[NSL p. 140. Insert after Note 5. For excerpt concerning framing of the Appropriations Clause from the same opinion, see *supra* insert for NSL p. 107.]

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.

I. . . .

C. . . .

In support of its position that each chamber has a distinct interest, the House relies on statements from the founding era. In particular, the House turns to the history of the passage and amendment of the Appropriations Clause. In an early draft of the Constitution, all appropriation bills had to originate in the House and could not be altered by the Senate. *See* 2 *The Records of the Federal Convention of 1787*, at 131 (M. Farrand ed., 1911) (hereinafter *Records*); House Br. at 26-27. The origination provision was removed, the House asserts, because it made the Senate subservient to the House in appropriations and the Framers intended that each chamber would have the independent ability to limit spending. Additionally, the House references statements from the founding era that recognize the federal purse has "two strings" and "[b]oth houses must concur in untying" them. 2 *Records* at 275. The structure of the "two strings" system means, the House maintains, that the House, by not passing an appropriation, can prevent the expenditure of funds for a government project, such as the proposed border wall even if the Senate disagrees. In sum, as the House asserts, "unlike the situation in which one chamber of Congress seeks to enforce a law that it could not have enacted on its own, a suit to enforce a spending limit vindicates a decision to block or limit spending that each chamber of Congress could have effectively imposed — and, in this case, the House did impose — unilaterally." House Br. at 27-28.

II. . . .

B. . . .

. . . [*Raines v. Byrd*, 521 U.S. 811 (1997), and other Supreme Court cases] seemingly give rise to two important questions for analyzing legislative standing: First, did the defendant's action curtail the power and authority of the institution? . . .

Second, is there a mismatch between the entity pursuing litigation and the entity whose authority or right was curtailed? . . . .

In addition to those two questions, our cases and the Supreme Court's additionally consider three other factors: the history of interbranch disputes in the courts, alternative political remedies available to the plaintiff, *see, e.g.*, *Raines*, 521 U.S. at 829 (considering whether litigating the dispute is "contrary to historical experience" and whether Congress would have "an adequate remedy" without judicial intervention), and separation of powers, *Chenoweth* [*v. Clinton*, 181 F.3d 112, 116-17 D.C. Cir. 1999)]. In none of the above decisions of the Supreme

Court or this court was there ever an express determination of the first question before us: whether a single house of a bicameral legislature can ever have standing to litigate an alleged injury to its legislative prerogative distinct from the institutional standing of the entire legislature to litigate an institutional injury to the body as a whole. In [*Comm. on Judiciary of the U.S. House of Representatives v. McGahn*, 968 F.3d 755 (D.C. Cir. 2020)], the en banc court considered that question in deciding an action brought on behalf of the House of Representatives to enforce a subpoena not involving the joinder of the Senate. The court answered the standing question with a resounding "yes." . . .

When the injury alleged is to the Congress as a whole, one chamber does not have standing to litigate. When the injury is to the distinct prerogatives of a single chamber, that chamber does have standing to assert the injury. The allegations are that the Executive interfered with the prerogative of a single chamber to limit spending under the two-string theory discussed at the time of the founding. Therefore, each chamber has a distinct individual right, and in this case, one chamber has a distinct injury. That chamber has standing to bring this litigation. . . .

To put it simply, the Appropriations Clause requires two keys to unlock the Treasury, and the House holds one of those keys. The Executive Branch has, in a word, snatched the House's key out of its hands. That is the injury over which the House is suing.

That injury — the snatched key — . . . is not a generalized interest in the power to legislate. Rather, the injury is concrete and particularized to the House and the House alone. The alleged Executive Branch action cuts the House out of the appropriations process, rendering for naught its vote withholding the Executive's desired border wall funding and carefully calibrating what type of border security investments could be made. The injury, in other words, "zeroe[s] in" on the House. *Arizona State Legislature* [*v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 802 (2015)]; *see also I.N.S. v. Chadha*, 462 U.S. 919, 946 (1983) ("These provisions of Art. I are integral parts of the constitutional design for the separation of powers.").

Applying the "especially rigorous" standing analysis that the Supreme Court requires in cases like this reinforces the House's injury in fact. To hold that the House is not injured or that courts cannot recognize that injury would rewrite the Appropriations Clause. That Clause has long been understood to check the power of the Executive Branch by allowing it to expend funds only as specifically authorized. As then-Judge Kavanaugh wrote for this court, the Appropriations Clause is "a bulwark of the Constitution's separation of powers among the three branches of the National Government," and it "is particularly important as a restraint on Executive Branch officers." *U.S. Dep't of Navy v. Fed. Lab. Rel. Auth.*, 665 F.3d 1339, 1347 (D.C. Cir. 2012).

The ironclad constitutional rule is that the Executive Branch cannot spend until both the House and the Senate say so. "However much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of any thing not thus previously sanctioned. Any other course would give to the fiscal officers a most dangerous discretion." *Reeside v. Walker*, 52 U.S. (11 How.) at 291. The Appropriations Clause even "prevents Executive Branch officers from even inadvertently obligating the Government to pay money without statutory authority." *U.S. Dep't of Navy*, 665 F.3d at 1347 (citing *Off. Pers. Mgmt. v. Richmond*, 496 U.S. 414, 416 (1990), and *U.S. Dep't of Air Force v. Fed. Lab. Rel. Auth.*, 648 F.3d 841, 845 (D.C. Cir. 2011)).

But under the defendants' standing paradigm, the Executive Branch can freely spend Treasury funds as it wishes unless and until a veto-proof majority of both houses of Congress forbids it. Even that might not be enough: Under the defendants' standing theory, if the Executive Branch ignored that congressional override, the House would remain just as disabled to sue to protect its own institutional interests. That turns the constitutional order upside down. *Cf. Chadha*, 462 U.S. at 958 ("[T]he carefully defined limits on the power of each Branch must not be eroded."). The whole purpose of the Appropriations Clause's structural protection is to deny the Executive "an unbounded power over the public purse of the nation," and the power to "apply all its monied resources at his pleasure." *U.S. Dep't of Navy*, 665 F.3d at 1347 (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §1342, at 213-14 (1833)); *see also Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937) (noting the Appropriations Clause "was intended as a restriction upon the disbursing authority of the Executive department").

Nor does it work to say that suit can only be brought by the House and Senate together, as that ignores the distinct power of the House alone not to untie its purse string. "[*E*]*ach* Chamber of Congress [possesses] an *ongoing* power — to veto certain Executive Branch decisions — that each House could exercise independent of any other body." [*Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1954 n.5 (2019)]. Unlike the

affirmative power to pass legislation, the House can wield its appropriations veto fully and effectively all by itself, without any coordination with or cooperation from the Senate.

For that reason, expenditures made without the House's approval — or worse, as alleged here, in the face of its specific disapproval — cause a concrete and particularized constitutional injury that the House experiences, and can seek redress for, independently. And again, failure to recognize that injury in fact would fundamentally alter the separation of powers by allowing the Executive Branch to spend any funds the Senate is on board with, even if the House withheld its authorizations.

In short, Article III's standing requirement is meant to preserve not reorder the separation of powers. . . .

CONCLUSION

The judgment of the district court insofar as it dismisses the Administrative Procedure Act claims is affirmed. Insofar as the judgment dismisses the constitutional claims, it is vacated and remanded for further proceedings consistent with this decision.