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Congressional Subpoenas in Court

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CONGRESSIONAL SUBPOENAS IN COURT[*]

AMANDEEP S. GREWAL[**]

The ongoing political battles between President Donald J. Trump and House Democrats have sparked substantial debates over the legislature's authority to oversee the executive branch. The House has not been discouraged by Trump Administration resistance and has conducted several headline-making investigations. The judiciary has also been pulled into the fray through various lawsuits seeking to enforce House-issued subpoenas. Yet courts cannot address the validity of those subpoenas until they address a threshold question: Does Congress have standing to judicially enforce a subpoena against the executive branch? The Supreme Court has never held that Congress, its houses, or its members enjoy standing to sue the executive branch, whether through a subpoena or otherwise. Raines v. Byrd *rebuffs most congressional lawsuits initiated by individual legislators, but the Court has not formally rejected lawsuits initiated by the House or Senate. For those, the Court has vaguely warned that separation of powers problems would arise, saying little else. This Article wrestles with the complex standing issues that arise when the legislature sues the Executive. It shows that under one key conceptual approach—and possibly the one that the Supreme Court will adopt—Congress can never sue the executive branch to enforce a subpoena.*

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INTRODUCTION

The ongoing political battles between President Donald J. Trump and the House of Representatives have sparked substantial debates over the legislature's authority to oversee the executive branch and ferret out wrongdoing. The House has not been discouraged by the Trump Administration's resistance and has conducted several headline-making investigations.[1] The judiciary has been pulled into this fray through various lawsuits seeking to enforce House-issued subpoenas.[2] But courts cannot address the validity of those subpoenas until they address a threshold question: Does Congress have standing to judicially enforce a subpoena against the executive branch?

The Supreme Court has never held that Congress, its houses, or its members enjoy standing to sue the executive branch, whether over a subpoena or otherwise.[3] In *Raines v. Byrd*,[4] the Court held that individual congressional members themselves suffered no "injury-in-fact," as contemplated by the Article III case-or-controversy requirement,[5] when their institutions had allegedly been harmed.[6] The Court left open whether institutional injuries alleged by the House or Senate would be judicially cognizable.[7] Thus, whether the House or Senate enjoys standing to sue over the executive branch's defiance of a subpoena remains an unresolved question.

1. *See* Matthew Callahan & Reuben Fischer-Baum, *Where the Trump Administration Is Thwarting House Oversight*, WASH. POST (Oct. 11, 2019), https://www.washingtonpost.com/graphics/2019/politics/trump-blocking-congress/ [https://perma.cc/QN2G-9YGA (dark archive)] (tracking the progress of about twenty different oversight battles between the House and the Trump Administration).

2. *See id.*; *see also* Comm. on the Judiciary v. McGahn, 951 F.3d 510, 516–22 (D.C. Cir. 2020) (involving subpoena to compel testimony from former White House official), *reh'g en banc granted sub nom.* House of Representatives v. Mnuchin, No. 19-1576, 2020 WL 1228477 (D.C. Cir. 2020) (en banc); Comm. on Oversight v. Barr, No. 1:19-cv-03557 (D.D.C. 2019) (involving subpoena for census-related information); Comm. on Ways & Means v. Dep't. of Treasury, No. 1:19-CC-01974 (D.D.C. filed July 2, 2019) (involving subpoena for President Trump's tax return information); Cummings v. Murphy, 321 F. Supp. 3d 92, 107–08 (D.D.C. 2018) (involving demand made under 5 U.S.C. § 2954 for information held by the General Services Administration related to its dealings with the Trump Hotel).

3. Aside from subpoena lawsuits, the House and its members have filed lawsuits related to border wall construction and the Foreign Emoluments Clause. *See, e.g.*, Blumenthal v. Trump, 949 F.3d 14 *passim* (D.C. Cir. 2020) (denying standing to group of various Representatives and Senators for claims related to the Foreign Emoluments Clause); U.S. House of Representatives v. Mnuchin, 379 F. Supp. 3d 8 *passim* (D.D.C. 2019) (denying congressional standing to pursue claims related to border wall construction), *en banc review granted*, No. 19-1576, 2020 WL 1228477 (D.C. Cir. 2020) (en banc) (explaining that the D.C. Circuit's internal procedures allow "en banc consideration prior to the [initial] panel decision").

4. 521 U.S. 811 (1997).

5. *See infra* notes 14–16 and accompanying text.

6. *Raines*, 521 U.S. at 829–30; *see also* Va. House of Delegates v. Bethune-Hill, 139 S. Ct. 1945, 1953 (2019) ("[I]ndividual members lack standing to assert the institutional interests of a legislature.").

7. *Raines*, 521 U.S. at 829–30.

This Article, prepared for the *North Carolina Law Review* symposium, *Legal Ethics in the Age of Trump*,[8] shows how the "public trust approach" would deny standing to congressionally initiated subpoena lawsuits.[9] As Part I explains, the public trust approach emphasizes that legislators and legislative bodies exercise authority only in representational capacities, as trustees for their constituents. Thus, any harm they suffer in those capacities cannot be "personal"[10] as required by injury-in-fact analysis.[11]

Part II applies the public trust approach to congressional subpoena disputes. It concludes that, under the public trust approach, neither Congress nor its individual houses enjoy standing to judicially enforce subpoenas against the executive branch.[12] This part also shows how arguments used to support congressional standing in prior subpoena disputes do not undermine the principles behind the public trust approach.

Part III explores what the Court might do if a congressional subpoena dispute reaches it. Case law established after *Raines* severely muddies the issues,

8. *See generally* Michael J. Gerhardt, *Introduction: Legal Ethics in the Age of Trump*, 98 N.C. L. REV. 1029 (2020); F. Andrew Hessick, *Defending the Constitutionality of Federal Statutes*, 98 N.C. L. REV. 1185 (2020); Nancy B. Rapoport, *Training Law Students To Maintain Civility in Their Law Practices as a Way to Improve Public Discourse*, 98 N.C. L. REV. 1143 (2020); Rebecca Roiphe, *A Typology of Justice Department Lawyer's Roles and Responsibilities*, 98 N.C. L. REV. 1077 (2020).

9. *See infra* Part I.

10. An injury in fact generally arises when the plaintiff has suffered "an invasion of a legally protected interest" that is "concrete and particularized," rather than one that is "conjectural or hypothetical." Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) (internal quotation marks omitted) (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)). To be particularized, "the injury must affect the plaintiff in a *personal* and individual way." *Id.* at 560 n.1 (emphasis added).

11. The Court has recognized that legislators may suffer personal injuries in limited contexts. *See Raines*, 521 U.S. at 821 (describing *Powell v. McCormack*, 395 U.S. 486, 496 (1969), which involved a legislator who had been excluded from the House of Representatives and who suffered a loss of salary, as a case in which the plaintiff asserted his claim in a "private capacity" over something to which he was "personally . . . entitled"); *see also* Tara Leigh Grove, *Government Standing and the Fallacy of Institutional Injury*, 167 U. PA. L. REV. 611, 651–58 (2019) [hereinafter Grove, *Standing and Fallacy*] (analyzing the Court's inscrutable decision in *Coleman v. Miller*, 307 U.S. 433 (1939), involving vote-nullification claims brought by state legislators). These unusual circumstances do not bear on interbranch subpoena disputes because congressional investigatory power is vested in the House or the Senate as a whole, rather than in individual members. *See, e.g.*, Reed v. Cty. Comm'rs, 277 U.S. 376, 388–89 (1928) (acknowledging the Senate's investigatory powers but concluding that individual Senators, who formed a special committee, could not sue to enforce that power when not authorized by the chamber).

12. Standing doctrine includes multiple elements. *See infra* notes 16–18 and accompanying text. But this Article will, for ease of exposition, assume that a plaintiff that satisfies the injury-in-fact requirement has standing to sue. Also, this Article does not deal with other potential barriers to congressional lawsuits, such as whether a statutory cause of action must exist for the House or Senate to sue the executive branch or whether courts must receive a specific statutory grant of jurisdiction to hear interbranch disputes. District courts have previously resolved those issues in favor of Congress. *See* Comm. on Oversight & Gov't Reform v. Holder, 979 F. Supp. 2d 1, 17–20 (D.D.C. 2013) (concluding that 28 U.S.C. § 1331 provides subject matter jurisdiction for congressionally initiated subpoena lawsuits); Comm. on Judiciary v. Miers, 558 F. Supp. 2d 53, 80–85 (D.D.C. 2008) (concluding that cause of action exists for congressionally initiated subpoena lawsuits).

and it is impossible to determine the conceptual approach the Court will use. The Court must wrestle with inconsistencies whether it adopts the public trust approach or another approach. But the public trust approach fits best with broader structural principles embraced by the Constitution. The Court should thus adopt it.

I. CONGRESSIONAL LAWSUITS AND ARTICLE III REQUIREMENTS

This part explains how courts have applied standing doctrine to interbranch lawsuits. Section I.A shows how the United States Court of Appeals for the District of Columbia Circuit exercised its jurisdiction over those suits and how dissenting judges on that court established the public trust approach. Section I.B shows that the Supreme Court has partially followed the public trust approach but has left open key questions related to interbranch lawsuits.

A. *Development of the Public Trust Approach*

Under the Constitution, the judiciary enjoys limited authority in our government. Article III specifies that federal courts enjoy the "judicial power of the United States," which generally extends only to specified "cases" and "controversies."[13] Courts strenuously observe the case-or-controversy requirement because "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies."[14] Without it, the judicial function might "intrude upon the powers given to the other branches."[15]

The standing doctrine helps ensure that federal courts do not exceed their constitutional authority.[16] In short, the doctrine contemplates that only those who have suffered a "legal wrong" may maintain a federal lawsuit.[17] To meet this "irreducible constitutional minimum," a "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."[18]

13. U.S. CONST. art III, §§ 1–2.

14. *Raines*, 521 U.S. at 818 (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 37 (1976)).

15. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016) (citing DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 341 (2006)).

16. *See* Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408 (2013) ("The law of Article III standing . . . serves to prevent the judicial process from being used to usurp the powers of the political branches.").

17. *Spokeo*, 136 S. Ct. at 1547.

18. *Id.* at 1543 (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992)); *see also* Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 125 (2014) (summarizing Article III standing requirements).

Beginning in the 1970s, courts wrestled with whether federal legislators or legislative bodies could satisfy standing doctrine, with a heavy focus on the injury-in-fact requirement.[19] Cases often arose when individual members of Congress sought judicial relief for an injury allegedly inflicted by the executive branch. In *Kennedy v. Sampson*,[20] for example, the D.C. Circuit held that Senator Ted Kennedy enjoyed standing to sue the executive branch when the President "pocket vetoed" a healthcare bill.[21] In so holding, the court emphasized that Senator Kennedy had voted for that bill and the President's actions had injured him by nullifying his vote.[22]

After some twists and turns, *Kennedy* and related cases established that, at least within the D.C. Circuit, federal legislators could satisfy Article III standing requirements.[23] Each legislator enjoyed a personal interest in the exercise of her governmental power, and harm to that interest could establish an injury in fact.[24] Though satisfaction of that requirement alone would not allow a lawsuit to proceed, the "personal interest" approach facilitated legislator lawsuits.[25] The D.C. Circuit also adopted an "institutional interest" approach, under which the House and Senate, as institutions, could pursue judicial relief for injuries to their constitutional powers.[26]

19. *See generally* R. Lawrence Dessem, *Congressional Standing To Sue: Whose Vote Is This, Anyway?*, 62 NOTRE DAME L. REV. 1, 5–9 (1986) (discussing congressional standing cases).

20. 511 F.2d 430 (D.C. Cir. 1974).

21. *Id.* at 436. Under Article I, Section 7, after Congress presents legislation to the President, he has ten days during which to sign the bill into law or return it to the originating house. U.S. CONST. art. I, § 7, cl. 2. If the President intends to return the bill but cannot do so because Congress has adjourned, the bill automatically expires (that is, it has been "pocket vetoed"). *See id.*

22. *Kennedy*, 511 F.2d at 435 ("The prerequisite to standing is that a party be 'among the injured,' in the words of *Sierra Club*, not that he be the *most* grievously or *most* directly injured. We think that appellee is 'among the injured' in this case."); *see also* Sierra Club v. Morton, 405 U.S. 727, 734–35 (1972) ("[T]he 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.").

