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Legal Sidebar

Full D.C. Circuit to Consider Whether Committees Can Enforce Congressional Subpoenas in Court

March 25, 2020

Although legal disputes between the executive and legislative branches of the federal government periodically lead to litigation, federal courts sometimes hesitate to adjudicate such disputes because deciding whether a coordinate branch of government has broken the law can implicate separation-of-powers principles. For example, a panel of three judges of the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) held in February that the House Committee on the Judiciary (Committee) lacked standing to bring a federal lawsuit to enforce a congressional subpoena against former White House Counsel Donald F. McGahn, II. Shortly thereafter, however, the Committee successfully persuaded the D.C. Circuit to vacate the panel's judgment and rehear the case en banc, which means all of the active judges of the court who are not recused will rehear the case. The en banc court's decision could affect whether—and under what circumstances—congressional entities may file lawsuits seeking information or testimony from executive branch defendants. This Sidebar therefore analyzes the standing doctrine before discussing *McGahn* and its implications for Congress.

Article III Standing and Interbranch Litigation

Article III, Section 2 of the U.S. Constitution authorizes the federal judiciary to hear certain enumerated categories of "Cases" and "Controversies." The Supreme Court has therefore inferred that federal courts lack jurisdiction to adjudicate disputes that do not qualify as "Cases" or "Controversies." To implement this limitation, the Court has developed several *justiciability doctrines* that preclude federal courts from resolving certain types of disagreements. One such doctrine is Article III standing, which requires plaintiffs (and sometimes other litigants) to prove they have suffered an *injury in fact* that is *traceable* to their opponents' conduct, and that a court can *redress* the injury by issuing a decision favorable to the plaintiff. To satisfy the injury in fact requirement, a litigant must show that it has "suffered 'an invasion of a *legally protected interest*' that is '*concrete and particularized*' and '*actual or imminent*, not conjectural or hypothetical.'" Litigants who cannot satisfy these jurisdictional prerequisites cannot maintain lawsuits in federal court.

Congressional Research Service
https://crsreports.congress.gov
LSB10429

According to the Supreme Court, the Article III standing requirement promotes separation-of-powers principles by preventing the judiciary from encroaching on the political branches' policymaking roles. Federal courts therefore apply the standing doctrine "especially rigorous[ly]" in cases implicating the constitutional separation of powers. In particular, many courts have invoked the standing doctrine to avoid adjudicating disputes between legislative and executive entities. In the 2019 case of *U.S. House of Representatives v. Mnuchin*, for example, the U.S. District Court for the District of Columbia (D.D.C.) determined that the House of Representatives lacked standing to sue various executive branch defendants to enjoin them from expending certain funds to construct a border wall. The full D.C. Circuit has scheduled oral argument in *Mnuchin* for April 28, 2020. Similarly, the D.C. Circuit ruled last February that certain individual Members of Congress lacked standing to sue the President for allegedly violating the Constitution's Foreign Emoluments Clause. A separate CRS product analyzes these and other congressional standing cases in greater detail.

Committee on the Judiciary v. McGahn

As especially relevant here, a panel of three D.C. Circuit judges ruled in *Committee on the Judiciary v. McGahn* that the Committee lacked Article III standing to enforce a congressional subpoena in federal court. In that case, the Committee issued a subpoena ordering former White House Counsel Donald F. McGahn, II, to testify before Congress about whether the President obstructed justice in connection with a Special Counsel investigation. In response, the President asserted that McGahn, as a presidential aide, was "absolutely immune from compelled congressional testimony with respect to matters occurring during" his service to the President. President Trump therefore directed McGahn not to testify. The Committee responded by suing McGahn in federal court to enforce the subpoena.

The panel held that Article III foreclosed the court "from resolving this kind of interbranch information dispute." The court first stated that Article III "does not vest federal courts with some 'amorphous general supervision of the operations of government,'" but only authorizes the judiciary "'to decide on the rights of *individuals*.'" Thus, reasoned the court, federal judges "lack authority to resolve disputes between the Legislative and Executive Branches until their actions harm an entity 'beyond the [Federal] Government.'" In the court's view, the dispute between McGahn and the Committee did not implicate any individual's private rights, so the court lacked jurisdiction to resolve it. The court then opined that separation-of-powers concerns also counseled against judicial intervention in interbranch disputes. According to the court, Article III contemplates that political actors will resolve their disputes through negotiation, not litigation. To support that conclusion, the court observed that Congress possessed several nonjudicial remedies to goad the Executive into compliance, including withholding appropriations, refusing to confirm nominees, holding officers in contempt, and impeaching executive officials. Turning to historical practice, the court next observed that the federal judiciary resolved interbranch disputes only on rare occasions. Finally, the court emphasized that the full Congress had not enacted a statute explicitly authorizing the Committee to bring the subpoena enforcement lawsuit. While the House of Representatives passed a resolution authorizing the Committee to file the lawsuit, the court found that resolution insufficient to establish standing.

