IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

MEMORANDUM OF AMICUS CURIAE, THE AMERICAN CENTER FOR LAW AND JUSTICE, IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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Dated: November 21, 2012

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INTEREST OF AMICUS

The American Center for Law & Justice ("ACLJ") is an organization dedicated to defending constitutional liberties secured by law. ACLJ attorneys have argued before the Supreme Court of the United States and other federal and state courts in numerous cases involving constitutional issues. *E.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *McConnell v. FEC*, 540 U.S. 93 (2003); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). ACLJ attorneys also have participated as amicus curiae in numerous cases involving constitutional issues before the Supreme Court and lower federal courts. *E.g.*, *United States v. Arizona*, 132 S. Ct. 2492 (2012); *FEC v. Wisconsin Right to Life*, *Inc.*, 551 U.S. 449 (2007).

The ACLJ is committed to protecting founding principles, including the separation of powers, which is essential to the Constitution's guarantee of individual liberties. The Executive Branch's assertion in this case that the Judiciary has no role in resolving information disputes between Congress and the President is meritless and, if accepted, would truly threaten both the separation of powers, and accountability in government.

ARGUMENT

The stability of our Constitutional government rests in large part on the doctrine of the separation of powers. The Constitutional Convention of 1787 adopted the doctrine "not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting). The core purpose of divided government is preservation of individual liberty. "Liberty is always at stake when one or more of the branches

seek to transgress the separation of powers." *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring).

Defendant argues that this Court lacks jurisdiction to hear this case because the "threat of a judicial declaration permitting Congress access to such information would alter the balance of power that exists in such negotiations . . . . 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." Mem. in Supp. of Def's Mot. to Dismiss ("Def. MTD") at 29. Instead of judicial intervention, Defendant argues, "Congress can exert pressure on the Executive Branch through the constitutionally sanctioned process of negotiation and accommodation . . . ." *Id.* Defendant's recommended approach conflicts with the overwhelming weight of authority in separation-of-powers cases, and gravely threatens accountability in government. For the court to abstain from exercising jurisdiction here would tilt the balance of power in favor of the Executive and render the Executive Branch a judge in its own cause in determining the proper scope of testimonial privileges. As Justice Scalia has stated:

> [W]here the issue pertains to separation of powers, and the political branches are (as here) in disagreement, neither can be presumed correct. The reason is stated concisely by Madison: "The several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers . . . ."

Morrison v. Olson, 487 U.S. 654, 704–05 (1988) (Scalia, J., dissenting) (*quoting The Federalist* No. 49 (James Madison)).

I. THE SEPARATION OF POWERS DOCTRINE REQUIRES THE COURT TO EXERCISE JURISDICTION IN THIS CASE.

A. The Supreme Court's Separation of Powers Jurisprudence Supports Judicial Intervention.

A long line of United States Supreme Court cases establishes the Judiciary's authority to enforce the separation of powers when one branch interferes with the other's performance of its constitutionally assigned duties. *Myers v. United States*, 272 U.S. 52 (1926) (holding unconstitutional a statute that prohibited the President from removing without Senate approval certain executive officers he had appointed); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (holding that the President trespassed upon Congress's constitutional authority when he issued an executive order seizing the nation's steel mills); *INS v. Chadha,* 462 U.S. 919 (1983) (striking down a "congressional veto" provision that allowed either House of Congress to overrule the decision of the Executive Branch to suspend deportation proceedings in a particular case); *Bowsher v. Synar*, 478 U.S. 714 (1986) (invalidating a federal law intended to eliminate the federal budget deficit by prescribing procedures under which the Comptroller General would mandate cuts in spending whenever a deficit exceeded the statutory maximum); *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252 (1991) (holding that Congress exceeded its constitutional authority in creating a Board of Review composed of individual congressmen and empowered to veto decisions of local authorities regarding Washington D.C. area airports). *Clinton v. City of New York,* 524 U.S. 417 (1998) (invalidating the Line Item Veto Act, which allowed the President to cancel certain items contained in validly enacted laws).

