IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM IN SUPPORT
OF DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION

The House Committee on Oversight and Government Reform seeks to entangle the Judiciary in an ongoing political dispute between Congress and the Executive Branch regarding Executive Branch records over which the President has asserted executive privilege. Nothing in the Committee's Complaint justifies this Court's intervention.

Disputes of this sort have arisen regularly since the Founding. For just as long, these disputes have been resolved between the political Branches through a constitutionally grounded system of negotiation, accommodation, and self-help. Rejecting the full panoply of tools Congress has used throughout two centuries of inter-Branch give-and-take, the Committee attempts to invoke this Court's jurisdiction to determine the political Branches' relationship with each other. As the Supreme Court has made clear, however, defining the institutional boundaries of the political Branches in this context is not a proper judicial function. To the contrary, Article III of the Constitution, grounded in the separation of powers, presumes disputes such as this one will be resolved between the political Branches themselves.

Indeed, the threat to the separation of powers is heightened here. The Committee seeks documents reflecting not how the Executive Branch executed the laws, but how the Executive Branch responded to congressional oversight. The Department of Justice has made clear that "Operation Fast and Furious," the subject of plaintiff's congressional inquiry, was a fundamentally flawed law enforcement operation, but the Committee is not in this Court seeking documents about Operation Fast and Furious itself (what the Complaint refers to as the "Operations Component" of its investigation). Instead, the Committee seeks documents that were created long after that operation had ended –

documents that include deliberative communications among Department of Justice officials about how to respond to congressional and related media inquiries. Throughout this matter, the Department has sought to satisfy Congress's legitimate oversight interests while protecting critical Executive Branch interests such as the integrity of ongoing law enforcement operations, the identity of undercover officers and cooperating witnesses, foreign policy and national security concerns, and deliberations about how to respond to Congress itself. The Committee now asks this Court to enter the fray and decide whether the Committee's remaining interest in pursuing the so-called "Obstruction Component" of its investigation outweighs the Executive's interest in protecting its internal deliberations regarding how to interact with a coordinate Branch of government.

This Court must reject that request. The Founders intended Congress to use the tools provided in the Constitution—rather than the federal courts—to obtain documents that Congress believes necessary to engage in oversight of the Executive Branch. As Judge Wilkey observed in *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973) (per curiam), "[c]ongressional control over appropriations and legislation is an excellent guarantee that the executive will not lightly reject a congressional request for information." *Id.* at 778 (Wilkey, J., dissenting). The Branches' respective political tools, rather than litigation, provide the means for the two Branches to resolve their oversight differences.

For two hundred years, disputes over congressional requests for Executive Branch information have followed a common trajectory. Ordinarily, the Executive Branch provides information responsive to legitimate legislative inquiries while withholding material that implicates important Executive Branch prerogatives. Both sides seek to balance Congress's legitimate investigative concerns against the important confidentiality

concerns of the Executive. The strength and nature of Congress's desire for information and the Executive's desire for confidentiality shift over the course of the negotiations, for a host of reasons. The resulting "accommodation process" between the two co-equal Branches is political, and often disorderly and contentious, and the ultimate resolution often reflects a variety of considerations and compromises on both sides. But it is precisely the inherently political nature of the process of confrontation and resolution that makes it ill-suited for judicial review.

The combination of robust alternative remedies and the historical absence of involvement by the Judiciary have provided incentives for both Branches to work in earnest through the process of negotiation, accommodation, and ultimate resolution. That process would unravel if courts were available to dictate what information may be demanded or withheld. Judicial intervention would move the Branches toward litigation, not accommodation, and would dramatically alter the separation of powers.

The lure of litigation is evident here. In its investigation, the Committee has asked questions and requested documents concerning a host of matters relating (broadly speaking) to Operation Fast and Furious, some of which reflected legitimate oversight interests, and many more of which the Committee itself recognized were "blind alleys." The Department of Justice has accommodated numerous congressional requests. The Attorney General has publicly answered questions about Operation Fast and Furious in congressional testimony on nine separate occasions. Other senior Department officials have provided substantial information through hearings, interviews, and briefings. And the Department has produced thousands of pages of documents. In those instances where the Committee's requests have threatened important Executive Branch interests, the

Department has offered the Committee a range of alternative accommodations. Despite these substantial efforts by the Department to accommodate congressional interests, the House not only voted for the first time in American history to hold a sitting cabinet member in contempt of Congress, it then went further, seeking relief from this Court – even though the Department continued to offer additional accommodations, even though an independent investigation by the Department's Inspector General was still pending, and even though a host of political remedies remained unexhausted.

Ultimately, then, the gravest constitutional threat presented by this litigation concerns neither the identity of the victor nor the relative weights of the interests of the Executive and Congress in this particular matter, though those are of undeniable importance. Instead, the gravest constitutional threat would be presented by a decision from this Court to assume jurisdiction over this dispute.

Although one prior district court assumed jurisdiction over another congressional lawsuit, that decision does not justify judicial intervention here. *Committee on Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, *stayed pending appeal*, 542 F.3d 909 (D.C. Cir. 2008) (per curiam). *Miers* went down the wrong path, and there have now been more congressional suits challenging executive privilege in the past five years (two) than in the previous 220 years combined. This Court should reject the rash call for judicial intervention here, lest the constitutionally-sanctioned and time-honored process of negotiation and accommodation itself becomes a thing of the past. Such intervention is particularly inappropriate here, and it would serve no public interest. The Department has provided substantial accommodations and has offered to do more. The Department has acknowledged flaws in the operation, taken comprehensive steps to fix those

problems, and requested an independent Inspector General report that provides a comprehensive account of Operation Fast and Furious and its aftermath. Judicial restraint, not judicial intervention, is warranted.

The Committee's suit must therefore be dismissed.

BACKGROUND

I. OPERATION FAST AND FURIOUS

This litigation arises from a wide-ranging, nearly two-year congressional inquiry into a law enforcement investigation known as Operation Fast and Furious. The inquiry focused initially on the use of techniques that the Department has acknowledged were "fundamentally flawed." At issue here, however, are not documents relevant to those techniques, nor documents revealing how a February 4, 2011 letter from the Department to Senator Charles Grassley came to include inaccurate information about those techniques – an error the Department has acknowledged. Instead, at issue here are documents relevant only to the Committee's alleged concern that it took the Department too long to withdraw that letter, and the Committee's assertion that the delay was part of a deliberate effort to "obstruct" the Committee. What follows is a brief account of the back and forth between the Branches that led to the current litigation.[1]

A. A Brief History of the Operation

Operation Fast and Furious was launched out of the Phoenix field office of the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") in the fall of 2009. *See*

[1] Many of the documents cited herein have been compiled by the Committee on a Web site referenced in the Complaint. *See* Compl. at 2 n.1, ECF No. 1. For the convenience of the Court, defendant has attached to this Memorandum other public background documents not included on the Web site.

U.S. Dep't of Justice, Office of the Inspector Gen., A Review of ATF's Operation Fast and Furious and Related Matters at 106 (2012) ("IG Report"), *available at* http://www.justice.gov/oig/reports/2012/s1209.pdf. Its purpose was the takedown of drug trafficking organizations purchasing arms in the United States to support their operations in Mexico. *See id*. at 210. The stated goal was to conduct surveillance of suspected straw purchasers to determine to whom guns purchased in the United States were flowing, with the hope of bringing to justice higher-level members of drug and gun conspiracies. *See id*. at 214. Although the goal of dismantling criminal organizations was legitimate, strategy and tactics employed in Operation Fast and Furious were, as the Attorney General has stated, "fundamentally flawed." A report by the Department's Inspector General, following a review requested by the Attorney General, concluded that agents within ATF Phoenix made decisions not to arrest low-level straw purchasers, thus foregoing interdiction of firearms, *see* IG Report at 225, and that the U.S. Attorney's Office in Phoenix failed to press for seizures and arrests, *see id.* at 217.

The flawed tactics used in Operation Fast and Furious and in certain prior ATF investigations dating back to 2006, *see id.* at 30 (describing prior operations), ultimately came to light after the tragic death of U.S. Customs and Border Protection Agent Brian Terry, who on December 15, 2010, died of wounds suffered during a firefight near the Mexican border. *See id*. at 199. Two of the guns found at the scene were traced back to a purchaser connected to Operation Fast and Furious, although ATF did not learn of the sales of these weapons until after the transactions. *See id*. Shortly after "learn[ing] of the inappropriate tactics used in Operation Fast and Furious," the Attorney General ordered

"that those tactics should not be used again." Letter from Deputy Attorney General Cole to Chairman Issa 1 (May 15, 2012) ("Cole May 15 Letter").

