

[NSL p. 107. Insert before first full paragraph. For excerpt concerning standing from the same opinion, see *infra* insert for NSL p. 140.]

U.S. House of Representatives v. Mnuchin

United States Court of Appeals, D.C. Circuit, Sept. 25, 2020
2020 WL 5739026

Before: MILLETT and WILKINS, Circuit Judges, and SENTELLE, Senior Circuit Judge.

SENTELLE, Senior Circuit Judge: The United States House of Representatives brought this lawsuit alleging that the Departments of Defense, Homeland Security, the Treasury, and the Interior, and the Secretaries of those departments violated the Appropriations Clause of the Constitution as well as the Administrative Procedure Act when transferring funds appropriated for other uses to finance the construction of a physical barrier along the southern border of the United States, contravening congressionally approved appropriations. The District Court for the District of Columbia held that it had no jurisdiction because the House lacked standing to challenge the defendants' actions as it did not allege a legally cognizable injury. We disagree as to the constitutional claims and therefore vacate and remand for further proceedings. . . .

II.

A. . . .

Underlying the present litigation is a dispute about the nature of Congress's authority under the Appropriations Clause of the Constitution and whether the President's refusal to follow the limits on his authority injures one House of Congress. The Constitution provides, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, §9, cl. 7. Because the clause is phrased as a limitation, it means that "the expenditure on public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress." *United States v. MacCollom*, 426 U.S. 317, 321 (1976) (plurality opinion) (citing *Reeside v. Walker*, 52 U.S. (11 How.) 272, 291 (1851)). The Appropriations Clause, thus, provides one foundational element of the separation between the powers of the sword of the Executive Branch and the purse of the Legislative Branch. It is a core structural protection of the Constitution—a wall, so to speak, between the branches of government that prevents encroachment of the House's and Senate's power of the purse. *See Freytag v. Comm'r*, 501 U.S. 868, 878 (1991) ("Our separation-of-powers jurisprudence generally focuses on the danger of one branch's aggrandizing its power at the expense of another branch."); *see also Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 501 (2010) ("The Framers created a structure . . . giving each branch 'the necessary constitutional means, and personal motives, to resist encroachments of the others[.]'" (quoting *The Federalist* No. 48 at 333; and No. 51 at 349 (J. Madison)) (internal citations omitted); *cf. Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995) ("[T]he doctrine of separation of powers is a *structural safeguard* . . . establishing high walls and clear distinctions.") (emphasis in original).

The separation between the Executive and the ability to appropriate funds was frequently cited during the founding era as the premier check on the President's power. In fact, "the separation of purse and sword was the Federalists' strongest rejoinder to Anti-Federalist fears of a tyrannical president." Josh Chafetz, *Congress's Constitution, Legislative Authority and the Separation of Powers* 57 (2017); *see also 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 367 (Jonathan Elliot ed., 2d ed. 1836) (hereinafter *Debates*) (responding to charges that the President could easily become king by explaining that "[t]he purse is in the hands of the representatives of the people"). For example, James Madison, in the Federalist Papers, explained, "Th[e] power over the purse may in fact be regarded as the most compleat and effectual weapon with which any constitution can arm the

immediate representatives of the people” *The Federalist* No. 58 at 394 (J. Madison) (Jacob E. Cooke ed., 1961). At the New York ratification convention, Alexander Hamilton reassured listeners, stating, “where the purse is lodged in one branch, and the sword in another, there can be no danger.” *2 Debates* 349.

As evidenced by the quotations above, a repeated theme in the founding era was the importance of putting the power of the purse specifically in the hands of the “representatives of the people.” *The Federalist* No. 58 at 394 (J. Madison) (Jacob E. Cooke ed., 1961); *2 Debates* 393. As noted above, an early draft of the Constitution went as far as to require [that] appropriations bills originate in the House of Representatives, the representatives of the people. *2 Records* 131. While the final text does not include that same origination provision and provides only that “[a]ll bills for raising Revenue shall originate in the House of Representatives,” U.S. Const. art. I, §7, cl. 1, “[u]nder immemorial custom the general appropriations bills . . . originate in the House of Representatives.” *Cannon’s Procedure in the House of Representatives* 20, §834 (4th ed. 1944). In fact, “the House has returned to the Senate a Senate bill or joint resolution appropriating money on the ground that it invaded the prerogatives of the House.” Wm. Holmes Brown, *House Practice* 71 (1996); *see also* 3 *Deschler’s Precedents* 336 (1976). The appropriations statute at issue in this case originated with the House, as is traditional. 165 Cong. Rec. H997 (daily ed. Jan. 22, 2019); 165 Cong. Rec. H1181-83 (daily ed. Jan. 24, 2019). . . .