Significantly in these cases, the Court resolved separation of powers disputes even where "the branch whose power has allegedly been appropriated has both the incentive to protect its

prerogatives and institutional mechanisms to help it do so." *United States v. Munoz-Flores*, 495 U.S. 385, 393 (1990). In *Munoz-Flores*, the Court explicitly repudiated Defendant's primary argument: "the fact that one institution of Government has mechanisms available to guard against incursions into its power by other governmental institutions does not require that the Judiciary remove itself from the controversy . . . ." *Id.* (citing *Mistretta v. United States*, 488 U.S. 361 (1989)), *Morrison v. Olson*, 487 U.S. 654 (1988), *INS v. Chadha*, 462 U.S. 919 (1983). *See also Nixon v. Adm'r of Gen. Servs*., 433 U.S. 425, 559 n.7 (1977) (Rehnquist, J., dissenting) ("[I]t could have been plausibly maintained that the Framers thought that the Constitution itself had armed each branch with sufficient political weapons to fend off intrusions by another which would violate the principle of separation of powers, and that therefore there was neither warrant nor necessity for judicial invalidation of such intrusion. But that is not the way the law has developed in this Court.").

Thus, even when the political branches have reached a political compromise of the dispute, the Supreme Court of the United States has intervened when it determined that the political compromise trenched upon the constitutional authority of one of the branches. In *Nixon v. Administrator of General Services*, the Court struck down a statute which was the quintessential political accommodation and which resolved a politically contentious issue over the disposition of President Nixon's papers. 433 U.S. at 431–32. President Ford signed the law and President Carter's Solicitor General appeared before the Court in its defense. *Id*. at 441. The Court nevertheless held that it had the authority to determine whether the law interfered with "the proper balance between the coordinate branches," explaining that "the proper inquiry focuses on the extent to which [the statute] prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Id*. at 443. *See also INS v. Chadha*, 462 U.S. at 942 n.13

(rejecting the argument that the challenged law was "somehow immunized from constitutional scrutiny because [it] was passed by Congress and approved by the President").

B. Decisions from the Court of Appeals for the D.C. Circuit and this Court also Establish That the Court Has Jurisdiction in This Case.

Defendant's assertion that this case must be resolved without resort to the Judiciary is contradicted as well in decisions of the D.C. Circuit and this Court. The Court of Appeals for the D.C. Circuit repeatedly has recognized the crucial role of the Judiciary in preserving the separation of powers by "defining the respective roles" of the politically accountable branches. *Barnes v. Kline*, 759 F.2d 21, 30 (D.C. Cir. 1984) *vacated as moot sub nom. Burke v. Barnes,* 479 U.S. 361 (1987). In *Barnes,* the court held that Senate members had standing to assert injury from the President's use of the pocket veto. *Id*. at 25-30. The *Barnes* court specifically rejected the argument that "the separation of powers would be better served in this case by remitting the question involved to a political solution, rather than a judicial one." *Id*. at 29-30.

> The dissent understandably leaves unspecified the precise course of events contemplated: a "political solution" would at best entail repeated, time-consuming attempts to reintroduce and repass legislation, and at worst involve retaliation by Congress in the form of refusal to approve presidential nominations, budget proposals, and the like. That sort of political cure seems to us considerably worse than the disease, entailing, as it would, far graver consequences for our constitutional system than does a properly limited judicial power to decide what the Constitution means in a given case. To quote again from Justice Powell's opinion in Goldwater:
>
>> Interpretation of the Constitution does not imply lack of respect for a coordinate branch. *Powell v. McCormack,* [395 U.S. 486, 548 (1969)]. . . . *The specter of the Federal Government brought to a halt because of the mutual intransigence of the President and the Congress would require this Court to provide a resolution pursuant to our duty "'to say what the law is.'" United States v. Nixon*, 418 U.S. 683, 703 (1974), quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803).
>
> *Goldwater,* 444 U.S. at 1001 (Powell, J., concurring in the judgment). By defining the respective roles of the two branches in the enactment process, this court will help to preserve, not defeat, the separation of powers.

Id. (emphasis added).[1]

Additionally, in *Senate Select Committee on Presidential Campaign Activities v. Nixon,* 498 F.2d 725, 727 (D.C. Cir. 1974), the court exercised jurisdiction in a suit brought by a Senate Committee to enforce a subpoena against President Nixon requesting production of his oval office tape recordings. And in the *AT&T* cases, the court demonstrated that, however much negotiation and compromise may be desirable, judicial intervention in information disputes between the Legislative and Executive Branches is often the indispensible means of bringing final resolution. *See United States v. AT&T*, 551 F.2d 384, 390 (D.C. Cir. 1976) ("the mere fact that there is a conflict between the legislative and executive branches over a congressional subpoena does not preclude judicial resolution . . . ."), and 567 F.2d 121, 126 (D.C. Cir. 1977) ("judicial abstention" in a conflict between the Congress and the President will not lead to "orderly resolution of the dispute."). 567 F.2d at 126.

