cause to believe that certain named individuals did or did not commit specific crimes.

Id.

Indeed, Congress has ample means by which reasonably to inform its "legislative judgments" and to perform its legislative functions without the compelled interrogation of the President's immediate advisers over the President's objection and assertions of privilege and immunity. As it has done here in obtaining extensive testimony and documentation from the Department of Justice, Congress can obtain records from the executive departments and can receive the testimony of other executive officials. Any additional information that Congress might obtain from the compelled testimony of the President's immediate aides is too attenuated and too tangential to its legislative functions to overcome the President's paramount constitutional interests in preserving the autonomy and confidentiality of his Office and the performance of his executive functions. Cf. United States v. Nixon, 418 U.S. at 713 ("Without access to specific facts a criminal prosecution may be totally frustrated.").

V. THERE IS NO LEGAL REQUIREMENT THAT THE WHITE HOUSE PRODUCE A PRIVILEGE LOG TO A CONGRESSIONAL COMMITTEE IN RESPONSE TO A REQUEST FOR DOCUMENTS.

If the Court reaches the merits of this dispute, it should also dismiss Count II of the Complaint, which contends that the White House is legally obligated to provide the Committee with a privilege log in response to the subpoenas *duces tecum* that were served on defendants Harriet Miers and Joshua Bolten. See Compl. ¶ 81; Pl.'s Mem. at 35-45. The Committee points to no source of authority that expressly creates such an obligation, and none of the authorities on which the Committee relies can or should be read to create a rule on Congress's behalf that would require the White House to provide detailed accountings of presumptively privileged communications in response to any congressional demand for records. Indeed, any such rule would intrude upon the autonomy and confidentiality of the President's Office in clear violation of separation-of-powers principles. If Congress had a right to such logs, Congress could seek to

require the White House and Executive Branch agencies to identify and catalog privileged and potentially sensitive communications of the President and his advisers in response to any request for documents that might be made by any legislative committee on any given subject. Such a rule would impose manifestly unreasonable burdens on the Executive that would raise significant separation-of-powers concerns and that cannot be justified by any alleged need of the Committee for a privilege log. Here again, avoiding the constitutional thicket implicated by the Committee's requested relief is not only "fairly possible," but is commanded by a proper respect for the separation of powers. Zadvydas, 533 U.S. at 689.

A. No Law Exists Requiring The White House To Produce A Privilege Log To A Congressional Committee In Response To A Request For Documents.

As the Committee's brief implicitly recognizes, no statute, Federal Rule of Civil Procedure, or congressional rule having the force of law grants Congress an entitlement to a privilege log whenever it serves a subpoena on the Executive Branch. Instead, relying on Dellums v. Powell, 561 F.2d 242 (D.C. Cir. 1977) ("Dellums I") and Dellums v. Powell, 642 F.2d 1351 (D.C. Cir. 1980) ("Dellums II"), the Committee asserts an implied obligation to the effect that "even the *President himself* must produce a detailed privilege log when withholding documents on the ground of executive privilege." Pl.'s Mem. at 38 (emphasis added). But the Dellums decisions address demands for information in federal civil litigation, which are governed by, *inter alia*, the Federal Rules of Civil Procedure. The Committee points to no rule applicable to the legislative oversight process that has a similar force and effect.[15]

[15] In Dellums, the Court also stressed that "[i]t is of cardinal importance . . . that the claim of privilege is being urged solely by a former president, and there has been no assertion of privilege by an incumbent president . . . ." Dellums I, 561 F.2d at 247.

In addition, Dellums required a privilege log so that the courts could fulfill their institutional responsibility "to make a rational decision whether the withheld material must be produced without actually viewing the documents themselves, as well as to produce a record that will render the District Court's decision capable of meaningful review on appeal." Dellums II, 642 F.2d at 1360. But whatever the role of the courts in acting pursuant to lawful authority to adjudicate a case properly before the courts, those principles have no application here. Courts have no inherent authority, and the Committee points to no additional authority, to require a privilege log to facilitate legislative proceedings. The very nature of the request – a committee of Congress enlisting the aid of the judiciary vis-a-vis the Executive to facilitate a Congressional investigation – is far removed from Dellums, and more fundamentally, raises core separation-of-powers issues.