B. The Committee's Initial Inquiry and the October 11, 2011 Subpoena

In January 2011, Members of Congress began a series of inquiries about a range of issues related to Operation Fast and Furious. On January 27, 2011, Senator Grassley sent a letter to ATF seeking information about allegations by ATF whistleblowers regarding the use of inappropriate tactics, *see* Letter from Senator Grassley to ATF Acting Director Melson (Jan. 27, 2011).[2] Four days later Senator Grassley sent another letter, outlining his concerns that such whistleblowers were not getting appropriate treatment within the Department, *see* Letter from Senator Grassley to ATF Acting Director Melson (Jan. 31, 2011). The Committee became involved shortly thereafter, sending its first letter to the Department about Operation Fast and Furious on March 16, 2011. *See* Letter from Chairman Issa to ATF Acting Director Melson (Mar. 16, 2011).

Just fifteen days later, on March 31, 2011, the Committee issued its first subpoena, directed to ATF, for documents regarding the genesis of Operation Fast and Furious and related operations, the authorization of and concerns about so-called "gunwalking," the Terry shooting, and communications with a cooperating gun dealer. *See* Comm. on Oversight & Gov't Reform, Subpoena (Mar. 31, 2011). While seeking to be responsive to the Committee's interest in the "gunwalking" allegations, the Department also explained that there were certain materials, including grand jury and law enforcement sensitive material such as Reports of Investigation ("ROIs"), that could not

[2] The correspondence actually discussed "Project Gunrunner," a program implemented by ATF in 2006 "to attack the problem of gun trafficking to Mexico." H.R. REP. NO. 112-546, at 188 (2012).

be produced. *See* Letter from Assistant Attorney General Weich to Chairman Issa 1-2 (Oct. 11, 2011). The Department informed Congress that providing access to many of the documents sought would compromise the integrity of ongoing criminal investigations and prosecutions and, in some instances, would violate federal law. *Id.*

The Department nonetheless collected and reviewed documents that might be relevant to the investigation. *See* Cole May 15 Letter at 3. By October 11, 2011, the Department had produced 2,050 pages of responsive records to the Committee. H.R. REP. NO. 112-546, at 13. The Department had also responded to more than a dozen additional letters and requests from Congress, conducted briefings with the Committee, and provided witnesses to testify before congressional staff and at Committee hearings.

On October 11, 2011, the Committee issued a second subpoena for records, directed to the Attorney General, which contained 22 separate broad requests for documents and reflected the shift in the focus of the Committee's investigation to include prominently the Department's responses to the congressional inquiries. *See* Comm. on Oversight & Gov't Reform, Subpoena at 2-5 (Oct. 11, 2011). It sought, among many other things, all communications regarding Operation Fast and Furious to or from 16 senior Department officials, *see id.* at 2 (¶ 1); documents relating to "any instances prior to February 4, 2011" where ATF failed to interdict weapons, *see id.* at 2-3 (¶¶ 4-5); and all Fast and Furious ROIs, *see id.* at 3 (¶ 8). *See also* Letter from Chairman Issa to Attorney General Holder 1-2, 5 (Oct. 9, 2011) (Ex. A).

C. The February 4, 2011 Letter

By the time of the October subpoena, February 4, 2011, had become important in the congressional investigation. On that date, the Department responded to letters from

Senator Grassley seeking information about allegations raised by ATF whistleblowers regarding the use of inappropriate investigative tactics. *See* Letter from Assistant Attorney General Weich to Senator Grassley (Feb. 4, 2011) ("February 4 Letter"). In that letter, the Department indicated its belief that ATF did not "'sanction[]' or otherwise knowingly allow[] the sale of assault weapons to a straw purchaser who then transported them into Mexico," and that "ATF makes every effort to interdict weapons that have been purchased illegally and prevent their transportation to Mexico." *Id*. at 1.

In preparing the February 4 letter, the Department had sought to provide a thorough and accurate response in a tight timeframe. After the letter was sent to Congress, however, conflicting information regarding what had happened in Operation Fast and Furious began to emerge. *See* IG Report at 361-69. As a result, the Attorney General, less than a month after the letter was sent, asked the Department's Acting Inspector General to investigate the "gunwalking" allegations in Senator Grassley's letter. *See* Cole May 15 Letter at 1. Moreover, in the weeks and months after the February 4 letter, Department leaders publicly indicated that questions existed about what had happened in Operation Fast and Furious and that the Department had asked the Inspector General to resolve those questions. *See* Letter from Deputy Attorney General Cole to Chairman Issa 3 (June 20, 2012) ("Cole June 20 Letter"); H.R. REP. NO. 112-546 at 12. On October 7, 2011, the Attorney General described the tactics used in Operation Fast and Furious as "fundamentally flawed" and "completely unacceptable," Letter from Attorney General Holder to Chairman Issa *et al*. 2 (Oct. 7, 2011) (Ex. B), and in November 2011 both he and the Assistant Attorney General for the Criminal Division testified that the February 4 letter contained inaccuracies, *see* Cole May 15 Letter at 11.

Shortly thereafter, on December 2, 2011, the Department formally withdrew the February 4 letter. *See* Letter from Deputy Attorney General Cole to Chairman Issa and Senator Grassley 1 (Dec. 2, 2011) ("Cole Dec. 2 Letter"). As the Attorney General explained, the Department did so when it was "confident that it had a sufficient understanding of the factual record." Letter from Attorney General Holder to the President 6 (June 19, 2012) ("Holder June 19 Letter").

Ordinarily, the Department does not provide to Congress internal Executive Branch materials generated in the course of responding to a congressional inquiry. But in light of the acknowledged inaccuracies in the February 4 Letter, the Department "ma[d]e a rare exception to [its] recognized protocols and provide[d the Committee] with information related to how the inaccurate information came to be included in the [February 4] letter." Cole Dec. 2 Letter at 1. Thus, in connection with the withdrawal of the February 4 letter, the Department also produced 1,364 pages of records documenting the drafting of the letter. *See id*. The Department thereby gave the Committee "unprecedented access to deliberative materials reflecting how the letter came to be drafted." Letter from Attorney General Holder to Chairman Issa 2 (June 14, 2012) ("Holder June 14 Letter") (Ex. C).

In addition, the Department took concrete steps to ensure that the mistakes of Operation Fast and Furious and its aftermath were not repeated: the Deputy Attorney General made clear on March 9, 2011, that Department policy prohibited undercover operations in which guns crossed the border, IG Report at 99; ATF made "significant and helpful" policy changes to improve investigations and oversight, while the Criminal Division made "appropriate and necessary" improvements to its wiretap application

review process, *id*. at 428, 431; personnel changes were made at ATF, the U.S. Attorney's Office in Arizona, and the Criminal Division, and certain staff were referred for potential disciplinary action, Statement by Attorney General Holder (Sept. 19, 2012), *available at* http://www.justice.gov/opa/pr/2012/September/12-ag-1134.html; and the Department issued new guidelines to ensure accuracy in responses to Congress, IG Report at 469-70.

D. Shifting Scope of the Document Dispute

After the October 11, 2011 subpoena, the Department continued to respond to the congressional investigation. By May 2012, in response to the various inquiries received, the Department had made more than 45 separate productions of documents totaling over 7,600 pages. *See* Cole May 15 Letter at 4. More than 20 Department officials had participated in briefings and interviews with Members of Congress and testified at hearings, *see* H.R. REP. NO. 112-546 at 182, and the Department had responded to dozens of letters from lawmakers, including almost sixty letters regarding Operation Fast and Furious from Chairman Issa and Senator Grassley alone, *see* Cole May 15 Letter at 4. The information provided to Congress included testimony by high-ranking Department officials. *See id.* at 3. Indeed, the Attorney General testified before Congress about Operation Fast and Furious on seven separate occasions before May 2012 (and has appeared twice more since). *See id.*; Holder June 14 Letter at 1.

Nonetheless, on May 3, 2012, Chairman Issa sent a memorandum to update the Committee on the investigation that reflected a sharp escalation in his approach: Chairman Issa proposed to hold the Attorney General in contempt. Mem. from Chairman Issa to Members of the Comm. on Oversight and Gov't Reform 1 (May 3, 2012) ("Issa

Memo"), *available at* http://oversight.house.gov/wp-content/uploads/2012/05/Update-on-Fast-and-Furious-with-attachment-FINAL.pdf. Even though the memorandum highlighted information collected through the investigation, explaining that such information had "shed immense light on what occurred and why," Chairman Issa asserted not only that the Committee's work remained unfinished, but also that the Department was guilty of "Contempt Against the American People." *Id*. at 7.

