AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 12: The Contemporary Era – Judicial Power and Constitutional Authority/Constitutional Litigation

**Committee on the Judiciary v. McGahn, No. 19-5331** (D.C. Cir. 2020)

*In the aftermath of the 2016 presidential election, concerns were raised that Russia had attempted to interfere in the election and that members of now-President Donald Trump’s campaign had colluded with Russia to swing the election in Trump’s favor. On May 17, 2017, Deputy Attorney General Rod Rosenstein appointed Robert Mueller to serve as a special counsel to investigate those charges. The special counsel took over an investigation that was begun by the Federal Bureau of Investigation, but when President Trump fired FBI Director James Comey political pressure built for a more independent investigation. On March 22, 2019, Mueller submitted a confidential report on his investigation (which had expanded to include charges that President Trump had criminally obstructed the investigation into Russian interference) to the attorney general. Attorney General William Barr released a redacted version of the report to Congress on April 18. An unredacted version of the report was made available to congressional leaders, but even that version of the report excluded testimony before the federal grand jury that Mueller had used for his investigation. Rule 6(e) of the federal rules of criminal procedure requires that grand jury proceedings may not be disclosed except in limited circumstances.*

*In March 2019, the House Judiciary Committee began an investigation into the alleged misconduct of President Trump and his advisors. On April 22, 2019, the committee issued a subpoena to former White House Counsel Don McGahn as part of the House’s impeachment investigation directed at the president. The White House directed McGahn not to comply with that subpoena on the grounds that the president’s close advisors were immune from compelled testimony. On August 17, 2019, the committee filed suit in federal district court to enforce the congressional subpoena. The district court ordered McGahn to appear before the committee. On appeal, a divided panel of the circuit court held that the House committee lacked standing to bring a suit in federal court against the former White House counsel. Upon an* en banc *hearing, the full circuit court overruled the panel and affirmed the district court, holding that the House committee did have standing to file suit to enforce its subpoenas against the executive branch.*

Judge ROGERS.

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Article III of the Constitution vests in the federal judiciary “[t]he judicial power of the United States,” which extends to “[c]ases” and “[c]ontroversies,” “‘One element of the case-or-controversy requirement’ is that plaintiffs ‘must establish that they have standing to sue.’” The standing inquiry is “[t]rained on whether the plaintiff is [a] proper party to bring [a particular lawsuit].” . . .

“[T]he ‘irreducible constitutional minimum’ of standing consists of three elements.” “The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” *Spokeo v. Robbins* (2016). . . .

The Supreme Court has confirmed that these general principles of standing apply to institutional injuries claimed by legislative bodies. *Arizona State Legislature v. Arizona Independent Redistricting Commission* (2015). . . .

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As to the concreteness of the Committee’s alleged injury, the Supreme Court has acknowledged the essentiality of information to the effective functioning of Congress and long “held that each House has power ‘to secure needed information’” through the subpoena power. *Trump v. Mazars USA, LLP* (2020). Because Congress must have access to information to perform its constitutional responsibilities, when Congress “does not itself possess the requisite information — which not infrequently is true — recourse must be had to others who do possess it.” . . .

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The power of each House of Congress to compel witnesses to appear before it to testify and to produce documentary evidence has a pedigree predating the Founding and has long been employed in Congress’s discharge of its primary constitutional responsibilities: legislating, conducting oversight of the federal government, and, when necessary, checking the President through the power of impeachment. . . .

Congress commonly uses subpoenas not only to develop legislation but also in furtherance of its oversight of the federal government, including the Executive Branch. This subpoena power “comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.” *Watkins v. United States* (1957). . . .

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The House, then, has a long-recognized right, based in the Constitution, to have McGahn appear to testify and produce documents. Because each House of Congress delegates its power of inquiry to its Committees, which are “endowed with the full power of Congress to compel testimony.” . . . By refusing to testify in response to the Committee’s concededly valid subpoena, McGahn has denied the Committee something to which it alleges it is entitled by law. And because the Committee has alleged the deprivation of testimony to which it is legally entitled, its asserted injury is concrete.

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The Committee’s asserted injury is particularized because the Committee “is an institutional plaintiff asserting an institutional injury.” . . .

. . . . Because the Committee exercised the investigative authority of the full House, the Committee was entitled to McGahn’s testimony. Denial of his testimony is a deprivation that is a concrete injury and because the plaintiff is the distinctly injured party, the injury is particularized.

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The remaining two prongs of the traditional standing test — that the injury is “fairly traceable to the challenged conduct” and “is likely to be redressed by a favorable [judicial] decision”— are readily met. . . .

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For more than forty years this circuit has held that a House of Congress has standing to pursue a subpoena enforcement lawsuit in federal court. . . . Congress and the Executive Branch have long operated under the assumption that Congress may, if necessary, seek enforcement of a subpoena in federal court.