The Committee also attempts to rely on FOIA for the proposition that the Executive Branch is routinely required "to provide privilege logs for documents withheld on the basis of executive privilege." Pl.'s Mem. at 39. To be sure, FOIA's unique statutory scheme imposes certain duties on those executive agencies subject to FOIA, including a duty at the summary judgment stage of a lawsuit seeking documents under FOIA to produce an index in support of the withholding of documents from public release pursuant to any of FOIA's specifically enumerated statutory exemptions. See Vaughn v. Rosen 484 F.2d 820, 825 (D.C. Cir. 1973) (finding that the burden of justifying the application of a statutory exemption "has been placed specifically by statute on the Government"). But FOIA does not apply to the President and his advisers. See, e.g., Armstrong v. Exec. Office of the Pres., 1 F.3d at 1292. Indeed, that conclusion was required, even though the statute did not expressly resolve the question, because "[f]ailure to exempt presidential staff from the FOIA would raise a constitutional issue of

separation of powers." Ryan v. Dep't of Justice, 617 F.2d 781, 788 n.19 (D.C. Cir. 1980).[16] In any event this is not a FOIA case.

Nor does the Committee receive help from cases such as Quinn v. United States, 349 U.S. 155 (1955), and Emspak v. United States, 349 U.S. 190 (1955), in which the Supreme Court held that private citizens had properly invoked their Fifth Amendment privilege against self incrimination in refusing to answer questions posed by a House subcommittee, and that they could not be held criminally liable under 2 U.S.C. § 192 for refusing to answer questions absent notice by the subcommittee that it had first rejected the witness's invocation of privilege. In so holding, the Court noted that "no ritualistic formula is necessary in order to invoke the privilege" so long as "the committee [is] on notice of an apparent claim of the privilege." Quinn, 349 U.S. at 164. "It then [becomes] incumbent on the committee either to accept the claim or to ask petitioner whether he was in fact invoking the privilege." Id.; see also Emspak, 349 U.S. at 195 ("The way is always open for the committee to inquire into the nature of the claim before making a ruling."); Hutcheson v. United States, 369 U.S. 599, 610-11 (1962) (holding that a petitioner expressly waived his right to invoke the privilege against self-incrimination, and that he could not escape the scope of such waiver by arguing that his refusal to testify was based upon due process grounds and not privilege).

Quinn, Emspak, and Hutcheson thus stand for the unremarkable proposition that a congressional investigatory committee is, at most, entitled to "notice of an apparent claim of

---

[16] For these reasons, Democratic Nat'l Comm. v. U.S. Dep't of Justice, No. 07-712, 2008 WL 803421, at *2 (D.D.C. March 27, 2008), provides the Committee no support. See Pl.'s Mem. at 41. There, consistent with its obligations under FOIA, the Department submitted a Vaughn index in support of its withholding of information under FOIA's statutory exemptions. 2008 WL 803421 at *1. As noted above, the President and his closest advisers, unlike the Department, are exempt from FOIA's obligations. Armstrong, 1 F.3d at 1292.

privilege." Nowhere do these cases identify any constitutional entitlement to a document-by-document invocation of the privilege itself. Nor do these cases address the separation-of-powers issues presented by this case.

Here, of course, the White House has satisfied any obligation it may have under Quinn, Emspak, and Hutcheson by specifically asserting executive privilege over the information described in Acting Attorney General Clement's June 27, 2007 letter. That letter provides the Committee with significant information regarding the documents and testimony over which the President had asserted executive privilege. For example, the letter states that the "initial category of subpoenaed documents and testimony consists of internal White House communications about the possible dismissal and replacement of U.S. Attorneys," and that among other things, "these communications discuss the wisdom of such a proposal, specific U.S. Attorneys who could be removed, potential replacement candidates, and possible responses to congressional and media inquires about the dismissals." Letter from Paul D. Clement to the President (June 27, 2007), Ex. 8 at 2. The letter also provides descriptions of the other two categories of documents and testimony over which the President asserted executive privilege: "communications between White House officials and individuals outside the Executive Branch, including with individuals in the Legislative Branch, concerning the possible dismissal and replacement of U.S. Attorneys, and possible responses to congressional and media inquiries about the dismissals"; and "communications between the Department of Justice and the White House concerning proposals to dismiss and replace U.S. Attorneys and possible responses to congressional and media inquiries about the U.S. Attorney resignations." Id. at 5-6. The

Committee is therefore on notice of the Executive's claims of privilege; if the cases on which the Committee relies require anything in this case, the Executive already has provided it.[17]

B. Requiring the President And His Advisers To Provide Congress With A Privilege Log Would Violate The Separation of Powers.