The *AT&T* cases arose out of an investigation by the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce when

> the Subcommittee issued a subpoena for certain documents in the hands of the American Telephone & Telegraph Co. (AT&T). The Justice Department sued to enjoin AT&T from complying with the subpoena, on the ground that compliance might lead to public disclosure of the documents, with adverse effect on national security. [The subcommittee chairman] intervened on behalf of the House, as the real party in interest.

AT&T, 567 F.2d at 122-23.

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[1] Although the Supreme Court's decision in *Raines v. Byrd,* 521 U.S. 811 (1997) overruled *Barnes'* holding that *individual congressional members* have standing to assert institutional injury, *id.* at 821 n. 4, *Byrd* did not overrule case law holding that *Congress, or a Committee of Congress* authorized to represent the institution, has standing to assert an institutional injury. *See, e.g., United States v. AT&T*, 551 F.2d 384, 391 (D.C. Cir. 1976). In this case, of course, Congress authorized the Oversight Committee to bring this suit. See Complaint Para. 53.

Central to the court's decision were two factors not present in this case. First, the court in *AT&T* repeatedly emphasized that the parties had been close to an agreement. 551 F.2d at 386, 394, 395. Given that "[t]here was almost a settlement in 1976," the court reasoned that "[i]t may well be attainable in 1977." *Id.* at 394. Additionally, much of the court's reluctance to decide *AT&T* on the merits was due to concerns of the nature of the information sought by the subcommittee, which involved sensitive national security information. *Id.*

The court did nevertheless exercise jurisdiction, and when the parties continued in a stalemate after the first remand, the court ordered a compromise, stating, "[t]aking full account of the negotiating positions, *we have chartered the course* that we think is most likely to accommodate the substantial needs of the parties. . . . But in our view there is good reason to believe that *the procedure set forth in this opinion* will prove feasible in practice." 567 F.2d 121, 123 (D.C. Cir. 1977) (emphasis added).

This Court has also repeatedly exercised jurisdiction in informational disputes between Congress and the President. In *Committee on Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53 (D.D.C.), *stayed pending appeal*, 542 F.3d 909 (D.C. Cir. 2008) (per curiam), the Committee on the Judiciary asked "the Court to declare that former White House Counsel Harriet Miers must comply with a subpoena . . . ." *Id.* at 55. In this context, the court emphasized that "*the Supreme Court has confirmed the fundamental role of the federal courts to resolve the most sensitive issues of separation of powers*." *Id.* at 56 (emphasis added).

The *Miers* court rejected the Executive Branch's argument that "the process of accommodation and negotiation, including the exercise of other political tools such as withholding appropriations" could sufficiently remedy "the injury to Congress's investigative power." *Id.* at 92. "[T]he appropriations process is too far removed, and the prospect of

successful compulsion too attenuated, from this dispute to remedy the Committee's injury to its investigative function . . . ." *Id.* at 93. The court explained further,

> The notion that the Framers contemplated that Congress would be required to shut down the operations of government before an Article III court could exercise its traditional role of resolving legal disputes is an odd one. Moreover, as federal appropriations occur far in advance, the House would potentially be forced to wait before it could even credibly threaten to withhold funding for any particular executive branch function, which further underscores the inability of the appropriations process to serve as an expedient means to vindicate Congress's right to information.

Id. at 93 n.29. This Court thus recognized the Judiciary's essential role in resolving certain information disputes and thereby increasing the incentive for both branches to compromise. *See also U.S. House of Representatives v. U.S. Dep't of Commerce*, 11 F. Supp. 2d 76 (D.D.C. 1998) (three-judge panel) (House of Representatives suit against the Department of Commerce to vindicate its constitutional rights regarding the taking of the 2000 census); *United States v. U.S. House of Representatives*, 556 F. Supp. 150, 152 (D.D.C. 1983) ("[i]f these two co-equal branches maintain their present adversarial positions, the Judicial Branch will be required to resolve the dispute by determining the validity of the Administrator's claim of executive privilege.").

Defendant's reliance on *Raines v. Byrd*, 521 U.S. 811 (1997) is misplaced. The Supreme Court's decision in *Raines,* which held that individual members of Congress lacked standing to challenge the constitutionality of the Line Item Veto Act which passed both Houses of Congress and was signed by the President, *id.* at 839 (Breyer, J. dissenting), did nothing to alter the central holding of the preceding cases. There, the Court held that the plaintiffs "alleged no injury to themselves as individuals," but merely alleged "institutional injury" that was "abstract and widely dispersed." *Id.* at 829. Central to the Court's holding was the fact that plaintiffs "ha[d] not been authorized to represent their respective Houses of Congress in this action, and indeed both

Houses actively oppose[d] their suit." *Id.* The *Raines* Court clearly limited its holding to the specific facts of the case, finding only that disgruntled members of Congress do not have standing to challenge a duly enacted law with which they disagree. *See Committee on the Judiciary, U.S. House of Rep. v. Miers*, 558 F. Supp. 2d at 69.