23. *See Kennedy*, 511 F.2d. at 434 (recognizing the plaintiff's "injury . . . as a member of the legislative branch of the government, an interest among those protected by article I, section 7"); Synar v. United States, 626 F. Supp. 1374, 1381–82 (D.D.C. 1986) (stating that the law of the D.C. Circuit "recognizes a personal interest by Members of Congress in the exercise of their governmental powers," and "specific injury to a legislator in his official capacity may constitute cognizable harm sufficient to confer standing upon him"). The D.C. Circuit later acknowledged that *Raines* had substantially undermined some of its prior cases on congressional standing. *See* Chenoweth v. Clinton, 181 F.3d 112, 115–17 (D.C. Cir. 1999).

24. *Synar*, 626 F. Supp. at 1381–82 (summarizing cases within the D.C. Circuit).

25. The personal interest approach did not reflect the only approach used by courts to embrace legislator standing. Rather, courts also sometimes discussed whether a legislator enjoyed a "derivative interest," that is, whether she suffered a cognizable harm through an injury inflicted upon the chamber of which she was a member. *See* Dessem, *supra* note 19, at 14–18. Courts also examined whether a legislator could assert a "representative interest" for harms allegedly inflicted on the regions or persons whom she represented. *See id.* at 18–22. Nuances between the personal interest, derivative interest, and representative interest approaches do not meaningfully affect the issues discussed in this Article.

26. In *Kennedy*, the executive branch admitted that the House or Senate would have standing to assert an injury to its lawmaking power. *See* 511 F.2d at 434. The D.C. Circuit's apparent acceptance

But two prominent judges on the D.C. Circuit, Robert Bork and Antonin Scalia, questioned those approaches. Through separate opinions, each urged a public trust approach.[27] Under that approach, legislators or legislative bodies generally suffer no judicially cognizable harms when acting in their representational capacities.[28]

Barnes v. Kline[29] shows how the public trust approach differs from the personal and institutional interest approaches. In *Barnes*, various congressional plaintiffs sued the executive branch over the President's pocket veto of human rights legislation.[30] The majority opinion applied the individual interest and institutional interest approaches and held that the congressional plaintiffs established injuries that satisfied Article III standing requirements. For the individual congressional plaintiffs, the court followed its analysis in *Kennedy* holding there was a cognizable injury.[31] For the institutional congressional plaintiffs, the court extended *Kennedy* and concluded that "an injury to the lawmaking powers of the two houses of Congress" could qualify as a judicially cognizable injury.[32]

Judge Bork, writing in dissent, argued that none of these congressional plaintiffs met Article III standing requirements. The federal legislators and legislative bodies in *Barnes* sued "not because of any personal injury done [to] them" but because they wanted "the courts [to] define and protect their governmental powers."[33] The majority's approach implied that "elected representatives have a separate private right, akin to a property interest, in the

of this admission was dicta because the case involved an individual legislator as plaintiff. However, the D.C. Circuit later held that the House or Senate could satisfy standing requirements. *See infra* text accompanying note 32.

27. Judges Bork and Scalia did not expressly use the "public trust" label. This Article uses that term to refer to the principles embraced in their dissents. *See* Barnes v. Kline, 759 F.2d 21, 50 (D.C. Cir. 1985) (Bork, J., dissenting) (rejecting arguments that legislators have "a separate private right, akin to a property interest, in the powers of their offices" because it "has always been the theory, and it is more than a metaphor, that a democratic representative holds his office in trust, that he is nothing more nor less than a fiduciary of the people"); Moore v. U.S. House of Representatives, 733 F.2d 946, 956 (D.C. Cir. 1984) (Scalia, J., concurring) ("In my view no officers of the United States, of whatever Branch, exercise their governmental powers as personal prerogatives in which they have a judicially cognizable private interest. They wield those powers not as private citizens but only through the public office which they hold.").

28. *See Barnes*, 759 F.2d at 50; *Moore*, 733 F.2d at 956.

29. 759 F.2d 21 (D.C. Cir. 1985), *vacated as moot sub nom.* Burke v. Barnes, 479 U.S. 361 (1987). In vacating *Barnes*, the Court acknowledged the different approaches to standing taken by the D.C. Circuit majority and by Judge Bork. *Barnes*, 479 U.S. at 362–63. However, the Court stated that it did not need to resolve the standing question to address the mootness issue. *See id.* at 363.

30. *See Barnes*, 759 F.2d at 30.

31. *Id.* at 26 ("In the present action, the thirty-three individual Representatives allege an injury identical to that of the individual lawmaker in *Kennedy v. Sampson*.").

32. *Id.* at 26.

33. *Id.* at 42 (Bork, J., dissenting).

powers of their offices."[34] Judge Bork, by contrast, believed that a "democratic representative holds his office in trust" and "is nothing more nor less than a fiduciary of the people."[35] Citizens and taxpayers themselves could not sue for alleged injuries to congressional voting or legislative powers. Thus, it was "utterly anomalous to allow the representative to sue when those he represents may not."[36]

Judge Bork also emphasized that legislative suits would undermine the separation-of-powers principles protected by standing doctrine. That doctrine addressed "what kinds of interests courts will undertake to protect" and kept "courts out of areas that are not properly theirs."[37] Yet under the individual interest and institutional interest approaches, courts could exercise "judicial dominance" over matters otherwise reserved for the political branches.[38]

To Judge Bork, this dominance did not fit with "the role of the federal courts in our polity."[39] Courts declared statutes or executive acts unconstitutional "out of necessity, and as a last resort."[40] This "awesome power" fit within our representative structure only because it was "confined, limited, and tamed" by standing doctrine.[41] Courts traditionally acted only when they had to address the rights of private persons.[42] Thus, Judge Bork "would have no hesitation in reaching and deciding the substantive question" in *Barnes* if it "were a suit by a private party who had a direct stake in the outcome."[43] However, no such party was present in this case.

Judge Bork also argued that the "complete novelty" of the majority's approach should have given it pause.[44] For more than 175 years, "litigation directly between Congress and the President" was unknown.[45] The D.C. Circuit had therefore affected "a major shift in basic constitutional arrangements," and its approach carried consequences beyond interbranch disputes.[46] The D.C. Circuit had already held that individual legislators enjoyed standing to sue each other in federal court, and lawsuits between the Senate and the House did not

34. *Id.* at 50.
35. *Id.*
36. *Id.* at 51.
37. *Id.* at 43.
38. *Id.* at 44.
39. *Id.* at 52.
40. *Id.*
41. *Id.*
42. *See id.* at 46 (discussing how the President could judicially challenge the constitutionality of the legislative vetoes only after waiting for some "private person to raise the issue" in *INS v. Chadha*, 462 U.S. 919 (1983)).
43. *Id.* at 48.
44. *Id.* at 41.
45. *Id.*
46. *Id.*

seem far off.[47] Courts were thus becoming "not only a part of the legislative process but perhaps the most important part."[48]

That the Constitution expressly recognizes lawsuits by states themselves[49] only further proved Judge Bork's point.[50] The Framers knew that they should specify the judiciary's authority to hear, for example, a lawsuit between states or a lawsuit by a citizen of one state against another state.[51] Judge Bork thus doubted that the judicial power to hear federal interbranch disputes could be derived through implication. It would be "incredible that Framers who intended to extend judicial power to direct controversies between Congress and the President failed to include so important a category in their recitation."[52]

Judge Bork also believed that the majority's reasoning meant that courts could be pulled into purely intrabranch disputes. One agency that believed another agency had regulated within its sphere could seek relief from the courts, rather than from the President.[53] Similarly, a district court judge who believed that an appellate court had improperly limited her jurisdiction could petition the Supreme Court for redress.[54] Given these implications, Judge Bork believed that the *Barnes* majority should have "renounce[d] outright" the individual interest and institutional interest approaches.[55] Nonetheless, the D.C. Circuit maintained its jurisdiction over interbranch lawsuits.

47. *See id.* at 41 (referencing *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1177 (D.C. Cir. 1982) (Bork, J., dissenting) and *Moore v. U.S. House of Representatives*, 733 F.2d 946, 956 (D.C. Cir. 1984) (Scalia, J., concurring)). Though the D.C. Circuit had held that it enjoyed jurisdiction over intrabranch and interbranch lawsuits, it invoked an "equitable discretion" doctrine to sometimes decline to hear those suits. *See* Dessem, *supra* note 19, at 9–13 (discussing cases). In *Chenoweth v. Clinton*, the D.C. Circuit recognized the troubled history of its equitable discretion doctrine. *See* 181 F.3d 112, 114 (D.C. Cir. 1999).

48. *Barnes*, 759 F.2d at 46 (Bork, J., dissenting).

49. U.S. CONST. art. III, § 2, cl. 1.

50. *Barnes*, 759 F.2d at 57 (Bork, J., dissenting).

51. *Id.*

52. *Id.* Complex issues arise when a state sues the federal government. *See* RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 263–66 (9th ed. 2015) ("The cases on the standing of states to sue the federal government seem to depend on the kind of claim that the state advances. The decisions . . . are hard to reconcile."). The Court applies the injury-in-fact requirement to states but remains mindful that they "surrender[ed] certain sovereign prerogatives" when they joined the Union. Massachusetts v. EPA, 549 U.S. 497, 519 (2007). Given the "special" treatment given to states, *see id.* at 520, standing doctrine principles developed through state-initiated lawsuits do not easily translate to other contexts. For further scholarly commentary, see generally Tara Leigh Grove, *When Can a State Sue the United States?*, 101 CORNELL L. REV. 851 (2016) (arguing that though states have wide discretion in challenging state law in federal courts, they should enjoy no "special interest" in challenging the implementation of federal law).

53. *Barnes*, 759 F.2d at 47 (Bork, J., dissenting) ("The head of an agency who believes that another agency has improperly encroached on an area confided to his administration by statute or regulation no longer need bring the dispute before the President, for the courts stand ready to resolve it.").

54. *Id.*

55. *Id.* at 41.

B. *The Supreme Court Weighs in*

Though Judge Bork could not sway his colleagues, the Supreme Court partially followed his public trust approach in *Raines*.[56] That case arose when six federal legislators argued that the Line Item Veto Act unconstitutionally expanded the executive power, and that its cancellation mechanisms violated Article I's bicameralism and presentment requirements.[57] This, they alleged, harmed them in their official capacities. Any veto under the Act would alter the legislators' votes, remove them from their constitutional role in the repeal of legislation, and improperly alter the balance of power between the branches.[58]

The Court, in a 7–2 decision, concluded that the legislators lacked standing to assert these arguments.[59] Like Judge Bork, the Justices emphasized the separation-of-powers principles protected by standing doctrine and warned that courts exercise jurisdiction only as a last resort.[60] They would thus set "aside the natural urge to proceed directly to the merits of this important dispute and to 'settle' it for the sake of convenience and efficiency."[61] The Court would instead examine whether the legislators' alleged injuries were "*personal*, particularized, concrete, and otherwise judicially cognizable."[62]

The Court held that they were not. The legislators had alleged an institutional injury that damaged all members of Congress and both Houses of Congress equally.[63] Additionally, the legislators did not allege any loss to their private rights. Rather, the alleged injuries arose solely through their official positions. If one of the legislators "were to retire tomorrow, he would no longer have a claim; the claim would be possessed by his successor instead."[64] Thus, any alleged injury ran with each legislator's seat, which he "holds (it may quite

56. Raines v. Byrd, 521 U.S. 811, 825–29 (1997). The Court did not expressly state that it was following Judge Bork, but its decision echoes many of the points he made in *Barnes*. *See id.* Also, the Court noted that the D.C. Circuit embraced congressional standing over "strong dissent" by Judge Bork and then-Judge Scalia. *Id.* at 820 n.4.

57. *Id.* at 816; *see also* Line Item Veto Act, Pub. L. No. 104–130, 110 Stat. 1200 (1996), *invalidated by* Clinton v. City of New York, 524 U.S. 417 (1998). The Act did not mention the President's veto of legislation. *See* Line Item Veto Act, §§ 1–5, 100 Stat. at 1200–12. Rather, it contemplated that the President could "cancel" some spending and tax benefit measures before he signed bills into law. *Id.* at § 2(a), 100 Stat. at 1200; *Raines*, 521 U.S. at 814.