In his memorandum, the Chairman "identified three categories of documents necessary for Congress to complete its investigation," Letter from Chairman Issa to Attorney General Holder 1 (June 13, 2012) ("Issa June 13 Letter"), specifically, records relating to: (1) "How did the Justice Department finally come to the conclusion that Operation Fast and Furious was 'fundamentally flawed'?"; (2) "What senior officials at the Department of Justice were told about or approved the controversial gunwalking tactics that were at the core of the operation's strategy?"; and (3) "How did inter-agency cooperation in a nationally designated Strike Force fail so miserably in Operation Fast and Furious?" Issa Memo at 7-9. The memorandum also enclosed a draft report in favor of a contempt resolution.

The Department responded by letter on May 15, 2012, explaining "that a contempt proceeding would be unwarranted given the information the Department has disclosed to the Committee." Cole May 15 Letter at 1. The Department described its concerns about the "damage [a contempt proceeding] would cause to relations between the Executive and Legislative Branches," and explained that the remaining documents purportedly in dispute were not necessary to the Committee's investigation because "the core questions posed by the Committee about Operation Fast and Furious ha[d already]

been answered." *Id.*; *see also id.* at 8-12. Indeed, the letter explained how the type of information still sought by the Committee went to the core of the Department's mission to enforce the laws and imperiled the Department's independence. The Department also explained that any vote on contempt was premature, given that "the results of the Department's Inspector General review have not yet been reported," and that the Inspector General's review would likely "provide the Committee with clearer insight into the need for additional documents." *Id.* at 1. The Department continued to express its belief that both sides could "arrive at a mutually acceptable resolution." *Id.*

On May 18, 2012, leadership of the House of Representatives and Chairman Issa responded in a letter that revised the issues in dispute and focused on "two key questions": "first, who on your leadership team was informed of the reckless tactics used in Fast & Furious prior to Agent Terry's murder; and, second, did your leadership team mislead or misinform Congress in response to a Congressional subpoena?" Letter from John Boehner, Eric Cantor, Kevin McCarthy, and Darrell Issa to Eric Holder, Jr. 1 (May 18, 2012) ("Boehner May 18 Letter").

Shortly after receiving the May 18 letter from House leadership, the Department and Committee staff met twice to try to resolve the remaining questions. *See* Letter from Deputy Attorney General Cole to Chairman Issa 1 (June 11, 2012) ("Cole June 11 Letter") (Ex. D). The Deputy Attorney General, moreover, offered on several occasions to meet personally with Chairman Issa to try to find a way to resolve the matter. *Id.*

Despite those efforts to reach resolution, on June 11 Chairman Issa scheduled a contempt hearing to take place in just nine days, on June 20. *Id.* The Department responded by letter to Chairman Issa, again explaining that contempt would be

"premature" because negotiations were progressing. *Id*. The Deputy Attorney General again offered to meet with Chairman Issa and expressed confidence that such a meeting could "bring this matter to a close." *Id.*

Two days later, Chairman Issa again revised his request for documents. He "eliminated the dispute over information gathered during the criminal investigation," and focused on "documents from after February 4, 2011, related to the Department's response to Congress and whistleblower allegations." Issa June 13 Letter at 1.[3]

E. The Attorney General's Further Attempts at Accommodation

On June 14, 2012, the Attorney General proposed an accommodation to "fully address the remaining concerns identified" by the Chairman and House leadership. Holder June 14 Letter at 2. Specifically, the Department proposed to provide the Committee with "a briefing, based on documents that the Committee could retain, explaining how the Department's understanding of the facts of Fast and Furious evolved during the post-February 4 period, and the process that led to the withdrawal of the February 4 letter." *Id.* The Attorney General requested a meeting by June 18, 2012. *Id.*

In response, Chairman Issa proposed a meeting no earlier than June 19, 2012, the day before the scheduled contempt vote. Letter from Chairman Issa to Attorney General Holder 1 (June 15, 2012). The Chairman rejected the Attorney General's offer of a briefing and documents in exchange for an assurance that the Committee would not

[3] Confirming that the Committee had concluded its investigation into the Operations Component, shortly thereafter the Committee issued a final report on that aspect of the investigation. *See* Joint Staff Report, Fast and Furious: The Anatomy of a Failed Operation at 5 (July 31, 2012) ("Joint Staff Report I"), *available at* http://oversight.house.gov/wp-content/uploads/2012/07/7-31-12-FF-Part-I-FINAL-REPORT.pdf.

proceed with the contempt vote. Instead, the Chairman stated that, "it would best facilitate a constructive dialogue" if the Department produced the offered documents *before* the meeting between the Attorney General and the Chairman and before the Committee decided whether or not to proceed to contempt. *Id.*

At the ensuing meeting, despite "significant confidentiality and separation of powers concerns," Holder June 19 Letter at 2, the Attorney General offered to provide core deliberative materials pertaining to the "single outstanding question posed" in the Boehner May 18 letter, namely, whether the February 4 letter "was part of a broader effort by [the] Department to obstruct a Congressional investigation," and offered a briefing by the Department to "provide greater insight into the documents not being provided" and to respond to "follow-up questions about these issues." Letter from Deputy Attorney General Cole to Chairman Issa 1 (June 19, 2012) ("Cole June 19 Letter") (Ex. E). The offer was rejected. *See id.* Chairman Issa later stated that, when the Attorney General did not come to the June 19 meeting with the documents demanded by the Committee in hand, "we walked away." *Hearing Before the H. Comm. on Oversight and Gov't Reform*, 112th Cong. (2012) ("June 20 Hearing") (Ex. F at 3) (statement of Chairman Issa).

F. The President's Assertion of Executive Privilege

When it was apparent that the Committee would proceed with its contempt vote, the President asserted executive privilege over certain categories of internal Executive Branch documents generated after February 4, 2011, related to the Department's response to congressional oversight. Those documents, as the Attorney General explained in a letter to the President requesting the assertion, were "created after the investigative tactics

at issue in [Fast and Furious] had terminated and in the course of the Department's deliberative process concerning how to respond to congressional and related media inquiries into that operation." Holder June 19 Letter at 1-2. The Attorney General expressed his concern that release of such documents "would have significant, damaging consequences." *Id.* at 2. In particular, "it would inhibit the candor of such Executive Branch deliberations in the future and significantly impair the Executive Branch's ability to respond independently and effectively to congressional oversight." *Id.*

On June 20, 2012, the Department wrote to Chairman Issa prior to the scheduled hearing on contempt to report that the President had asserted executive privilege as requested by the Attorney General. *See* Cole June 20 Letter. The Department reiterated that the Inspector General's report had not yet issued, and noted that the report would likely provide further insight on Operation Fast and Furious. *Id*. at 1. The Department also indicated that it was still "willing to work toward a mutually satisfactory resolution." *Id*. at 4.

G. The Contempt Vote

Notwithstanding the President's assertion of executive privilege and the Attorney General's offer to provide the Committee with additional core deliberative materials, the Committee chose to go forward immediately with the scheduled contempt vote. On June 20, 2012, the Committee voted along party lines, 23-17, to refer the Committee's contempt report to the full House, despite strong criticisms by Members who protested the partisan nature of the investigation and the contempt proceedings. June 20 Hearing (Ex. F at 4). As reported to the full House, the Committee recommended that a contempt citation issue with respect to a single category of records, relating to the Department's

purported "fail[ure] to turn over lawfully subpoenaed documents explaining the Department's role in withdrawing the false letter it sent to Congress," H.R. REP. NO. 112-546 at 40.

At a meeting with Committee staff on June 26, Department officials reiterated the offer made at the June 19 meeting, but now also shared an illustrative subset of the documents in dispute. Again, the Committee rejected the Department's offer.

Just two days later, on June 28, 2012, the House voted to hold the Attorney General in contempt. *See* 158 Cong. Rec. H4164 (daily ed. June 28, 2012). Many Members absented themselves from this vote owing to its perceived partisan purpose. *See, e.g.*, *id.* at H4166. The final contempt vote was 255-67, with one Representative voting present and 109 not voting. *See id.* at H4417. Congress thus for the first time held a sitting Cabinet member in contempt.

H. The Report by the Department's Inspector General

On September 19, 2012, the Inspector General of the Department of Justice released a report that discusses, among other things, Operation Fast and Furious, *see* IG Report at 103-234, and the Department's actions in response to the congressional investigation, *see id.* at 329-418. In conducting his investigation, the Inspector General (as an Executive Branch official) had extensive access to internal Department documents he deemed relevant. The IG Report provides an extensive description of the very events that the Committee has pursued here, including the efforts by the Department to learn more about the facts of Operation Fast and Furious in the months following the February 4 letter to Senator Grassley, *see id.* at 361-79, the Department's responses to Congress as they related to the disputed statements in the February 4 letter, *see id.* at 379-89, and the

withdrawal of the February 4 letter on December 2, 2011, *see id.* at 389-97. The report concluded that the February 4 letter was not intentionally misleading but was instead the "byproduct of rushed and sloppy drafting." *See id.* at 410-11. In order to provide the public with the Inspector General's complete analysis of Operation Fast and Furious and its aftermath, the President authorized the Department to release in unredacted form those portions of the IG Report that discuss the Department's responses to Congress after February 4, 2011. In addition, the President authorized the production to Congress of post-February 4 documents referenced in the report regarding the Department's response to Congress.