As this Court held*, Raines* strongly suggests that authorized suits on behalf of the entire legislative body may proceed. 558 F. Supp. 2d at 70 (*Raines* "never held that an institution, such as the House of Representatives, cannot file suit to address an institutional harm").

II. DEFENDANT'S ASSERTION THAT THIS CASE SHOULD BE RESOLVED BY POLITICAL ACCOMMODATION AND NOT THROUGH THIS COURT'S INTERVENTION IS IMPRACTICABLE, ADVERSE TO THE NATION'S WELFARE, AND UNLIKELY TO LEAD TO A PRINCIPLED RESOLUTION.

Even if the weight of authority did not refute Defendant's claim that this Court lacks jurisdiction to hear this case, Defendant's recycled argument that this case is more properly resolved through "the constitutionally sanctioned process of negotiation and accommodation," Def.'s MTD at 29, is flawed for a number of practical reasons.

A. Partisan Loyalty Often Renders the Use of Political Remedies Impracticable.

First, even if it is true that some of Founders may have intended an inter-branch resolution of constitutional authority controversies via political compromise,[2] the same Founders

[2] For example, the *AT&T* court observed,

> The framers . . . relied, we believe, on the expectation that where conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our governmental system. Under this view, the coordinate branches do not exist in an exclusively adversary relationship to one another when a conflict in authority arises. Rather, 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.

567 F.2d at 127; *see also The Federalist* No. 51, at 323–24 (G.P. Putnam's Sons ed. 1908).

also unanimously took a dim view of political factions and parties.[3] Accordingly, it is dubious that the Founders would favor political compromise as a means of resolving inter-branch disputes had they foreseen the extreme partisanship which characterizes the nation's political life today. Partisan loyalty "typically drive[s] officeholders to compete within institutions, not against the opposing branch," with the "inevitable result" being a reduced sense of identification with [the] individual's current branch and a concomitantly lessened incentive to defend its prerogatives." David A. O'Neil, *The Political Safeguards of Executive Privilege,* 60 Vand. L. Rev. 1079, 1126 (2007) (citing Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 Harv. L. Rev. 915, 928–29 (2005).

When, as in this case, the President and Congress dispute Congress's right to access critical information, partisan loyalty will all too frequently deter members of the legislative branch from voting in favor of the measures which Defendant asserts would be effective in resolving information disputes between the Executive and Legislative Branches.

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[3] Several Founding Fathers specifically addressed the evils of factions or political parties. For example, Madison wrote that factions create "mischief" and "violence." *The Federalist* No. 10 (James Madison). The "mortal diseases" of factions, he wrote, were "instability, injustice, and confusion." *Id.* Thomas Jefferson declared that if he "could not go to heaven but with a party," he "would not go there at all." A. James Reichley, *The Life of the Parties: A History of American Political Parties* 17 (1992). In his "Farewell Address," George Washington warned "in the most solemn manner against the baneful effect of the spirit of party." George Washington, *Farewell Address* (Sept. 17, 1796) *in* 1 James Daniel Richardson, *A Compilation of the Messages and Papers of the Presidents* 213, 218 (1907). Party loyalty, Washington said, "tend[s] to render alien to each other those who ought to be bound together by fraternal affection," and "put[s] in the place of the delegated will of the nation the will of a party." *Id.* at 217–18. If left unchecked, Washington argued that factions will become "potent engines by which cunning, ambitious, and unprincipled men will be enabled to subvert the power of the people, and usurp for themselves the reins of government, destroying afterwards the very engines which have lifted them to unjust dominion." *Id.* at 218.

> [T]he force of party loyalty bridges the legislative-executive divide in ways that often undermine the institution involved. Political parties rule the fortunes of federal officeholders, divvying up access to the ballot, leadership positions within institutions, and indispensable support in seeking higher office. A legislator eager for the spoils of political success will therefore fare much better choosing party over branch where the two pull in opposite directions. The most obvious manifestation of this common-sense observation is the willingness of Congress, during periods of unified government, to cede core components of its constitutional authority in the service of the ruling party.

David A. O'Neil, *supra,* 60 Vand. L. Rev. at 1125 (internal citations omitted). In short, partisan dissension seriously undermines the premise that political compromises to inter-branch disputes will promote the health of the Nation's constitutional balance. *See, e.g., AT&T,* 551 F.2d at 394.