58. *Raines*, 521 U.S. at 816.

59. Chief Justice Rehnquist wrote for the Court majority, while Justices Breyer and Stevens each wrote separate dissents. *See id.* at 811; *id.* at 837 (Stevens, J., dissenting) ("[T]he deprivation of the right possessed by each Senator and Representative to vote for or against the precise text of any bill before it becomes law must also be a sufficient injury to create Article III standing for them."); *id.* at 841 (Breyer, J., dissenting) (rejecting the claim that the Constitution draws "an absolute line between disputes involving a 'personal' harm and those involving an 'official' harm").

60. *Id.* at 819–20 (majority opinion).

61. *Id.* at 820.

62. *Id.* (emphasis added).

63. *Id.* at 821.

64. *Id.*

arguably be said) as trustee for his constituents, not as a prerogative of personal power."[65]

Historical practice supported the Court's reasoning. Like Judge Bork, the Court explored the history of interbranch conflicts and noted that those conflicts were resolved outside the judiciary.[66] For example, under the theory advanced by the legislators, President Andrew Johnson could have sued Congress over statutory restrictions on his removal power. But it did not occur to him, nor to succeeding Presidents, to do so.[67] Instead, the Court addressed restrictions on the President's removal authority much later in *Myers v. United States*.[68] The plaintiff in *Myers* was a former federal official who believed that he had been improperly terminated and sued for relief.[69] In this procedural context, involving a private injury (lost federal salary payments), the Court struck down the contested statutory restrictions on the President's removal authority.[70]

The controversy over the legislative veto similarly showed that the Court resolved weighty constitutional questions only when private rights were at stake.[71] In *INS v. Chadha*,[72] the Court invalidated a statute through which one house of Congress could nullify some deportation decisions made by the Attorney General.[73] That controversy arose not when the Attorney General sued Congress for infringing his authority[74] but when a private person, Jagdish Chadha, faced deportation and challenged the statute.[75] The Court in *Raines*

65. *Id.* (citing THE FEDERALIST NO. 62, at 346 (James Madison) (Clinton Rossiter ed., 1999) ("It is a misfortune incident to republican government, though in a less degree than to other governments, that those who administer it may forget their obligations to their constituents and prove unfaithful to their important trust.")).

66. *Id.* at 826–29.

67. *Id.* at 826–28.

68. 272 U.S. 52 (1926); *see also Raines*, 521 U.S. at 827–28 (discussing *Myers*, 272 U.S. at 106–07, 173, 176).

69. *Myers*, 272 U.S. at 106.

70. *Id.* at 176; *see also Raines*, 521 U.S. at 827–28. The statute at issue in *Myers* provided that various postmasters could not be terminated without Senate consent. *See* 272 U.S. at 106. The Postmaster General, at the direction of the President, terminated Myers, even though the Senate had not consented to his termination. *See id.* The Court ultimately held that the Senate-consent restriction was unconstitutional. *See id.* at 174–75.

71. *Raines*, 521 U.S. at 828; *see also* David A. Martin, *The Legislative Veto and the Responsible Exercise of Congressional Power*, 68 VA. L. REV. 253, 256–59 (1982) (describing different legislative veto regimes, through which a single house or a single congressional committee could block executive branch actions outside the Article I bicameralism and presentment process).

72. 462 U.S. 919 (1983), *invalidating* Immigration and Nationality Act, ch. 477, § 244(c)(2), 66 Stat. 163, 216 (1952) (codified as amended at 8 U.S.C. § 1254(c)(1) (repealed 1996)).

73. *Id.* at 959.

74. *Raines*, 521 U.S. at 828 (noting that, if the legislative plaintiffs in *Raines* had standing, then the Attorney General in *Chadha* would also have had standing to challenge the one-House veto provision at issue because it rendered his authority provisional rather than final).

75. *Chadha*, 462 U.S. at 927–29 (describing Chadha's potential deportation).

thus observed that judicial resolution of direct interbranch disputes would run "contrary to historical experience."[76]

The Court did not fully embrace the public trust approach, however. Though its reasoning followed Judge Bork's, the Court left open whether the House or Senate would have had standing to challenge the Line Item Veto Act.[77] Neither the House nor the Senate authorized the *Raines* plaintiffs' lawsuit, and the Court initially attached "some importance" to this.[78] But then the Court quickly backtracked, saying that it would "not now decide" whether anything would change if House or Senate authorization were present.[79]

The Supreme Court has thus rejected the personal interest approach to congressional standing.[80] Legislators cannot satisfy Article III standing requirements by alleging that they have suffered injuries in their representational capacities. Nor can they assert injuries on the behalf of the House or Senate.[81] *Raines* leaves open whether the House or Senate can themselves do so.

After *Raines*, the Justices have expressed different views on whether harms alleged by the House or Senate would be judicially cognizable. For example, Justice Stevens and Justice Breyer embraced the institutional interest approach when they concluded that the House enjoyed standing to challenge how the Department of Commerce conducted the 2000 census.[82] They believed that because the census would determine each state's congressional delegation, the House could assert a concrete and particularized interest in preventing its unlawful composition.[83] The Court majority resolved the census dispute without reaching the congressional standing question.[84]

76. *Raines*, 521 U.S. at 829.

77. Eventually, the Court invalidated the Line Item Veto Act in a case did that not involve an interbranch conflict. *See* Clinton v. City of New York, 524 U.S. 417, 420–21 (1998).

78. *Raines*, 521 U.S. at 812, 829.

79. *Id.* at 829–30.

80. For further commentary about why the Supreme Court might have been skeptical about the D.C. Circuit's embrace of congressional standing, see Neal Devins & Michael A. Fitts, *The Triumph of Timing:* Raines v. Byrd *and the Modern Supreme Court's Attempt To Control Constitutional Confrontations*, 86 GEO. L.J. 351, 354 (1997) ("The Court . . . finds little institutional gain in immersing itself in the resolution of highly charged intramural squabbles brought by disgruntled members of Congress . . . . [But the D.C. Circuit's] approval of congressional standing enhances its power inside the Washington beltway . . . .").

81. *Raines*, 521 U.S. at 829; *see also* Va. House of Delegates v. Bethune-Hill, 139 S. Ct. 1945, 1953 (2019) ("[I]ndividual members lack standing to assert the institutional interests of a legislature." (citing *Raines*, 521 U.S. at 829)).

82. Dep't of Commerce v. U.S. House of Representatives, 525 U.S. 316, 357, 364–65 (1999) (Stevens, J., dissenting). Justice Stevens's dissent had three parts, the third of which expressed his view that the House of Representatives had standing to pursue its claims. Of the three other dissenters, only Justice Breyer joined that part. *See id.*

83. *Id.* at 364–65.

84. *Department of Commerce v. U.S. House of Representatives* included two consolidated cases, one which the House initiated. The Court held that by resolving the case that involved the non-House

In *United States v. Windsor*,[85] Justice Alito's dissent blessed the institutional interest approach for "the narrow category of cases in which a court strikes down an Act of Congress and the Executive declines to defend the Act."[86] In those circumstances, Justice Alito wrote, "Congress both has standing to defend the undefended statute and is a proper party to do so."[87] Courts impair the "legislative power by striking down an Act of Congress," and the House or Senate would have standing to protect this institutional interest.[88] But Justice Scalia, joined by Chief Justice Roberts and Justice Thomas, fiercely criticized Justice Alito's approach. Those Justices found no basis for the claim that "Congress can hale the Executive before the courts not only to vindicate its own institutional powers to act, but to correct a perceived inadequacy in the execution of its laws."[89]

The law on congressional standing thus remains a mess. *Raines* rejected the personal interest approach, but it remains unclear which approach the Court might use going forward. The institutional interest and the public trust approaches have each drawn support from some Justices, but no discernible majority yet exists for either.

II. CONGRESSIONAL SUBPOENAS UNDER THE PUBLIC TRUST APPROACH

This part addresses the specific standing issues that may arise in an interbranch dispute over a congressional subpoena. Section A describes Congress's investigative authority and discusses how the D.C. Circuit, in the 1970s, found jurisdiction in two interbranch subpoena disputes. In recent years, district court judges within the D.C. Circuit have found similarly. Under their institutional interest approach, the House or Senate would generally enjoy standing to judicially enforce subpoenas.

Section B examines how a court that adopts the public trust approach should address congressional subpoena disputes. It concludes that under the public trust approach, the House or Senate can never judicially enforce a subpoena against the executive branch.

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plaintiffs, the House's lawsuit no longer presented a "substantial federal question" and would therefore be dismissed. *Id.* at 344.

85. 570 U.S. 744 (2013).

86. *Id.* at 807 (Alito, J., dissenting). The majority opinion in *Windsor* did not address issues related to congressional standing because the Court found that a noncongressional party satisfied Article III requirements. *Id.* at 744–45 (majority opinion). For further discussion of whether Congress enjoys standing to sue executive branch officials regarding their failure to enforce a law, see John Harrison, *Legislative Power, Executive Duty, and Legislative Lawsuits*, 31 J.L. & POL. 103, 104–05 (2015) ("The Constitution does not authorize federal legislators or legislative chambers to sue executive officials to compel them properly to execute the law, with no claim other than executive failure to do so. Nor does it allow Congress to provide for lawsuits of that kind by statute.").

87. *Windsor*, 570 U.S. at 807 (Alito, J., dissenting).

88. *Id.* at 805.

89. *Id.* at 788–89 (Scalia, J., dissenting).

A. *Congressional Subpoena Authority*

As a "necessary incident"[90] to its legislative or other constitutional powers,[91] Congress enjoys broad investigative authority. The Court has recognized that Congress "cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change."[92] The relevant conditions do not relate only to enacted legislation but also extend to "defects in our social, economic or political system."[93] Thus, Congress, through its two houses, can properly investigate and issue subpoenas on many different subjects.

In most cases, Congress does not face barriers when it seeks information. Many people readily share their insights with Congress.[94] Written and oral testimony may satisfy a civic duty or provide a sense of pride.[95] Citizens often want to share their thoughts with Congress and want to be heard.[96]

If potential witnesses refuse to testify or provide documents, Congress can exert power over them. Those who defy congressional subpoenas face potential

90. Barenblatt v. United States, 360 U.S. 109, 111 (1959) ("The scope of the power of inquiry . . . is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."); Jurney v. MacCracken, 294 U.S. 125, 144 (1935) (noting the plaintiff's concession that the Senate committee "had authority to require the production of [his] papers as a necessary incident of the power of legislation").

91. Congress can perform investigations related to nonlegislative constitutional powers. *See* Barry v. U.S. *ex rel.* Cunningham, 279 U.S. 597, 616 (1929) (noting that the Senate enjoys investigatory authority when it "acts as a judicial tribunal" and judges "the elections, returns, and qualifications of its members").

92. McGrain v. Daugherty, 273 U.S. 135, 175 (1927).

93. Watkins v. United States, 354 U.S. 178, 187 (1957).

94. *See, e.g.*, Noah Weiland, *Impeachment Briefing: Highlights from Legal Experts' Testimony*, N.Y. TIMES (Dec. 4, 2019), https://www.nytimes.com/2019/12/04/us/politics/impeachment-hearing-highlights.html [https://perma.cc/FC9G-FTKL (dark archive)] (summarizing the testimony of four law professors invited to discuss the constitutional permissibility of impeaching President Trump, including Professor Michael Gerhardt who authored the introduction to this symposium).

95. *See, e.g.*, *20 Celebrities Who Testified Before Congress*, NAT'L J. (May 11, 2015), https://www.nationaljournal.com/s/52349 [https://perma.cc/SPY8-UVV7 (dark archive)] (compiling images of celebrities who have appeared before Congress, almost exclusively to advocate for philanthropic causes they support).