Accepting McGahn’s position that the Committee lacks standing would significantly curtail the possibility of accommodation. That outcome would upset settled expectations and dramatically alter bargaining positions in the accommodation process over informational disputes in the future. Without the possibility of enforcement of a subpoena issued by a House of Congress, the Executive Branch faces little incentive to reach a negotiated agreement in an informational dispute. Indeed, the threat of a subpoena enforcement lawsuit may be an essential tool in keeping the Executive Branch at the negotiating table. For example, President Clinton and a Senate subcommittee “[e]ventually . . . reached an agreement” over an informational dispute only after “a Senate threat to seek judicial enforcement of the subpoena.” Without that possibility, Presidents could direct widescale non-compliance with lawful inquiries by a House of Congress, secure in the knowledge that little can be done to enforce its subpoena — as President Trump did here. Traditional congressional oversight of the Executive Branch would be replaced by a system of voluntary Presidential disclosures, potentially limiting Congress to learning only what the President wants it to learn. And the power of impeachment, the “essential check . . . upon the encroachments of the executive,” would be diminished because a President would be unlikely to voluntarily turn over information that could lead to impeachment.

Neither does holding that the Committee has Article III standing displace the historical practice of accommodation, as McGahn maintains. Litigation, as the General Counsel to the Committee emphasized to this court during oral argument, is not a preferred option of politicians. . . .

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Further, contrary to McGahn’s assertion, the court does not impermissibly take sides in an interbranch dispute by holding that the Committee has standing and resolving whether or not McGahn is required to appear and testify. What the Committee seeks through its subpoena enforcement lawsuit is resolution of a discrete and limited legal issue: whether McGahn must appear before it to testify, absent invocation of a valid privilege that would excuse his refusal to answer specific questions. Given McGahn’s previous role as a close presidential advisor, it is plausible that Executive privilege could be properly asserted in response to at least some of the Committee’s questions, depending on their substance. Such a potentially available privilege is a powerful protection of the President’s interest in Executive Branch confidentiality, and it remains unaffected by an order compelling McGahn to appear and testify before the Committee. Consequently, entertaining the Committee’s subpoena enforcement lawsuit does not raise the specter that the judiciary is taking sides in an interbranch dispute. A court is not normally understood to be taking sides when it enforces a subpoena in civil litigation, and McGahn points to nothing to support a contrary conclusion here.

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In *Raines v. Byrd* (1997), six Members of Congress sued the Director of the U.S. Office of Management and Budget to challenge the constitutionality of the Line Item Veto Act, which authorized the President to cancel spending provisions in enacted appropriations statutes. The Supreme Court held that the individual members of Congress lacked standing. The Court has since clarified that *Raines* is a decision narrowly concerned with the standing of individual Members of Congress. *Arizona State Legislature*. . . .

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*Affirmed*.

Judge HENDERSON, dissenting.

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For over two hundred years, the coordinate branches did not enlist the Judiciary in their fights. But our court did not leave well enough alone and, roughly forty years ago, set about to “umpire disputes between th[e] branches regarding their respective powers.” This approach started to collapse under its own weight, however, as “the Supreme Court began to place greater emphasis upon the separation of powers concerns underlying the Article III standing requirement.” *Chenoweth v. Clinton* (D.C. Cir. 1999). . . . Notwithstanding our court’s past ill-advised effort to mediate battles between the political branches, the fact remains that the High Court has yet to sanction such an intrusion and we, an inferior court, should not take it upon ourselves to alter the balance of powers. . . .

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In suggesting that the Judiciary is needed to “keep[] the Executive Branch at the negotiating table,” the majority largely ignores “the wide variety of means that the Constitution puts at [the House’s] disposal,” *Mazars*, if a recalcitrant President orders “widescale noncompliance with lawful inquiries by a House of Congress.” The House may, for example, withhold appropriations or, as it did here, impeach the President for “[d]irecting the . . . def[iance of] a lawful subpoena.” Thus, even if the House is unlikely to invoke its inherent contempt authority or pursue a criminal prosecution, it is untrue that “no practicable alternative to litigation exists.” The political process may be messy, subject to the pitfalls of supercharged partisanship, but “we must put aside the natural urge . . . to ‘settle’ [this dispute] for the sake of convenience and efficiency,” *Raines*, no matter how tantalizing a “judicial alternative” appears.

By holding that the Committee has standing, the majority enlarges the Judiciary’s power to intervene in battles that should be waged between the Legislature and the Executive and opens the door to future disputes between the political branches. Even if “the precise function” we perform in this case— subpoena enforcement—“is a traditional feature of civil litigation in federal court,” “congressional subpoenas directed at” the Executive Branch “differ markedly” because they “unavoidably pit the political branches against one another.” *Mazars*. This distinction matters. If the interbranch character of the dispute was of no consequence, any President could presumably challenge in court laws that he believes infringe upon Article II powers. . . .

Judge GRIFFITH, dissenting.