At a public hearing on the IG Report, Chairman Issa "congratulate[d]" the Inspector General for "delivering an extremely comprehensive, strong and independent report," *Hearing Before the H. Comm. on Oversight and Gov't Reform*, 112th Cong. (2012) ("Sept. 20 Hearing") (Ex. G at 1) (statement of Chairman Issa), and noted that the IG Report "concludes a major chapter in Fast and Furious and the false statements made to Congress," *id.* (Ex. G at 2).

II. PROCEDURAL HISTORY

On August 13, 2012, prior to release of the IG Report, the Committee filed the present suit. *See* Compl. In the Complaint, the Committee identifies two separate components of its investigation into Operation Fast and Furious. The first, which the Committee describes as the "Operations Component," relates to the conception and implementation of Operation Fast and Furious. *Id.* ¶ 4. The second, which the Committee refers to as the "Obstruction Component," relates to whether the Department of Justice "attempted to obstruct the Committee's investigation by (a) lying to the

Committee or otherwise providing it with false information, (b) continuing to maintain a demonstrably false position about the use of gun walking tactics, and (c) retaliating against DOJ whistleblowers." *Id*. ¶ 7.

The Committee asserts "a legal and constitutional right to obtain from the Attorney General all documents responsive to the [October 2011] Subpoena not already produced." *Id.* ¶ 62; *see also id.* at 3. The Committee, however, focuses on "documents dated or . . . created after February 4, 2011, that are responsive to Categories 1, 4, 5, and 10" of the October 11 subpoena. *Id*. ¶ 62. These records, according to the Committee, "include[] or constitute[] the documents most likely to be relevant to the Obstruction Component of the Committee's investigation." *Id.* ¶ 62.

ARGUMENT

Adjudicating a suit brought by one coequal Branch against another is in no sense a routine judicial task, and the subpoena that the Committee here seeks to enforce simply embodies Congress's contention that it may obtain sensitive documents over the President's objection. This case is not a case or controversy under Article III: it is a quintessentially political dispute between the Branches over the scope of their respective constitutional powers.

The Constitution itself, and not the Federal Rules of Civil Procedure, provides the mechanism for resolving such contests. The Founders carefully set out the tools by which Congress may protect its institutional interests, and they are substantial. Among other powers, Congress can withhold funds from the Executive Branch, override vetoes, decline to enact legislation, refuse to act on nominations, and adjourn. If Congress is dissatisfied with the President's response to a congressional investigation, it is free to

employ these or any other means of self-help within its constitutional authority to reach a political accommodation—but only if it is willing to incur the associated political costs. *Cf.* THE FEDERALIST No. 51 (Madison) ("Ambition must be made to counteract ambition."). The Executive Branch must similarly weigh the harm from congressional incursion into its institutional prerogatives against the costs that may flow from resistance. That is how the political Branches have traditionally resolved such conflicts.

An assumption of jurisdiction here would short-circuit the constitutional design and threaten to alter permanently the relationship among the Branches. Filing suit is far easier than mustering the votes necessary to cut appropriations, defeat legislation, or override a veto, and is far less visible to constituents. A decision allowing the case to proceed would thus greatly diminish the political costs of inter-Branch confrontation and reduce the incentive for Congress to evaluate and prioritize the demands of its myriad committees. Judicial review would be particularly disruptive in this case, where the Executive Branch has consistently indicated that it remains willing to work toward further accommodation.

"Defining the rights and privileges of the Congress and President *inter sese* in the legislative process has never been a judicial function." Archibold Cox, *Executive Privilege*, 122 U. Pa. L. Rev. 1383, 1425 (1974). As the Supreme Court has emphasized, "the law of Art. III standing is built on a single basic idea – the idea of separation of powers." *Raines v. Byrd*, 521 U.S. 811, 820 (1997) (internal quotation omitted). That idea, embodied in Article III and the structure of the Constitution, dictates that institutional disputes between the political Branches should be resolved in the political forum, not in the federal courts. *See Allen v. Wright*, 468 U.S. 737, 750 (1984) ("All of

the doctrines that cluster about Article III—not only standing but mootness, ripeness, political question, and the like—relate in part, and in different though overlapping ways, to an idea . . . about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.") (internal quotation omitted).

These core constitutional concerns provide the backdrop for the several, interrelated bases for rejecting judicial involvement in this dispute. *First*, the limits imposed by Article III preclude jurisdiction over an inherently political dispute about the scope of the respective powers and responsibilities of the two political Branches. *Second*, reflecting these principles, Congress has enacted a statutory scheme that similarly precludes judicial involvement in these types of cases. The relevant statutes confirm that there is no statutory subject matter jurisdiction for suits by a House Committee seeking judicial enforcement of a legislative subpoena in the face of an assertion of privilege by the Executive Branch. Congress has similarly declined to provide any right of action to seek such judicial enforcement. *Third*, if ever a congressional subpoena action against the Executive Branch were justiciable, this is not the one. The prudential bases for refusing jurisdiction are especially strong here, where substantial accommodation was continuing and has continued, and where Congress's legitimate informational interests have been largely satisfied.

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

A. The Political Branches Have a Long History of Resolving Disputes over Congressional Requests without Judicial Intervention

Disputes between the Legislative and Executive Branches over congressional requests for information have arisen since the beginning of the Republic. In 1792, the House of Representatives and President Washington clashed over records relating to a military expedition led by Major General St. Clair, *see Sirica*, 487 F.2d at 733-34 (MacKinnon, J., concurring in part and dissenting in part); in a separate matter just two years later, President Washington responded to a Senate request for documents by withholding "those particulars which, in [his] judgment, for public considerations, ought not to be communicated," *History of Refusals by Executive Branch Officials to Provide Info. Demanded by Congress: Part I – Presidential Invocations of Exec. Privilege Vis-À-Vis Congress*, 6 Op. O.L.C. 751, 753 (1982).

Consistent with historical practice from President Washington forward, "the Justice Department—under Administrations of both political parties—has concluded repeatedly that the [doctrine of executive] privilege may be invoked to protect Executive Branch deliberations against congressional subpoenas." *Assertion of Exec. Privilege over Commc'ns Regarding EPA's Ozone Air Quality Standards & Cal.'s Greenhouse Gas Waiver Req.*, 2008 WL 5506397, *2 (U.S.A.G. June 19, 2008). In a 1954 letter prohibiting the testimony of Executive Branch officials or the production of documents to a Senate subcommittee, President Eisenhower explained the policy behind this position, noting "it is essential to efficient and effective administration that employees of the Executive Branch be in a position to be completely candid in advising with each other on

official matters." The Papers of Dwight D. Eisenhower (May 17, 1954), *available at* http://www.eisenhowermemorial.org/presidential-papers/first-term/documents/879.cfm. The President emphasized that such information must be kept confidential "to maintain the proper separation of powers between the Executive and Legislative Branches." *Id*.

President Eisenhower's concerns, frequently echoed by later Presidents,[4] arise with particular force in the context of the deliberative process regarding "possible responses to congressional and media inquiries" because the Executive Branch has long been concerned that compelled disclosure of such materials to Congress would "significantly impair[]" the ability of the Executive Branch to respond effectively and independently to congressional inquiries. *Assertion of Exec. Privilege Concerning the Dismissal & Replacement of U.S. Att'ys*, 2007 WL 5038036, *4 (U.S.A.G. June 27, 2007) (internal quotation omitted).

In 1996, for example, Attorney General Janet Reno recommended the assertion of executive privilege over documents prepared in response to an ongoing investigation by a congressional committee. *See Assertion of Exec. Privilege Regarding White House Counsel's Office Docs.*, 1996 WL 34386607 (U.S.A.G. May 23, 1996). Attorney General Reno noted that "it is clear that congressional needs for information in that context will

[4] For example, in 1981 President Reagan asserted executive privilege over internal deliberations within the Department of the Interior, *see* 43 Op. Att'y Gen. 327 (1981); in 1982 President Reagan asserted executive privilege over internal EPA files, *see Prosecution for Contempt of Congress of an Exec. Branch Official Who Has Asserted a Claim of Exec. Privilege*, 8 Op. O.L.C. 101 (1984); in 2001 President George W. Bush asserted executive privilege over Department of Justice memoranda, Memorandum from Attorney General Ashcroft to President Bush, Dec. 10, 2001, *available at* http://www.justice.gov/olc/executiveprivilege.htm; and in 2008 President Bush asserted executive privilege to protect EPA documents, *see* 2008 WL 5506397; *see also Sirica*, 487 F.2d at 732 n.9 (MacKinnon, J., concurring in part and dissenting in part).

weigh substantially less in the constitutional balancing than a specific need in connection with the consideration of legislation." *Id*. at *2. That decision was echoed by Acting Attorney General Paul Clement in 2007, when he recommended an assertion of executive privilege over documents concerning responses to "congressional and media inquiries about the dismissal[]" of certain United States Attorneys. *See* 2007 WL 5038036 at *1.