96. *See* David Morgan, *Ex-Trump Campaign Chief Lewandowski Says 'Happy' to Testify Before Congress*, REUTERS (Aug. 16, 2019), https://www.reuters.com/article/us-usa-trump-lewandowski/ex-trump-campaign-chief-lewandowski-says-happy-to-testify-before-congress-idUSKCN1V6244 [https://perma.cc/HA89-EYNX] ("Now a private citizen, Lewandowski said he looked forward to the chance to testify as 'a guy who's going to fight back' . . . [and that he] 'want[s] to go and remind the American people that these guys are on a witch hunt, right?'"); Jessica Taylor, *With Town Hall Script Flipped on GOP, Will History Repeat Itself?*, NPR (Feb. 17, 2017), https://www.npr.org/2017/02/17/515669097/with-town-hall-script-flipped-on-gop-will-history-repeat-itself [https://perma.cc/P5HF-8RNW] (covering the swaths of protestors flooding legislators' town halls in response to proposals that would repeal healthcare legislation).

detention by Congress[97] or, more likely,[98] criminal prosecution by the Department of Justice.[99] The Supreme Court has upheld several convictions for contempt of Congress.[100]

But Congress exercises less power over federal officials than it does over private persons.[101] When the Attorney General advises a federal official that she need not comply with a congressional subpoena, the official probably will not fear prosecution from the Justice Department.[102] Even so, the executive branch

97. *See* United States v. Fort, 443 F.2d 670, 676 (D.C. Cir. 1970) ("[A] witness who refused to testify was committed to the Sergeant-at-Arms of the respective House until he was willing to 'purge' himself of his contempt by supplying the requested information, but his confinement could not extend beyond the term of the session . . . ."); TODD GARVEY, CONG. RESEARCH SERV., RL34097, CONGRESS'S CONTEMPT POWER AND THE ENFORCEMENT OF CONGRESSIONAL SUBPOENAS: LAW, HISTORY, PRACTICE, AND PROCEDURE 10 (2017) [hereinafter GARVEY, ENFORCEMENT] ("Under the inherent contempt power the individual is brought before the House or Senate by the Sergeant-at-Arms, tried at the bar of the body, and can be imprisoned or detained in the Capitol or perhaps elsewhere."); James Hamilton, Robert F. Muse & Kevin R. Amer, *Congressional Investigations: Politics and Process*, 44 AM. CRIM. L. REV. 1115, 1132–33 (2007) (discussing principles established by *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821), and later Supreme Court cases).

98. The House and Senate have each long abandoned inherent contempt measures. *See* Michael A. Zuckerman, *The Court of Congressional Contempt*, 25 J.L. & POL. 41, 43 (2009) ("Congress has not exercised its direct contempt powers in any significant way since 1935.").

99. *See* 2 U.S.C. § 192 (2018) (stating that any person who willfully refuses to "produce papers upon any matter under inquiry before either House" will be deemed guilty of a misdemeanor); *see also id.* § 194 (describing the procedure by which the relevant congressional leader will describe a failure to comply under 2 U.S.C. § 192 "to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action"). In unconventional cases, a subpoenaed person might himself mount a physical defense. *See* Richard K. Neumann Jr., *The Revival of Impeachment as a Partisan Political Weapon*, 34 HASTINGS CONST. L.Q. 161, 185–87 (2007) (discussing the "strange impeachment" of Judge Charles Pickering, who was likely not of sound mind, and his demand for "trial by battle" upon being served by Senate subpoenas (internal quotation marks omitted) (quoting PETER CHARLES HOFFER & N.E.H. HULL, IMPEACHMENT IN AMERICA, 1635–1805, at 212 (1984))).

100. Andrew McCanse Wright, *Constitutional Conflict and Congressional Oversight*, 98 MARQ. L. REV. 881, 898 n.76 (2014) (summarizing cases).

101. Whether congressional arrests of executive branch officials violate the separation of powers remains an open question. That said, there have been at least two such arrests in our history. *See* Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHI. L. REV. 1083, 1135–38 (2009) (describing congressional arrests of two executive branch officials, with one occurring in 1879 and the other in 1916); *cf.* Stanley M. Brand & Sean Connelly, *Constitutional Confrontations: Preserving a Prompt and Orderly Means by Which Congress May Enforce Investigative Demands Against Executive Branch Officials*, 36 CATH. U. L. REV. 71, 71–72 (1986) ("Although there is arguably no constitutional impediment to the use of compulsion against an Executive Branch official who has refused to comply with a congressional subpoena, there are nevertheless several practical constraints . . . .").

102. The criminal contempt of Congress statute contemplates prosecution by a United States Attorney. *See* 2 U.S.C. § 194. The Attorney General heads the Department of Justice in which United States Attorneys serve. *See* 28 U.S.C. §§ 503, 509, 541 (2018). It thus seems unlikely that an executive branch official who follows the Attorney General's advice will face criminal prosecution under 2 U.S.C. § 194. A federal official who followed the Attorney General's advice might face criminal prosecution by a subsequent administration, although this would seem rather aggressive. Prosecution by a subsequent administration, if ever justified in this context, should be directed towards officials who give legal advice rather than subordinates who follow that advice.

routinely complies with congressional demands for information.[103] Congress, after all, establishes and funds executive branch agencies.[104] A collegial relationship and open communication serves each branch's interests.[105] Thus, the executive and legislative branches often resolve disputes through a negotiation and accommodation process.[106]

When that process fails, Congress historically has not sought judicial relief. But things began to change during the Watergate scandal.[107] In *Senate Select Committee on Presidential Campaign Activities v. Nixon*,[108] a congressional committee tried to judicially enforce a subpoena for materials held by President

103. *See* TODD GARVEY, CONG. RESEARCH SERV., R45653, CONGRESSIONAL SUBPOENAS: ENFORCING EXECUTIVE BRANCH COMPLIANCE 1 (2019) [hereinafter GARVEY, COMPLIANCE] ("Executive branch officials comply with most congressional requests for information."). For further discussion of how Congress uses its powers to investigate and influence executive branch agencies, see generally Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61 (2006) [hereinafter Beermann, *Administration*]. *See also id.* at 106 ("It is impossible to overstate the volume of reporting requirements Congress includes in legislation directed at agencies and the President."). Though interbranch informational disputes inevitably arise, they seem like deviations from the norm. For a survey of various disputes, see History of Refusals by Exec. Branch Officials to Provide Info. Demanded by Congress, 6 Op. O.L.C. 751, 752–71 (1982) (discussing different instances in history where executive branch officials have refused to disclose information requested by Congress).

104. *See* Beermann, *Administration*, *supra* note 103, at 68, 127; *see also* Jonathan G. Pray, *Congressional Reporting Requirements: Testing the Limits of the Oversight Power*, 76 U. COLO. L. REV. 297, 304, 311 n.108 (2005) ("The power to create executive agencies is vested in Congress, not the President. Implicit in this power to create is the authority to monitor and investigate. . . . [Moreover,] Congress ultimately holds the power of the purse and can credibly threaten the funding of [an] agency causing it problems.").

105. *See* Neal Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal–Do Nothing*, 48 ADMIN. L. REV. 109, 114 (1996) ("Congress and the executive have strong incentives to work with each other."); Paul R. Verkuil, *A Proposal To Resolve Interbranch Disputes on the Practice Field*, 40 CATH. U. L. REV. 839, 842–43 (1991) ("There is, at one level, no more routine practice than the sharing of information between executive officials and congressional committees. Both branches have strong interests in the process; Congress to perform its oversight function and the Executive to ensure that it can perform its constitutionally assigned tasks.").

106. *See* Comm. on Judiciary v. Miers, 558 F. Supp. 2d 53, 56 (D.D.C. 2008) (referring to "the process of negotiation and accommodation that most often leads to resolution of disputes between the political branches").

107. *See* GARVEY, COMPLIANCE, *supra* note 103, at 12 ("[T]he courts do not appear to have entertained a civil action to enforce a congressional subpoena against an executive official until the Watergate era." (citing Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974))); Michael Stern, *Congressional Standing To Sue: A Response to Grove and Devins on the History of Congressional Litigation*, POINT ORD. (May 7, 2015), https://www.pointoforder.com/2015/05/07/congressional-standing-to-sue-a-response-to-grove-and-devins-on-the-history-of-congressional-litigation/ [https://perma.cc/GER6-4UYL] ("During the 1970s, particularly during Watergate itself, Congress became (somewhat) more litigious, reflecting factors such as (1) the increasing litigiousness of society itself, (2) an increasing tendency to see congressional-executive disputes as essentially legal in nature and (3) the development of institutional legal offices in both Houses.").

108. 498 F.2d 725 (D.C. Cir. 1974) (en banc).

Richard Nixon.[109] The D.C. Circuit rejected the case on the merits, finding that the committee's needs were "too attenuated and too tangential" to justify the committee's demand.[110] The court did not raise or discuss any constitutional standing restrictions that might apply in an interbranch subpoena dispute.

The D.C. Circuit later recognized the significance of the issues. In *United States v. AT&T*,[111] (*AT&T I*) the executive branch filed a lawsuit to challenge a congressional subpoena directed towards a private telecommunications company.[112] The subpoenaed information related to sensitive FBI requests, and the executive branch sued to enjoin the subpoena's enforcement.[113] Though the executive branch had nominally sued AT&T, the "real defendant in interest" was the House of Representatives.[114] The House had intervened in the litigation through its subcommittee,[115] and this set up a "portentous clash between the executive and legislative branches."[116]

The subcommittee alleged that the judiciary could not enjoin a congressional subpoena. But the court disagreed: "[T]he mere fact that there is a conflict between the legislative and executive branches over a congressional subpoena does not preclude judicial resolution of the conflict."[117] In a later proceeding, the court rejected other justiciability arguments made by the subcommittee and held largely for the Executive.[118]

It is unclear how *AT&T I* bears on congressionally initiated subpoena lawsuits. The case arose when the executive branch sued a private company, not when the House initiated a lawsuit. This distinction carries constitutional significance. When the executive branch files a lawsuit, it may establish standing through its Article II authority to represent the interests of the United States.[119] It need not show the Article III injury required from other litigants.

109. *See id.* at 726. The court in *Senate Select Committee* did not discuss standing issues related to interbranch disputes.

110. *Id.* at 733.

111. 551 F.2d 384 (D.C. Cir. 1976); *see also id*. at 390 n.8 (citing competing academic views on justiciability issues raised by some interbranch disputes).

112. *Id.* at 385.

113. *Id.* at 385–87.

114. *Id.* at 385.

115. *Id.* (noting that the subcommittee chairman had intervened in the litigation on the House's behalf).

116. *Id.*

117. *Id.* at 390.

118. United States v. AT&T (*AT&T II*), 567 F.2d 121, 133 (D.C. Cir. 1977) (enjoining AT&T in a later case, on a conditional basis, from complying with the congressional subpoena).

119. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 138 (1976) ("A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'" (quoting U.S. CONST. art. II, § 3)); *see also* Tara Leigh Grove, *Standing Outside of Article III*, 162 U. PA. L. REV. 1311, 1314 (2014) ("In sharp contrast to private parties, the executive may bring suit to enforce or defend federal law, absent a showing of concrete injury."); *id.* at 1324–28 (discussing various Court cases). A state usually assigns

Thus, the executive branch's standing to enjoin a congressional subpoena does not imply the legislative branch's standing to enforce one.

In *AT&T I*, the D.C. Circuit broadly stated that the "House as a whole has standing to assert its investigatory power."[120] In doing so, it cited no authorities and did not mention the injury-in-fact requirement.[121] This may have been understandable because the Supreme Court expressed that requirement only a few years earlier in an Administrative Procedure Act case.[122] It was not until the 1980s that today's three-part standing test became familiar.[123] The D.C. Circuit may have thus missed the injury-in-fact issue.[124]

In any event, *Raines* now establishes that the injury-in-fact requirement plays a central role in interbranch disputes. The executive branch has thus

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litigation responsibility to its executive branch, but that is not inevitably so. *See* Va. House of Delegates v. Bethune-Hill, 139 S. Ct. 1945, 1951, 1953 (2019) (recognizing that one house of the Virginia legislature could satisfy federal standing requirements by showing either that the state had authorized it to represent the state's interests or by demonstrating injury-in-fact); Hollingsworth v. Perry, 570 U.S. 693, 710 (2013) ("[A] State must be able to designate agents to represent it in federal court. . . . That agent is typically the State's attorney general. But state law may provide for other officials to speak for the State in federal court.").

120. 551 F.2d at 391.