Other judges on the panel did not necessarily agree with all of these conclusions. A concurring judge, for instance, agreed that the Committee lacked standing but doubted whether Article III categorically barred federal courts from adjudicating interbranch disputes between legislative and executive entities. Meanwhile, a dissenting judge maintained that the Committee had standing to sue.

A few weeks after the panel issued its decision, a majority of the eligible active D.C. Circuit judges voted to vacate the panel's judgment and rehear *McGahn* en banc, i.e., to have all of the court's active judges who are not recused rehear the case. The court is scheduled to hear oral arguments in this round of the case on April 28, 2020, to consider whether the Committee has Article III standing to sue.

Considerations for Congress

A full D.C. Circuit ruling in *McGahn* could affect whether—and under what circumstances—federal courts in the District of Columbia possess jurisdiction to resolve informational disputes between the political branches. The court might, for instance, adopt the panel majority's approach to Article III standing, which appears to contemplate little to no judicial role in resolving interbranch informational disputes. Alternatively, the full court might instead agree with the dissenting judge that federal courts may adjudicate congressional subpoena enforcement actions against executive branch defendants.

The full court's decision to rehear *McGahn* gives the court an opportunity to reaffirm, clarify, or abrogate the court's prior congressional subpoena cases. During the 1970s, the D.C. Circuit decided at least two subpoena enforcement cases between Congress and the Executive without concluding that the legislative parties lacked standing. The D.D.C., following those D.C. Circuit cases, likewise ruled on at least two more recent occasions that congressional committees have standing to pursue subpoena enforcement actions against executive officials. The *McGahn* panel, however, suggested that intervening Supreme Court decisions involving congressional standing undermined the court's 1970s-era subpoena enforcement rulings. While the *McGahn* panel stopped short of explicitly overruling those cases, the panel's decision raises questions about whether the D.C. Circuit's pre-*McGahn* opinions will remain good law. The full court might answer those questions when it issues its opinion.

If the D.C. Circuit ultimately issues a decision in *McGahn* that hinders Congress from vindicating its informational interests in court, the Committee could ask the Supreme Court to review the case. Congress might also be able to take legislative measures to improve the chances that congressional litigants will satisfy the Article III standing requirement when they sue executive branch entities. Although Congress cannot *abrogate* the Article III standing requirement through ordinary legislation because standing is a constitutionally derived doctrine, the Supreme Court has suggested that Congress may statutorily "*elevate*" concrete but otherwise non-cognizable injuries to the status of Article III injuries-in-fact. To that end, the panel opinion in *McGahn* suggested (but did not decide) that Congress could surmount the standing obstacle by enacting a statute explicitly authorizing the Committee to file subpoena enforcement actions. In doing so, the opinion noted that the full Congress has enacted statutes authorizing the Senate—but not the House—to file subpoena enforcement actions subject to certain restrictions. That said, the Supreme Court has also stated that "Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." The Court ruled in *Raines v. Byrd*, for instance, that several individual Members of Congress lacked standing to maintain an interbranch lawsuit challenging a law's constitutionality even though Congress passed a statute authorizing "any Member of Congress" to challenge that law in court. In reaching that decision, the Court emphasized that "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." Similarly, in *Walker v. Cheney*, the D.D.C. ruled that a congressional plaintiff—namely, the Comptroller General—lacked standing to sue the Vice President for allegedly refusing to provide Congress certain information, even though a federal statute purported to authorize the Comptroller General to sue executive officials under specified circumstances. The full court's opinion in *McGahn* could clarify whether or when Congress can legislatively cure potential standing defects.

Congress could also propose amending Article III to empower federal courts to adjudicate congressional lawsuits against the Executive without regard to the "Case or Controversy" requirement. Proposing a constitutional amendment requires an affirmative vote by two-thirds of each house of Congress or two-thirds of the states. Three-fourths of the states would then need to ratify the amendment.

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