In light of the frequency with which disputes over executive information have arisen over the past two centuries, the infrequency with which such disputes have involved the federal judiciary is notable. When a House Committee filed a civil suit in 2008 to enforce subpoenas directed to two White House officials, it marked only the second time in the nation's history that a legislative committee sued to enforce a subpoena against a high-ranking Executive Branch official in the face of an assertion of executive privilege. *See Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974); *Miers*, 558 F. Supp. 2d 53.

B. The Committee's Attempt to Vindicate Its Alleged Institutional Harm in Federal Court, Contrary to Historical Practice, Is Foreclosed by Supreme Court Precedent

Pursuant to the case-or-controversy requirement, plaintiff, "based on [its] complaint, must establish that [it] ha[s] standing to sue." *Raines*, 521 U.S. at 818. To meet this requirement, plaintiff must allege a "personal injury" that is "concrete and particularized," and the dispute at issue must be one "traditionally thought to be capable of resolution through the judicial process." *Id.* at 818-19 (internal quotations omitted).

"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 v. U.S. House of Representatives*, 733 F.2d 946, 957 (D.C. Cir. 1984) (Scalia, J., concurring in result), *abrogation recognized by Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999). It is instead a suit brought by a single committee of Congress requesting judicial arbitration of an inherently political dispute between the Legislative and Executive Branches based on asserted interests in congressional oversight of the Executive. *See* Compl. ¶ 60. That is a remarkable request in light of historical precedent and the harm that such an approach would cause to the separation of powers.

In *Raines v. Byrd*, the Supreme Court held that it lacked jurisdiction to adjudicate a challenge brought by several Members of Congress to the constitutionality of the Line Item Veto Act. 521 U.S. at 813-14. The Court distinguished the Members' allegation of a "dilution of institutional legislative power" from prior decisions recognizing standing for individual Members who had suffered personal injury (such as denial of a seat in Congress). The Court then looked to history and found it significant that, although there had been analogous claims of injury to the power of Congress or the Executive, the disputes had been resolved in the political arena, not in the courts. *Id*. at 826-29; *see also Mistretta v. United States*, 488 U.S. 361, 401 (1989).

The Supreme Court made clear in *Raines* that our constitutional system contemplates a "more restricted role for Article III courts," which is to protect "'the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action.'" 521 U.S. at 828-29 (quoting *United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring)). "'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.'" *Id.* at 829.

If it were otherwise, "the courts of this circuit [would be] not the last but the first resort," *Barnes v. Kline*, 759 F.2d 21, 53 (Bork, J., dissenting), *vacated sub nom. Burke v. Barnes*, 479 U.S. 361 (1987), such that "the system of checks and balances [would be] replaced by a system of judicial refereeship," *Moore*, 733 F.2d at 959 (Scalia, J., concurring in result).[5] After all, if a committee of Congress could sue the Executive Branch on the basis of a claimed loss of power in a political dispute, then there would be little question that the President or subordinate officials of the Executive Branch would be entitled to bring political disputes with Congress into the judicial forum. *See Raines*, 521 U.S. at 828. Thus, the Judiciary would become the final arbiter of any political dispute between the Branches—or even one between officials of the same Branch—a result that is contrary to our constitutional scheme.

It may be that judicial resolution of political disputes would, in certain instances, and in a limited sense, be deemed more expedient than "political struggle and compromise." *Barnes*, 759 F.2d at 55 (Bork, J., dissenting). But that "political struggle and compromise" is an essential part of constitutional checks and balances:

[5] The opinions of Judge Bork in *Barnes* and Judge Scalia in *Moore* have been cited as early expressions, prior to *Raines*, of the "view[] that the role of the judiciary is properly limited to the adjudication of individual rights." *Walker v. Cheney*, 230 F. Supp. 2d 51, 72 n.18 (D.D.C. 2002). Indeed, one court in this district has explained that, "[f]or all intents and purposes, the strict legislative standing analysis suggested by Justice Scalia in [*Moore*], now more closely reflects the state of the law." *Campbell v. Clinton*, 52 F. Supp. 2d 34, 40 (D.D.C. 1999), *aff'd* 203 F.3d 19 (D.C. Cir. 2000).

> The business of government is intensely practical and much is accomplished by compromise and accommodation. The powers of the branches with respect to one another . . . ebb and flow as the exigencies of changing circumstances suggest. It is proper and healthful that this should be so. These matters should not be always settled at the outset by declarations of abstract principle from an isolated judiciary not familiar with the very real and multitudinous problems of governing.

Id.; *see also INS v. Chadha*, 462 U.S. 919, 959 (1983) ("[T]he Framers ranked other values higher than efficiency."). It is this process of compromise and accommodation, even when that process is contentious, that protects the powers of the political Branches from excessive judicial interference while at the same time preserving "public confidence in the judiciary" that would otherwise be eroded by "repeated use of the judicial power to negate the actions of the representative branches of government." *Walker v. Cheney*, 230 F. Supp. 2d 51, 65 (D.D.C. 2002).

Nowhere is the importance of the negotiation and accommodation process, and its maintenance of the separation of powers, more apparent than in the present context of a dispute between Congress and the Executive Branch over access to information. Here, as in *Raines*, the claimed injury is to Congress's power in relation to the Executive Branch—a dispute about institutional authority that is no more appropriate for this Court to resolve than it was for the Supreme Court in *Raines*. *See Chenoweth*, 181 F.3d at 116; *Walker*, 230 F. Supp. 2d at 70, 72; *see also id.* at 70 ("[N]o court has ever ordered the Executive Branch to produce a document to Congress or its agents.").

The absence of judicial intervention in such controversies is not coincidental. As the D.C. Circuit has explained, the accommodation process represents more "than the mere degree to which ordinary parties are willing to compromise," as "[t]he Constitution contemplates such accommodation." *United States v. AT&T Co.*, 567 F.2d 121, 130

(D.C. Cir. 1977). Accordingly, "[n]egotiation between the two branches should thus be viewed as a dynamic process affirmatively furthering the constitutional scheme." *Id*. "Under this view, . . . each branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation." *Id*. at 127. This approach, therefore, has dominated conflicts between the political Branches over requests by Congress for information from the Executive Branch. *See United States v. AT&T Co.*, 551 F.2d 384, 394 (D.C. Cir. 1976); *see also Sirica*, 487 F.2d at 778 (Wilkey, J., dissenting).

The accommodation process, as contentious and imperfect as it may be, has thus governed this dispute as it has countless others. The Department provided Congress thousands of pages of material, as well as hours of testimony and interviews with senior officials, with additional productions and briefings offered. Moreover, as is so often the case, the dispute between the Branches narrowed as inter-Branch consultations continued. Nevertheless, rather than continuing to engage in a constructive accommodation process or wait for the independent Inspector General report that was then forthcoming, the Committee terminated negotiations, and, after taking the extraordinary step of voting to hold the Attorney General in contempt of Congress, then proceeded to file suit to vindicate its perceived interests. The threat posed by judicial intervention into the process of negotiation and accommodation could not be more apparent.

Moreover, the threat to the separation of powers is magnified by the nature of the information sought by the Committee in this suit. In requesting the documents at issue, Congress seeks not to discover information relating to Operation Fast and Furious itself, but rather to obtain discovery into the Executive Branch's deliberative process regarding

its responses to congressional requests for such information. As such, Congress's inquiry drifts further away from any true legislative purpose and instead goes to the heart of the Executive's process in negotiating with and responding to Congress in disputes over information. *See Watkins v. United States*, 354 U.S. 178, 187 (1957).