121. The D.C. Circuit focused heavily on the political question doctrine, rather than standing requirements. *See id.* at 390–91; *see also AT&T II*, 567 F.2d at 125–27 (concluding that the political question doctrine did not bar jurisdiction over the controversy). When the political question doctrine applies, "a court lacks the authority to decide the dispute before it." Zivotofsky *ex rel.* Zivotofsky v. Clinton, 566 U.S. 189, 195 (2012); *see also* Baker v. Carr, 369 U.S. 186, 217 (1962) (listing factors relevant to whether a nonjusticiable political question exists). If a court finds that the political question doctrine does not apply, that finding does not automatically establish its jurisdiction over the case. Rather, other requirements, including those related to standing, must be satisfied. *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 215 (1974) (explaining that standing doctrine and political question doctrine present "distinct and separate" limitations). Thus, the D.C. Circuit's political question analysis does not resolve whether the defiance of a congressional committee establishes a judicially cognizable harm.

122. *See* Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 152 (1970). In *Kennedy v. Sampson*, which arose prior to *AT&T I*, the D.C. Circuit cited *Data Processing*. *See* 511 F.2d 430, 433 (D.C. Cir. 1974). But it did not believe that that case established a uniform standing test. *See id.* (citing *Data Processing* to show that "[a] somewhat different analysis of standing has been employed with respect to parties who challenge administrative action").

123. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 751 (1984); Watt v. Energy Action Educ. Found., 454 U.S. 151, 161 (1981); *see also* Heather Elliott, *The Structure of Standing at 25: Introduction to the Symposium*, 65 ALA. L. REV. 269, 269 (2013) ("The injury-in-fact requirement had emerged by the early 1970s, as had aspects of the traceability and redressability requirements, but the Court did not state the test as a tripartite requirement until the 1980s.").

124. Arguably, the D.C. Circuit should have been more mindful of Court decisions as it addressed interbranch lawsuits. *See* Jonathan Remy Nash, *A Functional Theory of Congressional Standing*, 114 MICH. L. REV. 339, 361–62 (2015) ("The D.C. Circuit's position in the early 1970s flouted the Supreme Court's then-evolving test for standing by not calling for a congressional plaintiff to establish an injury in fact, and therefore also ignored standing's separation-of-powers underpinnings.").

repeatedly argued that Congress cannot judicially enforce subpoenas,[125] and has dismissed the legislature's reliance on *AT&T I*.[126]

District court judges within the D.C. Circuit have nonetheless concluded that congressional committees may judicially enforce subpoenas against the executive branch.[127] Their opinions pick up where *AT&T I* left off and wrestle with the injury-in-fact requirement. Under their decisions, a harm to congressional investigatory authority may qualify as a judicially cognizable injury-in-fact.[128] These courts thus do not apply the public trust approach. To defeat a congressional subpoena, the executive branch must rely on privileges or other doctrines.[129]

B. *The Public Trust Approach: A Subpoena Exception?*

The limited case law does not reveal how a judge who adopts the public trust approach would address a congressional subpoena dispute. At first glance, the issues might seem straightforward. As Section I.A discussed, under the

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125. *See, e.g.*, Brief for Defendant-Appellant at 14–33, Comm. on the Judiciary v. McGahn, 951 F.3d 510 (D.C. Cir. 2019) (No. 19-5331); Memorandum of Plaintiff & Affidavit in Support of Defendants' Motion to Dismiss and in Opposition to Plaintiff's Motion for Partial Summary Judgment on Counts I and II at 22–37, Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53 (D.D.C. 2008) (No. 08-0409); Memorandum in Support of Defendant's Motion to Dismiss at 22–35, Comm. on Oversight v. Holder, 979 F. Supp. 2d 1 (D.D.C. 2013) (No. 12-1332).

126. Before the Court decided *Raines*, and during the D.C. Circuit's broad embrace of congressional standing, the executive branch believed that courts could entertain a congressionally initiated subpoena dispute. *See* Response to Cong. Requests for Info. Regarding Decisions Made Under the Indep. Counsel Act, 10 Op. O.L.C. 68, 87–88 (1986).

127. *See* Comm. on the Judiciary v. McGahn, 415 F. Supp. 3d 148, 178 (D.D.C. 2019) ("The veritable death-knell with respect to DOJ's present non-justiciability suggestions is the D.C. Circuit's jurisdictional analysis in *AT&T I*."), *vacated*, 951 F.3d 510 (D.C. Cir. Feb. 28, 2020), *reh'g en banc granted sub nom.* House of Representatives v. Mnunchin, No. 19-1576, 2020 WL 1228477 (D.C. Cir. 2020) (en banc); Comm. on Oversight & Gov't Reform v. Holder, 979 F. Supp. 2d 1, 12 (D.D.C. 2013) (continuing to treat *AT&T I* as "the law in this Circuit"); *Miers*, 558 F. Supp. 2d 53 at 68 (rejecting argument that *Raines* abrogated *AT&T I*).

128. *See McGahn*, 415 F. Supp. 3d 148 at 192 ("[T]he Judiciary Committee has alleged an actual and concrete injury to its right to compel information . . . ."); *Holder*, 979 F. Supp. 2d at 21 (stating that the executive branch's defiance of a House committee subpoena established a "clearly delineated, concrete injury to the institution"); *Miers*, 558 F. Supp. 2d at 71 ("The injury incurred by the Committee, for Article III purposes, is both the loss of information to which it is entitled and the institutional diminution of its subpoena power."); *see also* U.S. House of Representatives v. U.S. Dep't of Commerce, 11 F. Supp. 2d 76, 86 (D.D.C. 1998) ("[I]t [is] well established that a legislative body suffers a redressable injury when that body cannot receive information necessary to carry out its constitutional responsibilities. This right to receive information arises primarily in subpoena enforcement cases, where a house of Congress or a congressional committee seeks to compel information in aid of its legislative function."), *prob. juris. noted*, 524 U.S. 978 (1998) (mem.), *appeal dismissed*, 525 U.S. 316 (1999); Nash, *supra* note 124, at 374 ("[A]n impediment to Congress's investigatory power and processes injures Congress's ability to legislate effectively. Accordingly, it is clear that Congress suffers an injury when its investigative efforts are stymied.").

129. For a general discussion of the various limitations that may apply to a congressional subpoena, see GARVEY, ENFORCEMENT, *supra* note 97, at 52–73.

public trust approach a legislative body exists as a representative of the people. Thus, an alleged harm to the House or Senate cannot be personal in the way contemplated by the injury-in-fact requirement, whether the harm relates to informational demands or anything else.

But courts might treat subpoena disputes differently from other interbranch disputes. In *U.S. House of Representatives v. Mnuchin*,[130] for example, the U.S. District Court for the District of Columbia held that the House lacked standing to sue the executive branch under an Appropriations Clause claim.[131] In doing so, it distinguished cases related to congressional subpoenas.[132] And Judge Bork, in his *Barnes* dissent, cited *Kennedy* as the first case through which the D.C. Circuit addressed an interbranch dispute, even though *Senate Select Committee* had been decided earlier.[133] This might imply, however weakly, that Judge Bork would not extend the public trust approach to interbranch subpoena disputes.[134]

Nonetheless, a court that applies the public trust approach should reject any subpoena exceptions. Various functional and policy arguments might support that exception, but those arguments do not undermine the theory behind the public trust approach.

One functional argument may relate to each chamber's inherent contempt authority. If a government official defies a congressional subpoena, the House or Senate might detain her.[135] Then, she may judicially challenge her detention

130. 379 F. Supp. 3d 8 (D.D.C. 2019), *en banc review granted*, No. 19-1576, 2020 WL 1228477 (D.C. Cr. 2020) (en banc).

131. *Id.* at 23 ("[C]onsidering the House's burden to establish it has standing, the lack of any binding precedent showing that it does, and the teachings of *Raines* and *Arizona State Legislature*, the Court cannot assume jurisdiction to proceed to the merits.").

132. *See id.* at 16 ("[U]sing the Judiciary to vindicate the House's investigatory power is constitutionally distinct from seeking Article III standing for a supposed harm to Congress's Appropriations power."). The district court in *Mnuchin* noted the executive branch's arguments that prior cases on interbranch congressional subpoena disputes were incorrectly decided. *See id.* at 17 n.4. But the court determined that it did not need to address cases on Congress's investigatory power, because it could decide the case through analysis of Congress's appropriations power. *See id.*

133. Barnes v. Kline, 759 F.2d 21, 41 (D.C. Cir. 1985) (Bork, J., dissenting), *vacating as moot sub nom.* Burke v. Barnes, 479 U.S. 361 (1987). The *Kennedy* opinion enjoyed special influence in how the D.C. Circuit developed its standing doctrine, so Judge Bork may have cited the case for that reason. *See* Dessem, *supra* note 19, at 6 (noting that *Kennedy* had become "the seminal case on congressional standing"). Dessem also discusses how the D.C. Circuit in *Kennedy* did not cite another congressional standing case, *Mitchell v. Laird*, 488 F.2d 611 (D.C. Cir. 1973), even though the district court and congressional plaintiff in *Kennedy* had relied on it. Dessem, *supra* note 19, at 6.

134. *See Barnes*, 759 F.2d at 41 (Bork, J., dissenting). Though one is left to guess, Judge Bork may have cited *Kennedy* rather than *Senate Select Committee* because the latter case involved no meaningful discussion of how Article III applies to interbranch disputes. *See id.*

135. *See supra* notes 97–100 and accompanying text; *see also* GARVEY, ENFORCEMENT, *supra* note 97, at 14–15 ("As applied to subpoena enforcement, the Supreme Court has affirmed the existence of each house's constitutionally based authority to arrest and detain individuals for refusing to comply with congressional demands for information.")

through a habeas corpus petition.[136] If this path were followed, a court would enjoy jurisdiction to resolve a dispute involving a congressional subpoena. The detained person, after all, would suffer a judicially cognizable injury. She would also satisfy the other Article III standing requirements.[137] One might thus naturally ask: If a detained person enjoys standing to challenge a subpoena, why would Congress not have standing to enforce it?[138]

The injury-in-fact requirement answers that question. To establish that element, the plaintiff must show its own injury. Showing that the plaintiff will injure someone else does not suffice. The plaintiff's injury arises when the plaintiff gets punched, not when the plaintiff punches someone else.[139] A federal official's ability to challenge her detention thus does not establish Congress's right to judicially enforce a subpoena against her.

To justify jurisdiction over congressional subpoena lawsuits, a court might emphasize each house's independent investigative authority. Though the two chambers jointly share constitutional authority over some matters, the House and Senate can unilaterally summon witnesses or perform investigations.[140]

136. *See* U.S. Servicemen's Fund v. Eastland, 488 F.2d 1252, 1260 (D.C. Cir. 1973) (describing methods through which a person may challenge a congressional subpoena), *rev'd on other grounds*, 421 U.S. 491 (1975); United States v. Fort, 443 F.2d 670, 676 (D.C. Cir. 1970) (discussing historical inherent contempt procedures, under which congressional detention "could always be challenged by habeas corpus"); Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53, 92 (D.D.C. 2008) (discussing potential judicial resolution of congressional subpoena controversy through a habeas proceeding); *see also* Kilbourn v. Thompson, 103 U.S. 168, 197 (1880) ("[W]e cannot give our assent to the principle that, by the mere act of asserting a person to be guilty of a contempt, [the houses of Congress] thereby establish their right to fine and imprison him, beyond the power of any court or any other tribunal whatever to inquire into the grounds on which the order was made.").

137. If, for example, the House detained a person, that person's detention would be traceable to the House's actions and could be redressed through a judicial order mandating her release. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) (discussing standing doctrine's traceability and redressability requirements).

138. *See* Michael Stern, *The Reed Case and Congressional Standing*, POINT ORD. (May 14, 2008), https://www.pointoforder.com/2008/05/14/the-reed-case-and-congressional-standing/ [https://perma.cc/Y853-TMSV] ("If the judicial power extends to a claim for relief by an individual who has been sanctioned by Congress for refusing to provide information, it must also extend to a congressional action alleging that the individual is subject to sanction for this refusal.").

139. In some cases, a plaintiff can obtain judicial relief before suffering an injury-in-fact. *See* Clapper v. Amnesty Int'l USA, 568 U.S. 398, 401 (2013) (finding that a "certainly impending" injury may satisfy standing requirements); *see also* 11A CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY K. KANE, FEDERAL PRACTICE AND PROCEDURE § 2941 (3d ed. 2013) (discussing procedures for obtaining injunctive relief in federal courts).