Even if the Committee could point to some law or rule obligating the production to Congress of a privilege log, applying that rule to the President and his advisers would violate the separation of powers. As noted above, the Supreme Court has long recognized that "a President's communications and activities encompass a vastly wider range of sensitive material than would be true of any 'ordinary individual,'" United States v. Nixon, 418 U.S. at 715, and has precluded invasion of the President's autonomy and confidentiality in the performance of his "'responsibilities'" and "'his office,'" and "'in the process of shaping policies and making decisions.'" Nixon v. Admin. of Gen. Servs., 433 U.S. at 449 (quoting Nixon, 418 U.S. at 708, 711, 713). If the President and his advisers were required to provide detailed accountings of their communications and activities to Congress in response to any legislative request for documents that might be made of them, the President's autonomy and independence from Congress would unquestionably be impaired.

The subpoenas at issue in this case exemplify these problems. The subpoenas demand the production of documents created in the exercise (by the President's staff) of a core, constitutional power of the Executive, namely, the President's Article II power to nominate and

---

[17] Sanders v. McClellan, 463 F.2d 894 (D.C. Cir. 1972), on which the Committee also relies, is irrelevant to the issue whether the White House is legally compelled to produce a privilege log to Congress. In Sanders, the D.C. Circuit declined to exercise its equitable jurisdiction based on plaintiff's First Amendment claims to order declaratory and injunctive relief preventing enforcement of a Senate subpoena *duces tecum.* Id. at 899-903. In deciding that the equities did not favor the plaintiff, the court simply noted that there were procedures in place for a witness to assert privileges in the course of a congressional investigation. Id. at 899-900.

remove Officers of the United States, notwithstanding the Committee's limited (at best) entitlement to materials involving these subjects. In particular, the subpoenas demand the production of documents relating to, *inter alia*, the "evaluation or decision to dismiss [nine identified U.S. Attorneys]"; the "evaluation of any other U.S. Attorney(s) considered for dismissal since [November 2004]"; the "implementation of the dismissal and replacement of the dismissed U.S. Attorneys"; the "selection, discussion and evaluation of any possible replacement or interim or acting appointment to fill any vacancy [relating to the dismissed U.S. Attorneys]"; and "any and all documents related to the involvement of . . . any current or former White House employee or official" in any U.S. Attorney dismissal or replacement process. Subpoena (Joshua Bolten), Ex. 19. The subpoenas then demand that, as to those documents, the White House must provide a privilege log setting forth:

a. "the nature, source, and date of [each privileged] document";

b. "a description of the document's subject matter";

c. "the name and address of each recipient . . . together with the date or approximate date when each recipient received the document";

d. "the name and address of any other person to whom any of the contents of the document have been disclosed, the date such disclosure took place, and the means of such disclosure"; and

e. "the basis for withholding the document from the Committee. . . ."

Id.

These demands go beyond even the obligations generally imposed on civil litigants under Rule 26(b)(5)(A)(ii) of the Federal Rules of Civil Procedure, which requires only that a party claiming privilege to "describe the nature of the documents . . . in a manner . . . [that] will enable other parties to assess the claim." And by requiring the White House to describe its privileged communications and reveal the name of "each recipient" of documents and the identity of "any

other person to whom any of the contents of the document have been disclosed," such a log could easily provide significant information regarding sensitive actions being contemplated by the President. Indeed, the detail requested (or some of it) might itself be privileged, and thus the very act of providing such a log might undermine the protection of the privilege itself.