The threat of a judicial declaration permitting Congress access to such information would alter the balance of power that exists in such negotiations by effectively compelling the Executive to reveal, in the accommodation process, deliberations regarding strategies for responding to a congressional request for documents and other sensitive materials, without affording the Executive a corresponding ability to demand comparable information from Congress regarding its motivations and justifications for its inquiry. *See AT&T*, 551 F.2d at 394 ("A court decision selects a victor, and tends thereafter to tilt the scales."). In light of the extensive remedies that are available to Congress in the absence of judicial intervention, the Court should not permit such an outcome. *See Campbell v. Clinton*, 203 F.3d 19, 23 (D.C. Cir. 2000). Congress can exert pressure on the Executive Branch through the constitutionally sanctioned process of negotiation and accommodation that has regulated such disputes for centuries. *See AT&T*, 567 F.2d at 127. It can tie up nominations. *See Tucker v. Comm'r of Internal Revenue*, 676 F.3d 1129, 1132 (D.C. Cir. 2012); *see also* 157 Cong. Rec. S2475 (daily ed. Apr. 14, 2011) (statement of Sen. Grassley). It can legislate change within the Department of Justice, *see McGrain v. Daugherty*, 273 U.S. 135, 173-74 (1927), or slash the budget in the area of concern, *see Barenblatt v. United States*, 360 U.S. 109, 111 (1959). It can hold—and has held—the Attorney General in contempt, and it can bring its case to the people through the electoral process, *see Barenblatt*, 360 U.S. at 132-33

(quoting *McCray v. United States*, 195 U.S. 27, 55 (1904)). It has additional tools at its disposal as well. Indeed, variations of these political options have been used in past disputes over information. *See* Neal Devins, *Cong. - Exec. Info. Access Disputes: A Modest Proposal – Do Nothing*, 48 Admin. L. Rev. 109, 134-35 (1996). That these political remedies remain available to Congress to remedy any perceived institutional injury demonstrates why courts are properly reluctant to intervene in ways that may unsettle the balance of powers.

"In the end, given that the Article I and Article II Branches have been involved in disputes over documents for more than two hundred years, what is most striking about the historical record is the paucity of evidence that the instant lawsuit is 'of the sort traditionally amenable to, and resolved by, the judicial process.'" *Walker*, 230 F. Supp. 2d at 73-74 (quoting *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 774 (2000)). In this case, the accommodation process was continuing and has continued even after the filing of this suit. Thus, Congress has received additional information as a result of the decision to release without redactions the IG Report and accompanying documents and to allow public testimony by the Inspector General. This Court should not permit the Committee to circumvent this historical—and in this case, fruitful—process of negotiation and accommodation by seeking resolution of this inherently political dispute in federal court.

C. Post-*Raines* Decisions Do Not Support This Court's Jurisdiction

"When Members of the Congress first began to seek judicial relief from allegedly illegal executive actions that impaired the exercise of their power as legislators," the D.C. Circuit was "initially receptive to the idea that [the courts] had jurisdiction to hear their

complaints." *Chenoweth*, 181 F.3d at 114. In many cases, however, although the court found standing, it achieved the same end as in *Raines* by exercising its discretion to dismiss cases where "a legislator attempts to bring an essentially political dispute into a judicial forum." *Id*.

In light of this jurisdictional "receptiveness" by the D.C. Circuit, it is perhaps unsurprising that the courts of this Circuit may have once been similarly receptive to Congress's standing to sue "to assert its investigatory power." *AT&T*, 551 F.2d at 391; *see also Senate Select*, 498 F.2d 725 (assuming, *sub silentio*, standing for the Senate Committee to sue to enforce a subpoena directed at the President). However, that analysis is now an historical artifact, having been overtaken by the Supreme Court's decision in *Raines*. *Raines* now requires recognition that separation of powers imposes structural limitations on Article III standing. *See Chenoweth*, 181 F.3d at 115.

In the wake of *Raines*, the D.C. Circuit has rejected efforts by legislators to obtain judicial review of purported Executive Branch encroachment on their power as legislators. *See, e.g.*, *Campbell*, 203 F.3d 19. Two district court decisions have, however, permitted such suits, including a 2008 decision holding that a House Committee had standing to sue to enforce a subpoena for information possessed by the Executive Branch—a decision later stayed by the D.C. Circuit, which noted that the decision was of "potentially great significance for the balance of power between the Legislative and Executive Branches." *See Committee on Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, *stayed pending appeal*, 542 F.3d 909, 911 (D.C. Cir. 2008) (per curiam); *U.S. House of Representatives. v. U.S. Dep't of Commerce*, 11 F. Supp. 2d 76 (D.D.C. 1998).

In *Miers*, the Court held that *Raines* did not "overrule or otherwise undermine" the D.C. Circuit's conclusion, prior to *Raines*, that the House could designate a Member to act on its behalf to assert "its investigatory power." *See* 558 F. Supp. 2d at 67, 69. According to the Court, *Raines* was limited to the standing of "individual" Members, such that a suit by the institution as a whole, or by an individual authorized by the institution, would be justiciable. *See id*. at 69-70. However, that distinction is at odds with *Raines* and its progeny, where the judicial focus was on the nature of the injury asserted—a claimed diminution of congressional authority in relation to the Executive—rather than whether that injury was asserted by the individual or the institution the individual sought to represent. *See Walker*, 230 F. Supp. 2d at 67.

The *Miers* Court also held that the suit was justiciable because the existence of a subpoena dispute made the "asserted interest more concrete than the situation in *Raines*, where the purported injury was wholly hypothetical." 558 F. Supp. 2d at 70.[6] But the mere fact that the present dispute takes the form of a subpoena enforcement action does not alter the result. To be sure, there is a "deeply rooted" authority for courts to "enforce subpoenas," such as grand jury subpoenas, subpoenas "to compel testimony or produce documents pursuant to Fed. R. Civ. P. 45, or subpoenas issued by administrative agencies of the United States pursuant to Fed. R. Civ. P. 81(a)(5)." *Miers*, 558 F. Supp. 2d at 71.

[6] *Raines* itself rejects this distinction, by describing real and acute diminutions of power—such as that embodied in the Tenure of Office Act that resulted in President Johnson's impeachment—as beyond the power of the federal courts. *See Raines*, 521 U.S. at 826 ("[I]f the federal courts had entertained an action to adjudicate the constitutionality of the Tenure of Office Act immediately after its passage in 1867, they would have been improperly and unnecessarily plunged into the bitter political battle being waged between the President and Congress.").

But it ignores the fundamental separation of powers concerns inherent in disputes between the political Branches to suggest that courts familiar with the enforcement of judicial and administrative subpoenas are therefore equipped to mediate the political dispute over demands by Congress for information from the Executive. Indeed, in contrast to the requirements that govern subpoenas issued pursuant to Rule 45, the negotiation and accommodation process between Congress and the Executive Branch are conducted in the absence of legal requirements set forth by the Judiciary. *See In re Sealed Case*, 121 F.3d 729, 753 (D.C. Cir. 1997); *see also United States v. Nixon*, 418 U.S. 683, 697 (1974).

Moreover, unlike the context of judicial subpoenas, officials of the Executive Branch may not avail themselves of procedural safeguards, such as moving to quash or seeking a protective order, in response to a congressional subpoena. Indeed, Congress has historically resisted the notion that federal courts have the authority to oversee suits brought against it by officials who are the subject of a legislative subpoena. *See, e.g.*, *United States v. House of Representatives*, 556 F. Supp. 150, 152 (D.D.C. 1983); *see also Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 501-03 (1975). Permitting judicial resolution of a subpoena dispute between the political Branches only where Congress is the plaintiff would therefore skew the allocation of authority between coordinate Branches of government in a manner that cannot be contemplated by the Constitution.

The Court in *Miers* also held that the Committee had "informational standing," a theory utilized by the Court in *U.S. House of Representatives v. U.S. Dep't of Commerce*, 11 F. Supp. 2d 76, to find congressional standing based on a purported "right" to obtain particular information. *See Miers*, 558 F. Supp. 2d at 77; *see also U.S. House of*

Representatives, 11 F. Supp. 2d at 85-86, 90 (relying on *FEC v. Akins*, 524 U.S. 11 (1998), to hold that a "statutory right to receive information" makes the suit the "extremely rare case" that survives *Raines*). But, as discussed herein, the Committee has no such absolute "right"—let alone a judicially cognizable one—as applied to the Executive Branch, which, since the early days of the Republic, has had an equal and opposite right to protect information where disclosure would, for example, disturb the operations of the Executive Branch, alter the balance of power with Congress, or interfere with national security. It is precisely the political nature of this dispute over information that removes the concrete or particularized basis for a finding of Article III injury. *Compare U.S. House of Representatives*, 11 F. Supp. 2d at 85 ("The inability to receive information *which a person is entitled to by law* is sufficiently concrete and particular to satisfy constitutional standing requirements.") (emphasis added), *with AT&T*, 551 F.2d at 394 ("A court seeking to balance the legislative and executive interests asserted here would face severe problems in formulating and applying standards.").