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The most puzzling aspect of today’s decision is the court’s disregard for the relationship between Article III and the separation of powers. Heedless of the interbranch nature of this dispute, the majority trots through the three-part standing test from *Lujan v. Defenders of Wildlife* (1992), as if the Committee were just like a private party enforcing a subpoena in a breach-of-contract suit. The majority returns this circuit to the prudential approach to standing that we experimented with decades ago and that the Supreme Court rejected in *Raines v. Byrd* (1997). And the court fails to offer any limits to its revived doctrine of congressional standing, leaving future panels to struggle to find a coherent stopping point.

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Consider just a few possibilities. Under the majority’s reasoning, why couldn’t Congress (or the House or the Senate or a committee) challenge any Executive Order that allegedly violated the Bicameralism and Presentment Clause? *Chenoweth*. Or any military action that allegedly violated the Declare War Clause? *Campbell v. Clinton* (D.C. Cir. 2000). Or one of the Executive Branch’s spending decisions that allegedly violated the Appropriations Clause? *U.S. House of Representatives v. Mnuchin* (D.C. Cir. 2020) (Griffith, J., dissenting). Just as in this case, each hypothetical suit involves allegations that Congress has been denied something to which it is entitled by law*—*the prerogative to enact statutes, or to declare war, or to appropriate funds. The majority’s stripped down conception of standing authorizes Congress to bring all these suits and more.

Worse, if Congress or one of its chambers may sue the Executive Branch, “it must follow that the President may, by the same token, sue Congress.” Under the majority’s reasoning, whenever Congress passes a statute that the President believes invades his constitutional prerogatives, he could come into court to obtain a judicial declaration on that statute’s constitutionality. And why stop at suits between the Legislative and Executive Branches? The D.C. Circuit could sue Congress for stripping its habeas jurisdiction over Guantanamo Bay by alleging that Congress deprived it of its jurisdiction.

. . . . In short order, we could be forced to interpret constitutional provisions that have traditionally been interpreted by the political branches and “never before . . . by the federal courts,” and that courts should consider only “in the last resort, and as a necessity.”

That cannot be right. If “the concrete injury requirement has the separation-of-powers significance” that the Supreme Court has “always said” it has, then the answer to whether these injuries suffice for Article III standing must be a resounding “No.” Components of the government cannot bring suit alleging that another branch has caused the “abstract dilution of institutional . . . power.” . . . If the political branches were deemed to have a judicially cognizable interest in the “powers that have been conferred upon them (whether specifically or vaguely) by Constitution or statute,” our system of separated powers would be reduced to a system of “judicial refereeship.” *Moore v. U.S. House of Representative* (D.C. Cir. 1984) (Scalia, J., concurring).

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Once again, the Judiciary cannot resolve pure interbranch disputes. Federal courts primarily sit “to decide on the rights of individuals,” *Marbury v. Madison* (1803), and our core function is “to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law.” To be sure, that task sometimes requires us to resolve deeply controversial political disputes. But we resolve those disputes “only in the last resort, and as a necessity in the determination of [a] real, earnest, and vital controversy between individuals.” *Chicago & G.T. Ry. v. Wellman* (1892). Because we address such disputes only “in the course of carrying out the judicial function” of resolving cases or controversies, *DaimlerChrysler Corp. v. Cuno* (2006), we cannot intervene in an interbranch dispute unless and until the actions of one of the branches harms an entity “beyond the [Federal] Government.”

It is no accident that every major separation-of-powers case to reach the Supreme Court in the Nation’s history fits exactly that pattern. . . .

Neither the Committee nor the court identifies a single example of a direct interbranch dispute—on any issue— resolved by the Supreme Court. Ever. The Supreme Court’s explanation in *Raines* remains true today: History is replete with “confrontations between one or both Houses of Congress and the Executive Branch,” but until recently, “no suit was brought on the basis of claimed injury to official authority or power.” If a chamber of Congress could sue the Executive Branch to enforce its institutional prerogatives—be it the right to participate in appointments, or the right to vote to go to war—the U.S. Reports should be littered with these claims. They are not.

The same is true of the subset of interbranch disputes at issue here: conflicts about *information*. Since the Founding, “congressional demands for [executive-branch] information have been resolved by the political branches without involving [the] [c]ourt[s].” . . .

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The majority’s opinion is a Pyrrhic victory for Congress. Courts have many virtues, but dispatch is not one of them. “To the extent that enforcement of congressional subpoenas is left to the courts, future administrations [will] now know that they can delay compliance for years,” all while avoiding the traditional political cost associated with refusing to negotiate with Congress in good faith.

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And the majority’s decision to open the courthouse doors to these futile lawsuits comes at a serious cost. The option of litigation weakens Congress’s ultimate lever of accountability: its impeachment power. In the past, the House Judiciary Committee has treated the Executive Branch’s failure to cooperate in an investigation as grounds for an impeachment. But once litigation is a viable option, the President can always defend against accusations of executive-branch stonewalling by turning around and reproaching Congress for bypassing the courts — just as the President did here. Today’s decision thus grants Congress the sluggish remedy of judicial superintendence only to blunt the most potent weapon in its arsenal.

. . . . We do neither ourselves nor the parties any favors by embarking down this path, and I would leave the political branches to resolve their disputes through the political process—as the Constitution demands.