A. Political Remedies Are Unrelated to the Dispute and Risk Sacrificing the Public Interest.

Second, the measures Defendant claims are available to the Legislative Branch to force the Executive to produce information would often be against the nation's interest. Defendant recommends a number of options, including: 1) tying up nominations, 2) legislating change within the Department of Justice, 3) slashing the budget in the area of concern, 4) holding the Attorney General in contempt; and 5) bringing its case to the people through the electoral process. Def's MTD at 29.

Most of these measures are, of course, wholly irrelevant to the constitutional interests at stake. They are merely punitive and do not promote any principled resolution of the dispute. Some of them clearly undermine the nation's wellbeing. For example, refusing to act on Presidential nominations hampers the efficient conduct of government, and in the case of judicial

appointments, fosters the delay of justice in the federal courts where overcrowded dockets are exacerbated by unfilled positions on the bench.[4]

Similarly, altering the composition of the Department of Justice or slashing ATF's budget endangers essential government services and, quite possibly, the administration of justice for the nation's citizens. It also risks penalizing federal employees who perform valuable services and who in no way contributed to the current impasse. Moreover, as this Court observed, "federal appropriations occur far in advance, [and] the House would potentially be forced to wait before it could even credibly threaten to withhold funding for any particular executive branch function." *Miers*, 558 F. Supp. 2d at 93 n.29.

In the same vein, declining to enact legislation places the public interest on the altar of political vendetta. Legislation in the public interest should not be held hostage to an unrelated dispute. Even if declining to enact legislation was a legitimate means of forcing the Executive to cooperate, it would, as mentioned earlier, succeed only where the voting members' institutional allegiances supersede their partisan loyalties.

Involving the public in the dispute is also unavailing toward achieving principled resolution. There is no reason to believe that public support for one outcome or another will be at all related to the constitutional merits of each side's position. To the contrary, a President who enjoys broad public support could successfully claim privilege where every constitutional consideration requires disclosure, as in Watergate. By the same token, Congress could prevail on a frivolous information request especially where a sympathetic press convinced the public that the President was hiding something significant, irrespective of the merits of the Executive's

[4] For example, an average appeal time in the Ninth Circuit exceeds sixteen months. *See* Carol J. Williams, *Judges' Deaths add to 9th Circuit Backlog*, L.A. Times, Oct. 15, 2011, http://articles.latimes.com/2011/oct/15/local/la-me-9th-circuit-vacancies-20111012.

privilege claim. In either case, public sentiment is more likely to be swayed by the underlying substantive controversy in evaluating the merits of the ensuing information request regardless of the constitutional arguments on either side. *See* O'Neil, *supra*, 60 Vand. L. Rev. at 1127.

In short, there is simply no rational basis for believing that Defendant's preferred political negotiation strategy will yield any resolution, much less a constitutionally correct one. As the D.C. Circuit noted, Defendant's "sort of political cure seems . . . considerably worse than the disease, entailing, as it would, far graver consequences for our constitutional system than does a properly limited judicial power to decide what the Constitution means in a given case." *Barnes*, 759 F.2d at 29.

Defendant's only plausible recommendation is to hold the Attorney General in contempt for refusal to produce the requested documents, which is of course exactly what Congress has done. Since the United States Attorney has refused to pursue this case, requesting judicial resolution of this controversy is the only remaining appropriate route.

Furthermore, even if negotiation and compromise could produce a satisfactory resolution of an inter-branch dispute, the *AT&T* cases illustrate that judicial involvement is essential in providing both branches the incentive to negotiate in good faith. "If negotiation fails—as in a case where one party, because of chance circumstance, has no need to compromise—a stalemate will result, with the possibility of detrimental effect on the smooth functioning of government." *AT&T*, 567 F.2d at 126. Without judicial oversight, the Defendant's incentive to cooperate is eliminated, and a constitutionally correct resolution unattainable.

At stake here is Congress's constitutional authority to investigate an egregious federal program in which the Department of Justice intentionally permitted guns to be illegally obtained and sold to Mexican drug cartels (Operation Fast and Furious), and then obstructed Congress's

efforts to obtain key information about the Operation. This Court clearly has jurisdiction in this case, and contrary to Defendant's claims, judicial abstention would do far greater injury to the separation of powers than permitting the Executive to continue its intransigent opposition to Congress's constitutional role.

CONCLUSION

Wherefore, Amicus, the American Center for Law and Justice requests this Court to deny Defendant's Motion to Dismiss.

Respectfully submitted this 21st day of November, 2012.

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