140. *See* McGrain v. Daugherty, 273 U.S. 135, 172 (1927) (noting that either chamber may independently "conduct investigations and exact testimony from witnesses for legislative purposes"). Neither chamber of Congress enjoys independent legislative authority. *See* U.S. CONST. art. I, § 1 (vesting the legislative power in the Congress as a whole). Each house needs the assent of the other to pass legislation and, unless a veto may be overcome, the assent of the President. *See* U.S. CONST. art. I, § 7, cls. 2–3; *see also* Tara Leigh Grove & Neal Devins, *Congress's (Limited) Power To Represent Itself in Court*, 99 CORNELL L. REV. 571, 607 (2014) ("Article I confers no independent 'legislative power' on either the House or the Senate but requires them to work together and with the President to enact

Thus, for example, if the House sought judicial enforcement for a subpoena, it would not need the assent of its sister chamber. A court, then, would not need to wrestle with whether the House enjoys authority to assert the interests held by Congress as a whole.[141]

But each house's independent investigative authority does not affect the principles underlying the public trust approach. Whether the Constitution vests joint or independent investigatory authority, in neither situation will harms to that authority be personal. After all, the House's or the Senate's investigative authority does not establish any Representative's or Senator's personal, private right[142] to demand information from the executive branch.[143] Thus, harms to congressional investigative authority do not establish judicially cognizable injuries.

laws."). Thus, each house's investigatory authority most sensibly stems from its authority to propose legislation or to concur with legislation passed by the other house, as contemplated by Article I, Section 1 and as detailed in Article I, Section 7. *Cf.* Kilbourn v. Thompson, 103 U.S. at 192 (referring to the House's "exclusive right" to propose revenue legislation). It is thus hardly obvious that alleged injuries to a chamber's investigative authority, whether or not judicially cognizable, are constitutionally different from other alleged injuries. After all, even if a given house of Congress cannot itself pass appropriations legislation, that house enjoys the authority to propose or concur with appropriations bills.

141. *See* Va. House of Delegates v. Bethune-Hill, 139 S. Ct. 1945, 1953–54 (2019) ("[A] single House of a bicameral legislature lacks capacity to assert interests belonging to the legislature as a whole.").

142. *Cf.* United States v. Ballin, 144 U.S. 1, 7 (1892) ("The two houses of Congress are legislative bodies representing larger constituencies. Power is not vested in any one individual, but in the aggregate of the members who compose the body . . . ."). In ongoing litigation, a district court has recognized that when the executive branch defies a congressional request for information, no personal injury to legislators arises. *See* Cummings v. Murphy, 321 F. Supp. 3d 92, 108–09 (D.D.C. 2018) (congressional plaintiffs suffered no personal injury when executive branch agency defied a request for information made under a statute that applied specifically to legislators), *appeal docketed*, No. 18-5305 (D.C. Cir. Oct. 16, 2018).

143. If the House or Senate demanded information from an executive branch agency, a former legislator might seek that same information through the Freedom of Information Act ("FOIA"). *See* 5 U.S.C. § 552 (2018). But that Act vests rights in persons generally, not in members of Congress specifically. *See id.* § 552(a)(6). Nothing in FOIA establishes that a former member of Congress can access executive branch information by virtue of her former office. *See id.* § 552. That statute thus does not establish any personal, private right to information for legislators or former legislators. It seemingly establishes personal, private rights for everyone. How this statutory feature interacts with the injury-in-fact requirement remains unclear. *See* William Baude, *Standing in the Shadow of Congress*, 2016 SUP. CT. REV. 197, 203 ("[T]he Court has said in dictum that FOIA plaintiffs need show only 'that they sought and were denied specific agency records,' and it continues to decide FOIA cases without demanding any more." (quoting Pub. Citizen v U.S. Dep't of Justice, 491 U.S. 440, 449 (1989))). *Compare* John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1228 n.60 (1993) ("Under FOIA, every person is given a right of access to nonexempt government documents. When an agency wrongfully denies an individual's FOIA request, that particular individual has suffered injury in fact under Article III and has standing to sue in federal court to redress that injury."), *with* Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine's Dirty Little Secret*, 107 NW. U. L. REV. 169, 172 (2012) ("A plaintiff may seek enforcement of a valid FOIA request without having to show any injury-in-fact at all.").

That same principle addresses the functional argument presented in *Committee on House Oversight & Government Reform v. Holder*.[144] In *Holder*, the court emphasized that the judiciary was "routinely involved in the enforcement of subpoenas."[145] Thus, an interbranch subpoena dispute presented "the sort of question that the courts are traditionally called upon to resolve."[146] These disputes were unlike those involving "matters of war and peace"[147] and did not bring politics "into a judicial forum."[148] Courts could competently resolve them.

The *Holder* court may have been correct that courts can often evaluate congressional subpoenas without making highly sensitive or deeply political judgments.[149] But that does not address the theory behind the public trust approach. Whether an institutional injury is concrete or vague, it is not *personal*. Even if a subpoena presents a straightforward issue, Congress cannot establish the injury-in-fact required to satisfy standing requirements.

Broad concerns about executive privilege also do not justify a subpoena exception to the public trust approach. In *Committee on the Judiciary v. Miers*,[150] the court observed that the judiciary defines the executive privilege, and that congressional subpoenas may relate to allegedly privileged material.[151] Thus, courts could exercise jurisdiction over interbranch subpoena disputes: "The judiciary must be available to resolve executive privilege claims."[152]

Once again, the court's statement may be true, but it does not address the injury-in-fact concerns raised by the public trust approach. Courts may properly determine whether the President enjoys executive privilege but only when the plaintiff satisfies standing requirements. After all, courts do not define the attorney-client privilege or the work-product doctrine outside of a case or controversy.[153] The Supreme Court has never suggested that Article III requirements may be abandoned simply because executive privilege issues arise.

144. 979 F. Supp. 2d 1 (D.D.C. 2013).

145. *Id.* at 22.

146. *Id.*

147. *Id.* at 21 (internal quotation marks omitted) (quoting Campbell v. Clinton, 52 F. Supp. 2d 34, 40 (D.D.C.1999)).

148. *Id.* at 24.

149. Whether a congressional subpoena threatens national security will depend on the facts. A House subpoena requesting the names of all undercover U.S. intelligence operatives, for example, could increase risks that their identities would be disclosed. *See also AT&T II*, 567 F.2d 121, 126–27 (D.C. Cir. 1977) (acknowledging the potential national security risks raised by a congressional subpoena, but noting that concerns had been addressed "by bringing into sharper focus the needs of the parties").

150. 558 F. Supp. 2d 53 (D.D.C. 2008).

151. *Id.* at 96.

152. *Id.*

153. The judiciary participates in promulgating the Federal Rules of Evidence and some other federal procedural rules, but it does not define the rights of specific parties through that participation. *See* 28 U.S.C. §§ 2072–74 (2018). Thus, that participation does not reflect the exercise of the Article III judicial power, and standing doctrine does not apply. *See* Warth v. Seldin, 422 U.S. 490, 498–99 (1975).

Courts have warned that if they do not enjoy jurisdiction over interbranch subpoena disputes, Congress cannot adequately address executive branch defiance.[154] This claim seems highly questionable given the various ways that Congress can exert pressure against the Executive.[155] Also, congressional subpoena lawsuits were unknown until the 1970s.[156] Congress can resolve and has resolved many informational disputes without going to court.[157] Nonjudicial remedies provide a potent check on the executive.[158]

Those remedies would be especially relevant if the executive branch defied a court order to comply with a congressional subpoena. In those circumstances, the House or Senate probably would not sit idle. Rather, they would withhold appropriations, reject nominations, rebuff executive branch policies, impeach and remove the President, or pursue other nonjudicial solutions.[159] In other words, they would pursue remedies *already* available when the executive branch defies a congressional subpoena. The public trust approach thus does not leave the legislature helpless to address executive branch defiance. It focuses the House and Senate on unilateral remedies, rather than judicial ones.

III. CONGRESSIONAL SUBPOENAS IN THE SUPREME COURT

The Court has never blessed Congress's authority to sue the executive branch, whether over a subpoena or otherwise. In *Raines*, discussed in Section I.B, the Court partially relied on the public trust approach to foreclose lawsuits

154. In *Miers*, the court observed that the House could potentially detain the subpoenaed witnesses, but it believed that doing so might precipitate a "constitutional crisis." 558 F. Supp. 2d at 83. In *McGahn*, the court rejected the executive branch's claim that "political checks" are "the sole solution" to an interbranch subpoena dispute. Comm. on the Judiciary v. McGahn, 415 F. Supp. 3d 148, 185 (D.D.C. 2019), *vacated*, 951 F.3d 510 (D.C. Cir. 2020), *reh'g en banc granted sub nom.* House of Representatives v. Mnunchin, No. 19-1576, 2020 WL 1228477 (D.C. Cir. 2020) (en banc); *see also* Una Lee, *Reinterpreting* Raines*: Legislator Standing To Enforce Congressional Subpoenas*, 98 GEO. L.J. 1165, 1192 (2010) ("It would seem perverse to hold that Congress does not have standing to enforce a subpoena against the Executive Branch in a civil suit because it has more extreme measures at its disposal to remedy its injury . . . .").

155. *See infra* note 159 and accompanying text.

156. *See supra* note 107.

157. *See supra* notes 103–06 and accompanying text; *see also* Brand & Connelly, *supra* note 101, at 77 ("Congressional demands for information from the executive branch are nothing new. Indeed, disputes between Congress and the President regarding the latter's obligation to produce requested information date back to the administration of George Washington.").

158. *See supra* notes 103–06 and accompanying text.

159. *See* Chafetz, *supra* note 101, at 1152–53 (describing congressional enforcement mechanisms that do not require cooperation from another branch). Chafetz observes that the House can institute impeachment proceedings against federal officers when the executive branch defies subpoenas, and that the Senate can withhold confirmation votes for the President's nominees. *Id.* at 1152. Either chamber can also refuse to address legislative matters that the President cares about, or may even shut down the entire federal government, by refusing to pass appropriations bills. *See id.* at 1152–53; *see also* Kucinich v. Bush, 236 F. Supp. 2d 1, 9 (D.D.C. 2002) (finding that, although a group of legislators lacked standing to sue the President, they could use "political leverage" to reach a desired policy result "as part of the give-and-take discussion and compromise envisioned by the Framers of the Constitution").

against the executive branch by individual legislators. Section III.A of this part shows how the Court's recent handling of a state interbranch dispute raises questions over whether it will adopt the public trust approach for federal subpoena disputes. Section III.B argues that structural considerations should nonetheless lead the Court to embrace that approach.

A. *The Public Trust Approach in State-Level Disputes*

Arizona State Legislature v. Arizona Independent Redistricting Commission[160] reveals the Court's ambivalence to the public trust approach. That case arose when the Arizona legislature sued a newly established independent state commission.[161] Through a ballot initiative, Arizona voters gave the state commission the authority to draw congressional districts.[162] But the Arizona legislature believed that under the U.S. Constitution it held the indefeasible, exclusive power to draw those districts.[163] It also believed that it enjoyed standing to assert its claims in federal court.[164]

The Court agreed with the legislature's standing argument. Unlike *Raines*, which had been brought by individual legislators, *Arizona Independent Redistricting Commission* involved "an institutional plaintiff asserting an institutional injury."[165] The legislature's power over districting issues had been completely nullified through the newly established commission.[166] This institutional injury ensured that the controversy could "be resolved . . . in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action."[167] The Court thus proceeded to the merits and held against the legislature.[168]

The standing analysis in *Arizona Independent Redistricting Commission* contradicts the public trust approach. State legislators and legislatures, like their federal counterparts, operate in representational capacities, as holders of public

160. 135 S. Ct. 2652 (2015).

161. *Id.* at 2658–59.

162. *Id.* at 2658.

163. *Id.* at 2673 ("The Arizona Legislature maintains that . . . the Elections Clause renders the State's representative body the sole 'component of state government authorized to prescribe . . . regulations . . . for congressional redistricting.'" (quoting Brief for Appellant at 30, Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652 (2015) (No. 13-1314))). The Elections Clause contemplates that Congress may alter how a state legislature regulates elections, but the controversy in *Arizona Independent Redistricting Commission* did not implicate that limitation. *See* U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . . .").

164. *Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. at 2663–64.

165. *Id.* at 2664.