Moreover, owing to the high visibility of the Office of the President, it is an easily identifiable target for demands for information by Congress, with what would be a consequent demand for detailed privilege logs identifying sensitive communications and activities on a vast range of subjects. If the Committee were to prevail on this claim, there would be no effective check on Congress's ability to demand an accounting of the President's communications. See Cheney v. U,S. Dist. Ct. For the Dist. of Columbia, 542 U.S. 367, 386 (2004) (noting that, in contrast to the criminal justice system, where "there are various constraints, albeit imperfect, to filter out insubstantial legal claims, . . there are no analogous checks in the civil discovery process . . ."). In fact, the 110th Congress alone has conducted more than 300 inquiries and investigations of the Executive Branch. See supra at pp. 9-10. If Congress had a judicially created right to a privilege log every time that it sought documents from the Executive Branch, the burdens would be enormous: the White House would need a full-time staff devoted to privilege issues, and senior advisers would be diverted from their primary duties to assist with the preparation of such logs. (Of course, the fact that the White House itself has not produced a single privilege log in the 110th Congress demonstrates the absurdity of the Committee's claim that if the Court were to "absolve . . . [the White House] of the need to produce privilege logs . . . it would render nugatory Congress's authority to investigate matters within its legislative . . . jurisdiction." Pl.'s Mem. at 35-36; see infra at pp. 72-74.)

A rule requiring a privilege log, moreover, would likely give rise to disputes between congressional committees and the White House concerning the adequacy of such privilege logs, as happens frequently in civil litigation. Those disputes would inevitably find their way into court, with the attendant prospect of federal judges superintending the minutiae of a process that has historically been left to the give-and-take of accommodation. Such an outcome would ensnare the Judiciary in such disputes and the possibility of an ultimate judicial resolution would diminish the likelihood that differences are resolved through the accommodation process. See Barnes v. Kline, 759 F.2d 21, 61 (D.C. Cir. 1985) (Bork, J., dissenting) ("As the spectacle of public officials suing other public officials over abstract constitutional questions becomes familiar, the taint will wear off, and what seemed unattractive will appear inevitable.").

The Committee attempts to argue that the courts have not found an "itemized description of the documents withheld . . . to be overly burdensome, intrusive or unnecessary, and in fact, have held such procedures to be necessary to the fair disposition of disputes involving the Executive Branch." Pl.'s Mem. at 36. That is simply wrong with respect to the White House. In Cheney, the Supreme Court rejected the notion that the Executive Branch at its highest level shall bear the initial burden in civil discovery "of invoking executive privilege with sufficient specificity and of making particularized objections" to discovery on a "line by line" basis in order to safeguard executive functions and maintain the separation of powers. 542 U.S. at 383. The withholding of information in a civil case, the Court determined, "does not hamper another branch's ability to perform its 'essential functions' in quite the same way" as in the criminal setting. Id. The Court also pointed out the differing considerations applicable in the criminal context, noting that because it is a "'primary constitutional duty of the Judicial Branch . . . to do justice in criminal prosecutions,'" the withholding of information "from a tribunal in an ongoing

criminal case when the information is necessary to the court in carrying out its tasks 'conflict[s] with the function of the courts under Article III.'" Id. at 384 (citations omitted). "Such an impairment of the 'essential functions of [another] branch' . . . is impermissible." Id. (citation omitted).

The Cheney Court's treatment of the separation-of-powers aspects of the information demands in that case has clear implications for this matter. The Committee's "essential functions" would not be impermissibly impaired if it could not compel the President and his advisers to identify privileged communications on a line-by-line basis regarding any given subject. As noted above, the Committee argues that were the Court to "absolve . . . [the White House] of the need to produce privilege logs . . . it would render nugatory Congress's authority to investigate matters within its legislative . . . jurisdiction." Pl.'s Mem. at 35-36. But that is nothing more than a flat assertion. It is contradicted by the fact that Congress has actively exercised its investigative authority even though the Executive provides such logs only infrequently, and is belied by the fact that the Committee points to only two circumstances (both more than ten years ago) in which the White House has provided Congress with a privilege log. See Pl.'s Mem. at 40-41 (identifying instances in 1996 and 1997 in which the White House voluntarily produced privilege logs to Congress). Certainly the fact that privilege logs have not often been provided in other contexts – and have not been provided at all by the White House during the 110th Congress – has not rendered Congress's investigative authority "nugatory."