Moreover, the circumstances of this case underscore why the courts should not intervene in a political dispute over "information." At issue are not documents pertaining to the Department's performance of its duties—indeed, in light of the documents and testimony provided by the Department, *see* Cole June 20 Letter; Cole Dec. 2 Letter, the Committee has "complet[ed its] investigative work" with respect to Operation Fast and Furious and supervision of the Operation from Washington. Joint Staff Report I at 5. Instead, the Committee here seeks documents concerning the Executive Branch's deliberations regarding how to respond to congressional oversight that the Committee believes relevant to the so-called "Obstruction Component" of the investigation. And

even as to that, the Department has accommodated the Committee by providing internal documents relating to the preparation of the February 4 Letter, by providing documents referenced in the IG Report, and by offering to provide additional documents relating to its subsequent responses to congressional inquiries into Operation Fast and Furious. The IG Report, which Chairman Issa called "extremely comprehensive, strong and independent," Sept. 20 Hearing (Ex. G at 1), criticized certain aspects of the Department's responses to congressional inquiries but did not find that the Department tried to mislead or otherwise obstruct Congress. Thus, as Chairman Issa opined, the IG Report allowed the Committee to "conclude[] a major chapter in Fast and Furious and the false statements made to Congress." *Id.* (Ex. G at 2). Against this backdrop, if so-called "informational rights" were thought to authorize this suit, then countless other suits are sure to follow, given the volume of document requests issued by the dozens of Senate and House Committees that perform oversight functions. This case thus illustrates vividly why the Judiciary must defer to the time-tested political process for resolution of such disputes.

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

A plaintiff may invoke the power of the federal courts only if the court has jurisdiction, the plaintiff has a cause of action, and the court may make available the relief requested. *Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979). In this case, the Committee cannot identify any source of law, either by statute or under the Constitution itself, that grants it the right to have a court enforce its subpoena against the Executive. This suit must therefore be dismissed.

A. This Court Lacks Statutory Subject Matter Jurisdiction

The Committee seeks to ground statutory subject matter jurisdiction in the general federal question provision, 28 U.S.C. § 1331. In light of the text and history of 28 U.S.C. § 1365, and particularly in light of the difficult separation of powers questions presented by the Committee's interpretation (*see supra* Part I), Section 1331, when read in conjunction with Section 1365, does not provide subject matter jurisdiction here. This action, therefore, must be dismissed.

Prior to 1978, Section 1331 did not provide a basis for subject matter jurisdiction for a suit to enforce a congressional subpoena, principally because Section 1331 contained an amount-in-controversy requirement of $10,000. Thus, in 1973, when the Senate Select Committee sought to enforce a subpoena against President Nixon, this Court – per Judge Sirica – dismissed the suit for lack of subject matter jurisdiction, concluding (as most pertinent here) that because there is "no possible valuation of the matter which satisfies the $10,000 minimum, the Court cannot assert jurisdiction by virtue of § 1331." *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 366 F. Supp. 51, 61 (D.D.C. 1973); *see Miers*, 558 F. Supp. 2d at 87 n.25 (noting that courts then lacked jurisdiction over such suits).[7]

In the Ethics in Government Act of 1978, Congress sought to address this deficiency by enacting Section 1365. That provision gives the "United States District Court for the District of Columbia" statutory subject matter jurisdiction over Senate

[7] Congress responded to Judge Sirica's decision by enacting a narrow statute that gave courts statutory subject matter jurisdiction over subpoena enforcement actions brought by the Senate Select Committee, *Senate Select*, 498 F.2d at 727-28. That provision is not at issue here.

subpoena enforcement actions, "without regard to the amount in controversy." But when Congress did so, it expressly limited the provision to Senate subpoenas, and it unequivocally excluded actions against federal officials who assert executive privilege. In short, Congress conferred jurisdiction on the federal courts over a range of enforcement actions against individuals, but expressly excluded the action the Committee seeks to bring here. *See Hinck v. United States*, 550 U.S. 501, 506 (2007) ("[W]hen Congress enacts a specific remedy when no remedy was previously recognized, . . . the remedy provided is generally regarded as exclusive.").

Two years later, Congress eliminated the amount-in-controversy requirement from Section 1331, but this action did not render the jurisdictional limitations in Section 1365 irrelevant. First, such a reading would render the detailed provisions of 1365(a) entirely superfluous. It is this Court's task to interpret statutory provisions in a manner that results in a coherent whole, not a series of conflicting enactments that would render entire provisions irrelevant. *See Asiana Airlines v. FAA*, 134 F.3d 393, 398 (D.C. Cir. 1998). Second, when Congress eliminated the amount-in-controversy requirement in Section 1365 it did so with care: it limited jurisdiction to this Court (not all district courts); to suits brought by the Senate (and not by the House); and to suits against defendants other than officers and employees of the Executive Branch. It would be exceedingly odd to think that when Congress acted just two years later to eliminate the amount-in-controversy requirement in Section 1331 more broadly, it suddenly (and without discussion) removed all of the careful limitations it had so recently imposed. *See*

Hinck, 550 U.S. at 506 (noting "a precisely drawn, detailed statute pre-empts more general remedies" (quotation marks and citations omitted)).[8]

B. The Declaratory Judgment Act Does Not Provide a Cause of Action

The Committee lacks any cause of action. Although Congress authorized criminal prosecutions for non-compliance with congressional subpoenas more than 150 years ago, *see* 2 U.S.C. § 192; *In re Chapman*, 166 U.S. 661 (1897), prior to 1978 it had never enacted a statute contemplating the civil enforcement of congressional subpoenas against anyone, much less against an Executive Branch official. Congress itself recognized these limitations. *See* S. REP. NO. 95-170, at 16 (1978).

In its Complaint, the Committee relies on the Declaratory Judgment Act ("DJA"). 28 U.S.C. §§ 2201(a), 2202. But in so doing, the Committee improperly elides the distinction between available relief and a cause of action. The two are distinct. While 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[,] *relief* is a question of the various remedies a federal court may make available." *Davis*, 442 U.S. at 239 n.18.

This is a distinction with particular relevance here. As the Supreme Court has explained, "'[t]he operation of the Declaratory Judgment Act is procedural only,'" and with the DJA "Congress enlarged the range of remedies available in the federal courts." *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950) (quoting *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240 (1937)). Because the DJA

[8] The Committee also invokes 28 U.S.C. § 1345. But this Court has already held that section 1345 does not give it jurisdiction to hear a suit instituted by a congressional committee. *Senate Select*, 366 F. Supp. at 56-57.

"creates a remedy, not a cause of action," *Buck v. Am. Airlines, Inc.*, 476 F.3d 29, 33 n.3 (1st Cir. 2007); *Okpalobi v. Foster*, 244 F.3d 405, 423 n.31 (5th Cir. 2001) (en banc), the D.C. Circuit has held that relief is available under the DJA only if a plaintiff can identify a separate and proper cause of action, *C&E Servs., Inc. of Wash. v. D.C. Water & Sewer Auth.*, 310 F.3d 197, 202 (D.C. Cir. 2002); *Schnapper v. Foley*, 667 F.2d 102, 116 (D.C. Cir. 1981); *see also Buck*, 476 F.3d at 33 n.3; *Seized Property Recovery, Corp. v. U.S. Customs & Border Protection*, 502 F. Supp. 2d 50, 64 (D.D.C. 2007) (Kay, Magistrate J.); *Superlease Rent-A-Car, Inc. v. Budget Rent-A-Car, Inc.*, No. 89-0300, 1989 WL 39393, at *3 (D.D.C. Apr. 13, 1989).

The district court in *Miers* reached a contrary conclusion, holding that plaintiff "need not identify a cause of action apart from the DJA," 558 F. Supp. 2d at 83-84, because the "plain text of the statute," *id.* at 82, "does not indicate that any independent cause of action is required to invoke the DJA," *id.* at 80. This reasoning is at odds with the case law cited above, including the D.C. Circuit case law stating that the "plain language of the Declaratory Judgment Act" is not controlling, *C&E Servs.*, 310 F.3d at 202, and holding that plaintiffs must identify a separate cause of action.

C. The Committee Has No Cause of Action Under the Constitution

Article I is not an independent source for an implied cause of action here. "Numerous Supreme Court decisions . . . establish that plaintiffs seeking to imply a cause of action from a federal statute bear [a] heavy burden," *Miers*, 558 F. Supp. 2d at 88, and "[t]here is even greater reason" for a court to decline to find implied rights of action "in the constitutional field," *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia,

J., concurring), where "an imagined 'implication' cannot even be repudiated by Congress," *Minneci v. Pollard*, 132 S. Ct. 617, 626 (2012) (Scalia, J, concurring).

Whether a court should find an implied cause of action under the Constitution for the Committee to sue in federal court to enforce its subpoena does not depend on whether Congress may investigate matters pertaining to its legitimate legislative authority, *see Watkins*, 354 U.S. at 187, or whether Congress may bring its own powers to bear to obtain the information it legitimately seeks, *see Eastland*, 421 U.S. at 505. These matters are undisputed. The question hinges, instead, on whether the Committee may obtain the assistance of the federal courts in enforcing its subpoena. This it cannot do. *See Reed v. Cnty. Comm'rs of Del. Cnty., Pa.*, 277 U.S. 376, 389 (1928) ("Authority to exert the powers of [Congress] to compel production of evidence differs widely from authority to invoke judicial power for that purpose.")