166. *Id*. at 2665.

167. *Id.* at 2665–66 (internal quotation marks omitted) (quoting Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982)).

168. *Id.* at 2677.

trust.[169] Yet the Court held that the Arizona legislature asserted a judicially cognizable injury.

Justice Scalia, writing in dissent, objected to the majority's approach. He argued that the Article III judicial power, as understood in *Marbury v. Madison*,[170] included only the power to "decide on the rights of individuals."[171] He echoed many of the arguments made by Judge Bork in *Barnes* and by the Court in *Raines*.

Arizona Independent Redistricting Commission might imply that Congress has standing to judicially enforce a subpoena in federal court. After all, if a state legislature can sue the state executive branch for institutional injuries, why can't the federal legislature sue the federal executive branch for institutional injuries? But, in a footnote, the Court cautioned that *Arizona Independent Redistricting Commission* did not "touch or concern the question whether Congress has standing to bring a suit against the President."[172] For that question, "separation-of-powers concerns" would arise.[173]

It is exquisitely unclear what the Court meant. The Court has already grounded standing doctrine in separation-of-powers concerns,[174] so its footnote might add nothing new. Justice Scalia understandably doubted the distinction offered by the Court, finding it implausible that "the Framers wanted federal courts limited to traditional judicial cases only when they were pronouncing upon the rights of Congress and the President, and not when they were treading upon the powers of state legislatures and executives."[175]

The Justices have continued to distinguish state interbranch disputes from federal interbranch disputes. In *Virginia House of Delegates v. Bethune-Hill*,[176] the

169. *See* Nev. Comm'n on Ethics v. Carrigan, 564 U.S. 117, 125–26 (2011) ("[A] legislator's vote is the commitment of his apportioned share of the legislature's power to the passage or defeat of a particular proposal. The legislative power thus committed is not personal to the legislator but belongs to the people; the legislator has no personal right to it.").

170. 5 U.S. (1 Cranch) 137 (1803).

171. *Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. at 2694 (Scalia, J., dissenting) (internal quotation marks omitted) (quoting *Marbury*, 5 U.S. (1 Cranch) at 170).

172. *Id.* at 2665 n.12.

173. *Id.*

174. *See* Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408 (2013) ("The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches."); Allen v. Wright, 468 U.S. 737, 752 (1984) ("[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers.").

175. *Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. at 2697 (Scalia, J., dissenting); *see also id.* at 2695 ("What history and judicial tradition show is that courts do not resolve direct disputes between two political branches of the same government regarding their respective powers.").

176. 139 S. Ct. 1945 (2019). In *Bethune-Hill*, twelve Virginia voters brought a federal lawsuit against two state agencies and four election officials. *Id.* at 1949–50. The voters successfully argued, in front of a three-judge federal district court, that some state legislative districts were redrawn in a way that violated the Fourteenth Amendment of the U.S. Constitution. *See id.* at 1950. The Virginia Attorney General subsequently announced that he would not appeal the adverse ruling. *See id.*

Court held that a single house within Virginia's bicameral legislature could not appeal a federal decision that the Virginia Attorney General decided not to contest.[177] As in *Arizona Independent Redistricting Commission*, the Court used a footnote to acknowledge the open issues related to federal interbranch disputes.[178] The dissenters in *Bethune-Hill* took a similarly cautious approach, noting that an "interest asserted by a Member of Congress or by one or both Houses of Congress that is inconsistent with [the federal constitutional] structure may not be judicially cognizable."[179]

The few words in *Bethune-Hill* do not shed light on the structural questions concerning the Justices. However, the Justices may have been concerned about unwarranted judicial supremacy.[180] Suppose, for example, that the judiciary immediately opined on actions taken by the executive and legislative branches. In this scenario, the President might announce an executive order on one day and a judge might quash it before any private party brought suit. Or, the House might pass legislation and a court might immediately announce it unconstitutional, rendering it dead on Senate arrival. In those cases, the public probably would not view the judiciary as the "least dangerous" branch.[181] Rather, if courts umpired direct disputes between the branches or supervised their internal affairs, our "system of checks and balances" would have been "replaced by a system of judicial refereeship."[182]

177. *Id.*

178. The majority said little about standing at the federal level, but it questioned the argument that *INS v. Chadha*, 462 U.S. 919, 929–31, 930–31 nn.5–6, 939–40 (1983), established that individual houses within Congress can satisfy Article III standing requirements. *See Bethune-Hill*, 139 S. Ct. at 1954 n.5 (specifying that, although *Chadha* referred to the United States House and Senate as parties in the litigation, it was "far from clear" that the Court was referring to standing doctrine in doing so).

179. *Bethune-Hill*, 139 S. Ct. at 1959 (Alito, J., dissenting).

180. *See* Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408–09 (2013) ("Relaxation of standing requirements is directly related to the expansion of judicial power." (quoting United States v. Richardson, 418 U.S. 166, 188 (1974) (Powell, J., concurring))); *see also* Devins & Fitts, *supra* note 80, at 361 n.54 ("*Raines* leaves little doubt that, for the Supreme Court, congressional standing is an invitation to disaster, risking 'public esteem' by 'plung[ing]' the Court into bitter political battles." (quoting Raines v. Byrd, 521 U.S. 811, 827, 829 (1997))).

181. *See* THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[T]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them."); *see also Raines*, 521 U.S. at 829 (explaining that it is a court's role in protecting individual rights and "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" (internal quotation marks omitted) (quoting United States v. Richardson, 418 U.S. 166, 192 (1974) (Powell, J., concurring))).

182. Moore v. U.S. House of Representatives, 733 F.2d 946, 957, 959 (D.C. Cir. 1984) (Scalia, J., concurring); *cf.* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 892 (1983) ("The degree to which the courts become converted into political forums depends not merely upon what issues they are permitted to address, but also upon *when* and *at whose instance* they are permitted to address them."). In *Raines,* Justice Souter warned that judicial intervention in an interbranch or intrabranch dispute "would risk damaging the public

These concerns about judicial supremacy or legitimacy cannot alone resolve whether Congress has standing to enforce its subpoenas. The Court has been pulled into several major separation of powers battles and has decided many contentious issues.[183] To reject jurisdiction over federal interbranch disputes, the Court should offer justifications beyond those related to public perception.[184]

The public trust approach provides a strong, conceptually sound basis for the Court to reject jurisdiction over congressionally initiated subpoena disputes. If the Court embraces the public trust approach, however, it may have to distinguish its holding in *Arizona Independent Redistricting Commission*. It is unclear how the Court could justify a distinction if it examines standing issues through the public trust lens. But, rightly or wrongly, the Court tolerates many theoretical inconsistencies in standing doctrine.[185] *Arizona Independent Redistricting Commission* probably thus does not pose a meaningful hurdle to applying the public trust approach in the federal context.

B. *Structural Considerations*

The case law on congressional subpoena disputes has focused mostly on interpretive issues under Article III. However, Professors Grove and Devins approach the issues through Article I of the Constitution.[186] Under Article I, the House and Senate each enjoy broad investigative powers.[187] The authors argue that to make those investigative powers effective, "each chamber must

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confidence that is vital to the functioning of the Judicial Branch . . . by embroiling the federal courts in a power contest nearly at the height of its political tension." *Raines*, 521 U.S. at 833 (Souter, J., concurring).

183. When personal rights are at stake, the Court will address significant questions that divide the branches. *See, e.g.*, NLRB. v. Noel Canning, 573 U.S. 513, 556–57 (2014) (invalidating some executive branch actions that relied on the President's unconstitutional recess appointment); INS v. Chadha, 462 U.S. 919, 959 (1983) (invalidating a statute establishing a legislative veto mechanism).

184. *See* Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 77 (2013) (stating that when jurisdiction exists, "a federal court's 'obligation' to hear and decide a case is 'virtually unflagging'" (quoting Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976))); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) ("[The judiciary has] no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.").

185. *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 475 (1982) ("We need not mince words when we say that the concept of 'Art. III standing' has not been defined with complete consistency in all of the various cases decided by this Court."); *see also* Flast v. Cohen, 392 U.S. 83, 129–30 (1968) (Harlan, J., dissenting) ("[S]tanding [is] a word game played by secret rules."); Heather Elliott, *Congress's Inability To Solve Standing Problems*, 91 B.U. L. REV. 159, 171 (2011) ("At the most basic level, standing doctrine is confusing and unpredictable."); Matthew I. Hall, *Making Sense of Legislative Standing*, 90 S. CAL. L. REV. 1, 3 (2016) ("[T]he case law contains various inconsistent pronouncements, rendering it difficult or impossible to discern a coherent doctrine of legislative standing.").

186. *See* Grove & Devins, *supra* note 140, at 574 (rejecting claims that Congress enjoys standing to defend federal statutes but arguing that the House or the Senate can judicially enforce its subpoenas).

187. *See id.* at 574–75.

have the authority to litigate any matters arising out of its investigations, including by enforcing subpoenas" in the courts.[188] They believe that this litigation authority derives from the Rules of Proceedings Clause.[189] Under that clause, "[a] House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member."[190]

The Grove and Devins approach raises tensions with the case law.[191] The Court has traced congressional investigatory authority mainly to the legislative power granted through the Vesting Clause.[192] It has not referred to the Rules of Proceedings Clause. Additionally, that clause addresses internal matters like committee arrangements, voting procedures, and hearing schedules.[193] Naturally read, it gives each house exclusive control over its own affairs.[194] If the Framers wanted to address external matters—for example, responsibility for litigation in Article III courts—they presumably would have done so elsewhere.[195] The Rules of Proceedings Clause thus presents a questionable basis for subpoena litigation authority.

Some may argue that the Impeachment Clauses establish Congress's authority to judicially enforce subpoenas.[196] Under those clauses, the House enjoys the "sole" power to impeach officers and the Senate enjoys the "sole"

188. *Id.* at 575; *see also* Grove, *Standing and Fallacy*, *supra* note 11, at 643 ("Each chamber's standing to enforce compliance with subpoenas can be justified as an extension of its inherent contempt power.").

189. Grove & Devins, *supra* note 140, at 574–75, 597–98 (citing U.S. CONST. art. II, § 5, cl. 2).

190. U.S. CONST. art. II, § 5, cl. 2.

191. Others have expressed skepticism about congressional standing to enforce subpoenas. *See, e.g.*, Chafetz, *supra* note 101, at 1154 ("[C]ourts have never offered a persuasive reason why a congressional subpoena to an executive branch official is a matter of which the judiciary can properly take notice.").

192. *See supra* Section II.A; *see also, e.g.*, Jack M. Beermann, *Congress's (Less) Limited Power To Represent Itself in Court: A Comment on Grove and Devins*, 99 CORNELL L. REV. ONLINE 166, 180 (2014) [hereinafter Beermann, *Limited Power*] ("[The investigatory power] is not derived from Congress's unicameral power to make its own rules and punish its members. Rather, it is derived from Congress's core legislative power.").

193. Beermann, *Limited Power*, *supra* note 192, at 177 (highlighting that the Rules of the Proceedings Clause "refers exclusively to internal congressional matters").

194. *See, e.g.*, Christoffel v. United States, 338 U.S. 84, 91 (1949) ("[The Court cannot] determine the rules for either House of Congress nor require those rules to be expressed with any degree of explicitness other than that chosen by the respective Houses.").

195. *But see* Beermann, *Limited Power*, *supra* note 192, at 177 (suggesting that the Rules of the Proceedings Clause may establish litigation authority for the House or Senate when that litigation relates to internal matters, such as the expulsion of a member).

196. *See* Michael Stern, *How Impeachment Proceedings Would Strengthen Congress's Investigatory Powers*, JUST SECURITY (May 28, 2019), https://www.justsecurity.org/64318/how-impeachment-proceedings-would-strengthen-congresss-investigatory-powers/ [https://perma.cc/4KP3-QXSB] ("Courts would likely prefer to resolve information disputes between Congress and the administration in the limited context of an impeachment inquiry (which would favor Congress), leaving broader questions of congressional standing for the future.").

power to try them.[197] Yet it seems awkward to read these clauses such that they bless congressionally initiated lawsuits. The two clauses ensure that the House and Senate enjoy an exclusive role in the impeachment and trial process, respectively.[198] Nothing in their language suggests that the Framers established subpoena litigation authority through them.