In addition, as the Court of Appeals has observed, "[w]hile fact-finding by a legislative committee is undeniably a part of its task, legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events." Senate Select Committee, 498 F.2d at 732. The

Committee has not even come close to demonstrating how a detailed accounting of privileged White House communications is essential to its ability to make legislative judgments on the predicted consequences of proposed legislative actions.[18]

The Committee points to past occasions in which the White House *voluntarily* provided congressional committees with privilege logs in response to requests for documents. Pl.'s Mem. at 40-41. But the mere fact that the White House may voluntarily provide such a log does not mean that Congress has a right to compel a privilege log, and no court has ever compelled the Executive Branch to provide one to Congress. Instead, the examples of voluntary inter-branch cooperation identified by the Committee demonstrates the efficacy of the traditional method by which the Executive and Legislative Branches have resolved their disputes. As the Court of Appeals has noted, "[n]egotiation between the two branches should be thus viewed as a dynamic process affirmatively furthering the constitutional scheme." AT&T Co., 567 F.2d at 130. The

---

[18] This fact distinguishes this case from the D.C. Circuit's decisions in Dellums on which the Committee relies. Dellums concerned the invocation of executive privilege by former President Nixon in response to a subpoena for White House communications that was served by plaintiffs in civil discovery in support of their claims for damages arising from alleged violations of their constitutional rights by former high level government officials. Ultimately, the court allowed limited review of putatively privileged material through the appointment of a Special Master, pursuant to Fed. R. Civ. P. 53(a), Dellums I, 561 F.2d at 250, and later required the production of a privilege log. Dellums II, 642 F.2d at 1359. But the court did not impose this burden without first weighing the respective interests involved. The court emphasized that "[i]t is of cardinal significance . . . that the claim of privilege is being urged solely by a former president, and there has been no assertion of privilege by an incumbent president . . . ." Dellums I, 561 F.2d at 247. The court further found that plaintiffs had demonstrated that the communications at issue "were not merely 'demonstrably relevant' but indeed substantially material to their case." Id. at 249. Lastly, the court stressed that there is "a strong constitutional value in the need for disclosure in order to provide the kind of enforcement of constitutional rights that is presented [here involving] . . . a charge of civil conspiracy among high officers of government to deny a class of citizens their constitution rights . . ." Id. at 247. No like "strong constitutional values" are present in this case to justify the compulsion of a privilege log from the White House.

process is flexible enough that it has resulted in the provision of a privilege log by the White House in the past in certain circumstances, without creating an obligation more generally.

* * * * * * *

This nation has a long and consistent history of having disputes between the political branches resolved through negotiation, compromise, and, when necessary, the exercise of political tools at their disposal, but without resort to the judiciary. Indeed, Congress has a variety of means by which it can and has exerted pressure on the Executive Branch, including the power of the purse and the ability to withhold consent for Presidential nominations. A resolution of this case on the merits would upset this historic practice by fixing judicially enforceable rules regarding these important and sensitive inter-branch issues, rather than leaving these issues to the give-and-take process that occurs every day between the branches. Forever altering the accommodation process that has served the Nation for over two centuries would be unwise and unnecessary.

CONCLUSION

For the reasons set forth above, the Court should grant Defendants' Motion to Dismiss and deny the Committee's Motion for Partial Summary Judgment.

Dated: May 9, 2008

Respectfully submitted,

GREGORY G. KATSAS
Acting Assistant Attorney General

CARL J. NICHOLS
Principal Deputy Associate Attorney General

JOHN C. O'QUINN
Deputy Associate Attorney General

JOSEPH H. HUNT
Director, Federal Programs Branch

/s/
JOHN R. TYLER (D.C. Bar No. 297713)
JAMES J. GILLIGAN (D.C. Bar No. 422152)
NICHOLAS A. OLDHAM (D.C. Bar No. 484113)
HELEN H. HONG (CA SBN 235635)
STEPHEN J. BUCKINGHAM
Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W.
Washington, DC 20530
Telephone: (202) 514-2000

ATTORNEYS FOR DEFENDANTS