First, the Court here is not being asked to find an implied cause of action for a *violation* of the Constitution. Failure to comply with a subpoena may violate a rule or resolution of the Committee or the House adopted in the exercise of their Article I powers, but that failure does not itself violate the Constitution. Finding an implied cause of action in such circumstances thus finds no support in *Bivens* or its progeny.

Second, there is no basis for courts to find an implied cause of action to benefit Congress, when Congress has authority to create a cause of action for itself. *See Wilkie v. Robbins*, 551 U.S. 537, 550, 562 (2007) (no implied cause of action because "Congress is in a far better position than a court to evaluate the impact of a new species of litigation") (quotation marks and citation omitted). Here, moreover, Congress *has* enacted certain statutory procedures for subpoena enforcement, and did not provide a cause of action for

the Committee's action here. *See* 2 U.S.C. §§ 192, 288d; 28 U.S.C. § 1365; *see also Watkins*, 354 U.S. at 207. That Congress has "demonstrated its awareness" of the issue by passing legislation pertaining to it—indeed, by passing legislation that excludes the very suit the Committee now seeks to maintain—underscores the impropriety of the courts' finding an implied cause of action. *Bush v. Lucas*, 462 U.S. 367, 389 & n.37 (1983); *see also Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 n.11 (1981).

Third, as noted above, the Constitution provides Congress with means of compelling compliance unavailable to a typical plaintiff. Thus, the Framers already put in place "an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations." *Bush*, 462 U.S. at 388. Within that system of political checks and balances, the Committee is "fully empowered . . . to take such steps as may be appropriate and necessary to secure information." *Reed*, 277 U.S. at 388. An implied right of action is thus barred.

Fourth, there are "special factors counselling hesitation" here, *Bush* 462 U.S. at 378, given the separation of powers issues that an implied cause of action would raise.

The Court in *Miers* sought to distinguish these cases, as limited to situations in which plaintiffs seek to imply a cause of action for damages. But in *Davis v. Passman*, the Supreme Court asked two questions: first, whether a cause of action could be implied from the Constitution, *see* 442 U.S. at 236-44, and second, only after answering the first question in the affirmative, whether damages were appropriate, *see id.* at 245-48. *Davis* thus makes clear that the first part of the inquiry applies broadly beyond damages cases to implied cause of action cases more generally, *see* 442 U.S. at 248-49.

Likewise unpersuasive was the *Miers* Court's conclusion that courts have more efficient means than does Congress to enforce a subpoena. 558 F. Supp. 2d at 92. In the implied cause of action analysis, "it is irrelevant" whether the existing system provides relief that is complete or equally effective. *United States v. Stanley*, 483 U.S. 669, 683 (1987); *see also Wilkie*, 551 U.S. at 554; *Malesko*, 534 U.S. at 68-69; *Bush*, 462 U.S. at 388. Congress's powers to compel compliance "through its own process," *McGrain*, 273 U.S. at 154, 160, are substantial. This Court should not augment those powers when Congress has chosen not to exercise them.

III. IN LIGHT OF SEPARATION OF POWERS CONCERNS, THIS COURT SHOULD EXERCISE ITS DISCRETION AND REFUSE TO GRANT THE COMMITTEE'S REQUEST FOR RELIEF

Even if this Court were to determine that the Committee's Complaint satisfies the technical criteria for standing, justiciability, and a cause of action, it should exercise its discretion and refuse to referee this dispute between the political Branches.

There is no absolute right to a declaratory judgment in federal court. The Declaratory Judgment Act instead provides that courts "*may* declare the rights and other legal relations of any interested party seeking" such a judgment and that "[f]urther necessary or proper relief based on a declaratory judgment or decree *may* be granted." 28 U.S.C. §§ 2201(a), 2202 (emphasis added). Accordingly, "[a] declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest." *Eccles v. Peoples Bank of Lakewood Vill., Cal.*, 333 U.S. 426, 431 (1948); *see also Wilton v. Seven Falls Co.*, 515 U.S. 277, 282 (1995).

Likewise, courts have frequently exercised their discretion to decline to decide suits filed by legislators attempting "to bring . . . essentially political dispute[s] into a

judicial forum." *Chenoweth*, 181 F.3d at 114. This discretionary doctrine, known as equitable or remedial discretion, was exercised in such a way that legislators' standing to sue "got them into court just long enough to have their case dismissed because of the separation of powers problems it created." *Id*. at 115; *see also Vander Jagt v. O'Neill, Jr.*, 699 F.2d 1166, 1174 (D.C. Cir. 1983) (exercising "remedial discretion" to dismiss case out of "proper respect for the political branches and a disinclination to intervene unnecessarily in their disputes") (internal quotation omitted). This exercise of remedial discretion has extended to inter-Branch informational disputes. *See AT&T*, 551 F.2d at 394 (choosing "a judicial suggestion of compromise rather than historic confrontation" as the option most "suitab[le]" to resolution of an inter-Branch dispute over national security information); *see also AT&T*, 567 F.2d at 130.

The separation of powers and the corresponding compelling requirement of judicial restraint counsel strongly against judicial intervention here. *First*, this suit—brought by a legislative entity against a Cabinet official implementing a presidential directive—directly pits the two political Branches against each other. As part of that suit, the Committee asks that this Court provide a ruling definitively rejecting the assertion of executive privilege over an entire category of confidential materials, including deliberative materials generated in response to a congressional inquiry. No court has ever granted such relief, for good reason. A court would have to weigh the relative interests of the political Branches and decide which interest prevails, either by elevating one over the other on a categorical basis or by enmeshing the court in the minutiae of the dispute between the Branches. Such an unmoored weighing of the interests of the political Branches is one the courts are ill-equipped to make. *See AT&T*, 551 F.2d at 394.

Second, the Committee sued before exhausting the possibilities both for accommodation and for gathering additional information. Prior to the Committee's vote on contempt, the Department had offered to provide additional documents and information relating to the matters at issue in this litigation, including an "extraordinary accommodation to the Committee" that would have provided the Committee with "unprecedented access to the[] documents" at issue. Cole June 19 Letter. But the Committee instead recommended that the Attorney General be held in contempt—a recommendation that was adopted by the full House a scant eight days later. This case thus stands in stark contrast to *Miers*, where the court noted that "no rush to the courthouse by either political branch is evident." 558 F. Supp. 2d at 96; *see also* 158 Cong. Rec. H4166 (daily ed. June 28, 2012) (statement of Rep. McGovern) ("Mr. Speaker, the last time Congress dealt with a contempt resolution was in the case of Joshua Bolt[e]n and Harriet Miers. The period of time between when the committee voted out the resolution and before there was floor action was 6 months.").

Moreover, political solutions to this dispute remain. *See, e.g.*, *Chenoweth*, 181 F.3d at 114. As explained previously, Congress here has the ability to employ a host of political tools, *see supra* at 29-30, including, most fundamentally, the ability to make its case to the public. While such remedies might not be the ones that the Legislature prefers to use, they are the ones that conform to the constitutional structure of checks and balances that the Framers developed.

Third, in *Miers* the Court found that the "equity of the conduct of the declaratory judgment plaintiff" weighed in favor of judicial resolution. 558 F. Supp. 2d. at 97 (internal quotation omitted). Here, equitable considerations lead to the opposite

conclusion. The Department has accommodated the Committee's requests by providing extensive documents and testimony; it has acknowledged errors in past practices and made improvements; and it remains open to further accommodation. Moreover, the Committee had little need to resort to the judicial process in order to conduct meaningful oversight. Although the Committee claims to have brought this suit to better understand the Department's post-February 4 deliberations, the IG Report covers this very topic in exhaustive detail, *see supra* at 17-18, and the Executive Branch has released documents discussed in the relevant sections of the report. The conceded strength and independence of the IG Report counsels strongly against exercising jurisdiction here, in a case rife with constitutional concerns based on a Complaint that has already been overtaken by events.

In short, 200 years of political history and court decisions make clear that the process of negotiation and accommodation is not simply the preferred option to resolve inter-Branch disputes over information, but the one that best preserves the separation of powers. The Committee in the present case has decided that it no longer desires to engage in that process, but would rather proceed to contempt and to court in order to have the Judiciary resolve the dispute for it, enmeshing the Court in a political dispute requiring political judgments. That is not the approach, or a role for the Judiciary, that the Constitution provides, and it is not one that this Court should adopt.

CONCLUSION

For the foregoing reasons, this suit should be dismissed.

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