The structural principles adopted in *Buckley v. Valeo*[199] should overcome any inferences drawn from the Rules of Proceedings Clause or the Impeachment Clauses.[200] In *Buckley*, the Court affirmed Congress's investigative authority under the Constitution.[201] However, it distinguished congressional investigative authority from congressional litigation authority.[202] Federal litigation, the Court held, must be conducted by officers appointed under the Constitution, not by legislators or their agents.[203]

Buckley did not directly involve litigation over congressional subpoenas. Rather, the case arose through a constitutional challenge to the Federal Election Commission ("FEC").[204] By statute, the FEC enjoyed broad investigation and litigation authority over federal election law.[205] But its eight members were not selected through the Appointments Clause. Under that clause, only the President, department heads, and courts may appoint officers.[206] FEC members were appointed with heavy congressional involvement.[207]

197. *See* U.S. CONST. art. I, § 2, cl. 5 (noting that the House of Representatives "shall have the sole Power of Impeachment"); *id.* art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments.").

198. *See* Nixon v. United States, 506 U.S. 224, 230–31 (1993) (discussing significance of "sole" in Article I, Section 3, Clause 6 and explaining how that term established that, in impeachment trials, the Senate could act "'independently and without assistance or interference'" (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2168 (1971))).

199. 424 U.S. 1 (1976).

200. *Id.* at 136–40.

201. *Id.* at 137–38.

202. *Id.* at 138.

203. *Id.* at 138–40.

204. *See id.* at 109 (describing the 1974 amendments to the Federal Elections Campaign Act of 1971 which created the FEC). *Buckley* also reached numerous significant holdings related to the First Amendment and federal election law. *See id.* at 143.

205. *See id.* at 137. The FEC also enjoyed rulemaking authority. *See id.*

206. U.S. CONST. art. II, § 2, cl. 2. Under the Appointments Clause, the President appoints principal officers with the advice and consent of the Senate. *See id.* Inferior officers may also be appointed by the President, unless Congress vests the power to appoint them in department heads or in the courts of law. *See id.* In *Buckley*, no member had been appointed through these procedures. *See Buckley*, 424 U.S. at 113.

207. *See Buckley*, 424 U.S. at 113. Under the relevant statute, four FEC members were appointed by congressional leaders, two were appointed by the President (with the consent of the House and Senate), and two congressional officers served as ex officio nonvoting members. *See id.*

The Court held that the FEC appointment arrangement violated the Constitution.[208] Given their authority, FEC members "surely"[209] qualified as officers subject to the Appointments Clause. They exercised "significant authority pursuant to the laws of the United States."[210] The FEC members were thus invalidly appointed.[211]

The Court nonetheless held that the FEC could perform its investigative functions. Those functions fell "in the same general category as those powers which Congress might delegate to one of its own committees."[212] The Court had long ago held that "the power of inquiry, with enforcing process, was regarded and employed as a necessary and appropriate attribute of the power to legislate."[213] The FEC could thus perform investigations—even if its members were appointed by Congress.

But the FEC's litigation authority could not survive. The "discretionary power to seek judicial relief is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress."[214] Lawsuits provided the "ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'"[215] Only properly appointed officers could exercise litigation authority related to federal election law.[216]

Buckley strongly implies that Congress cannot judicially enforce subpoenas. Lawsuits, "so far as the interests of the United States are concerned, are subject to the direction, and within the control of, the Attorney-General."[217] Though *Buckley* expressly dealt with federal election investigations, its

208. *Id.* at 143.

209. *Id.* at 126. The Court did not resolve whether FEC members would qualify as principal officers or instead as inferior officers. *See id.* (reasoning that the Commissioners "are at the very least such 'inferior Officers' within the meaning of [the Appointments] Clause"). The resolution of that distinction does not bear on this Article's thesis.

210. *Id.* at 126.

211. *See id.* at 136 ("Not having the power of appointment, unless expressly granted or incidental to its powers, the legislature cannot ingraft executive duties upon a legislative office, since that would be to usurp the power of appointment by indirection . . . ." (internal quotation marks omitted) (quoting Springer v. Philippine Islands, 277 U.S. 189, 202 (1928))).

212. *Id.* at 137.

213. *Id.* at 138 (internal quotation marks omitted) (quoting McGrain v. Daugherty, 273 U.S. 135, 175 (1927)). The "enforcing process" discussed in *McGrain* relates to matters like contempt and detention authority, rather than litigation authority. *See* McGrain v. Daugherty, 273 U.S. 135, 175 (1927) (framing the issue presented as whether the House or Senate enjoyed authority, "through its own process, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution").

214. *Buckley*, 424 U.S. at 138.

215. *Id.* at 138 (quoting U.S. CONST. art. II, § 3).

216. *Id.* at 140.

217. *Id.* at 139 (internal quotation marks omitted) (quoting The Confiscation Cases, 74 U.S. 454 (7 Wall), 458–59 (1869)).

principles naturally extend to broader congressional inquiries. After all, the Court in *Buckley* was plainly aware of congressional subpoena issues. When it blessed the FEC's investigative authority, the Court cited several major congressional subpoena cases and even block-quoted one.[218] *Buckley* thus follows *Reed v. County Commissioners*[219] in which the Court warned that a house of Congress's authority to conduct investigations did not establish its authority to pursue lawsuits.[220]

The *Buckley* approach deserves special weight because it follows historical practice.[221] Litigation initiated by Congress, over a subpoena or otherwise, has been unknown through most of our history. The executive branch has controlled federal litigation from the time of our nation's founding.[222] Relatively recently, Congress passed a statute authorizing the Senate to seek judicial enforcement of some subpoenas.[223] But that statute raises obvious tensions with *Buckley*'s admonition that only properly appointed officers may exercise "significant authority pursuant to the laws of the United States."[224]

The Court's decision in *Young v. United States ex rel. Vuitton et Fils S.A.*[225] also creates tensions with *Buckley*, although not in a way that affects

218. *Id.* at 137–38 (quoting *McGrain*, 273 U.S. at 175).

219. 277 U.S. 376 (1928).

220. *Id.* at 389 (stating that the Senate's authority to itself "compel production of evidence differs widely from authority to invoke judicial power for that purpose"). *Reed* involved an unsuccessful attempt by a Senate committee and its agent to judicially compel the disclosure of information from some Pennsylvania county officials. *See id.* at 386–87. However, the Senate had not authorized the lawsuit, and the Court dismissed the case without definitively addressing congressional authority to initiate litigation. *Id.* at 389.

221. The weight that the Court gives to historical practice varies. However, in the context of interbranch lawsuits, it has expressly relied on historical practice. *See* Raines v. Byrd, 521 U.S. 811, 826–29 (1997).

222. For a useful historical discussion about the Attorney General and oversight of federal litigation, see *In re* Grand Jury Investigation, 315 F. Supp. 3d 602, 612–17 (D.D.C. 2018) (describing the establishment of the Attorney General under the Judiciary Act of 1789 and the later statutory expansion of the Attorney General's powers). In qui tam lawsuits, private parties have sometimes been permitted to pursue litigation in the government's name, but the Court has yet to address whether those lawsuits comply with Article II. *See* Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 778 n.8 (2000) (expressing "no view on the question whether qui tam suits violate Article II, in particular the Appointments Clause of § 2 and the 'take Care' Clause of § 3").

223. *See* Ethics in Government Act of 1978, Pub. L. No. 95-521, §§ 703, 705, 92 Stat. 1877–80 (1978) (codified as amended at 2 U.S.C. §§ 288b(b), 288d(a) (2018) and 28 U.S.C. § 1365(a) (2018)). Jurisdiction established under 28 U.S.C. § 1365(a) generally does not apply to controversies involving a Senate subpoena directed towards the executive branch. The Senate has invoked the statute to judicially enforce subpoenas against other parties. *See* GARVEY, ENFORCEMENT, *supra* note 97, at 22–26. The Court has not yet addressed whether lawsuits that proceed under 28 U.S.C. § 1365 meet standing requirements. The statute itself cannot lift those requirements. *See Raines*, 521 U.S. at 820 n.3 ("It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff . . . ."). For all the reasons discussed in this Article, it is doubtful that the Senate suffers a judicially cognizable harm for lawsuits under 28 U.S.C. § 1365.

224. Buckley v. Valeo, 424 U.S. 1, 126 (1976).

225. 481 U.S. 787 (1987).

congressional subpoena litigation. In *Young*, the Court held that the judiciary could appoint private attorneys to prosecute contempt of court actions.[226] Those prosecutions thus were not left to the sole discretion of the executive branch.[227] However, the Court rejected any implied "congressional prosecutorial power" to punish legislative contempt.[228] If Congress could prosecute those who defied it, the universe of potential defendants could be large.[229] Given this potential, a congressional prosecutorial power could "be wielded to eradicate fundamental separation-of-powers boundaries."[230]

Young, like *Buckley*, casts doubt on any direct congressional role in federal litigation. Structural concerns thus do not undermine the public trust approach. They support it. If the Court looks beyond the injury-in-fact requirement when determining whether the House or Senate may judicially enforce a subpoena, it should heed *Buckley*'s and *Young*'s lessons. The executive branch litigates; the legislative branch legislates.[231] Weak inferences from the Rules of Proceedings Clause or the Impeachment Clauses do not alter this framework. If the executive branch unlawfully defies a subpoena, Congress should seek redress through nonjudicial remedies.[232] Or a subsequent administration should initiate prosecution.[233] The Constitution does not contemplate congressional lawsuits in this context. Congress suffers no injury-in-fact over a defied subpoena nor may it conduct litigation on behalf of the United States.

226. *Id.* at 800–01. In *Young*, no statute granted courts the authority to appoint prosecutors for contempt of court actions. *See id.* at 794 (noting that Federal Rule of Criminal Procedure 42(b) "assumes a *pre-existing practice* of private prosecution of contempts, but does not itself purport to serve as authorization for that practice"). Thus, whether such appointments could be authorized under the Appointments Clause was not at issue. *See* U.S. CONST. art. II, § 2, cl. 2 ("Congress may *by Law* vest the Appointment of such inferior Officers, as they think proper . . . in the Courts of Law . . . ." (emphasis added)).

227. Justice Scalia argued against any judicial appointment power in this context, emphasizing separation of powers principles. *Young*, 481 U.S. at 815–25 (Scalia, J., concurring).

228. *Id.* at 800 n.10 (majority opinion).

229. *See id.* ("[T]he court has jurisdiction in a contempt proceeding only over those particular persons whose legal obligations result from their earlier participation in proceedings before the court. By contrast, the congressional prosecutorial power the concurrence hypothesizes would admit of no such limit; the parties potentially subject to such power would include the entire population.").

230. *Id.*

231. For a contrary view, see Beermann, *Limited Power*, *supra* note 192, at 174–80 (acknowledging the "powerful argument" presented in *Buckley* and related cases, but concluding that "Congress's need for information" overcomes the Appointments Clause concerns).

232. *See supra* notes 157–59 and accompanying text.

233. Most federal crimes carry a five-year statute of limitations period. *See* 18 U.S.C. § 3282(a) (2018). This means that, absent presidential reelection, any officials who criminally defy a congressional subpoena might face prosecution by a subsequent administration. If Congress wishes to extend the statute of limitations such that it applies to executive branch officials who criminally defy a subpoena during the first of a reelected President's two terms, it should exercise its legislative power and do so.

CONCLUSION

Standing doctrine probably does not immediately come to mind when one hears the symposium title, *Legal Ethics in the Age of Trump*. But ethical controversies related to the Trump Administration have raised issues well beyond campaign finance laws, financial disclosure regulations, and so on. The various House subpoena lawsuits have made justiciability issues directly relevant to several ethical controversies.

Whether courts enjoy jurisdiction over congressional subpoena suits presents an unsettled legal question. As this Article has shown, under the public trust approach, the House or Senate would never enjoy standing to judicially enforce a subpoena against the executive branch. Whether the Court will fully embrace the public trust approach remains to be seen.

The open issues could have been resolved, and might still be resolved, in a controversy that does not implicate President Trump. But the Trump Administration has faced several significant subpoena lawsuits that call for Court guidance. The executive branch and the legislative branch should each know whether their informational battles must be waged in the judicial sphere or the political sphere. The public trust approach, if adopted, would provide a clear answer to that question.