

INTERBRANCH EQUITY

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ABSTRACT

In recent years, Congress has increasingly turned to the courts to challenge executive actions. In these suits, the executive branch has strenuously pressed several distinct doctrinal arguments that interbranch cases are nonjusticiable and must be dismissed. These arguments, though expressed in the relevant language of each individual justiciability doctrine, are all centered on a single fundamental point—the judiciary should not be involved in refereeing a dispute that is solely between the legislative and executive branches. The briefs and judicial opinions explicitly identify a coherent category of cases—interbranch cases. But these cases are treated haphazardly as a matter of doctrine. Within various doctrines, however, the same fundamental argument has been that interbranch suits are exceptional and not appropriate for judicial intervention. Even when that argument has been ultimately rejected, it has largely succeeded in preventing the judiciary from resolving the merits of these interbranch cases before they become moot.

This Article rejects the interbranch exceptionalism that obscures most discussions of these cases and asserts that the judiciary should address—and resolve—interbranch cases on the merits under its equity jurisdiction. It shows that the executive branch has not historically followed the justiciability positions it now asserts, but has in fact accepted and advocated for judicial intervention in the past. The executive branch has strategically adopted justiciability arguments recently to prevent judicial interference as it has asserted more robust and exclusive constitutional authority vis-à-vis Congress. The executive branch is better positioned to engage in constitutional self-help, and these justiciability arguments enable it to retain its constitutional advantage in interbranch disputes. A close analysis of each of these doctrinal justiciability arguments demonstrates that interbranch cases are not exceptional, however. And well-established traditions of equity—which parallel justiciability inquiries related to standing and the political question doctrine—establish the appropriate case-by-case inquiry into the judicial role in an interbranch case. The judicial power extends to all cases in equity arising under the Constitution, including interbranch cases. Courts should not shrink from that responsibility. When appropriate under traditional equitable principles, courts should decide interbranch cases in equity on the merits. Shirking that duty is not a passive virtue but a decision to allow the separation of powers to be determined by constitutional self-help.

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INTERBRANCH EQUITY

“The judicial Power shall extend to *all* Cases, in . . . Equity, arising under this Constitution...”¹

INTRODUCTION

On January 3, 2020, in two separate cases, lawyers from the Civil Division of the U.S. Department of Justice squared off against lawyers from the House of Representatives’ Office of General.² The arguments in the morning session involved the House’s attempt to enforce a subpoena issued to former White House Counsel Don McGahn for his testimony.³ The afternoon arguments involved the House’s attempt to access grand jury testimony.⁴ Both cases involved the same underlying subject matter, Special Counsel Robert Mueller’s investigation into Russian attempts to influence in the 2016 election.⁵ In the *McGahn* case, the parties spent almost the entire argument on various justiciability doctrines, the panel trying to discern whether the case was suitable for judicial resolution. In the case over access to grand jury material, the parties did not raise any justiciability issues. Indeed, even after the D.C. Circuit *sua sponte requested* the parties to brief justiciability, neither party argued that the case should be dismissed on those grounds. At the same time, the House counsel and the Department of Justice were also litigating *Trump v. Mazars USA, LLP*⁶ in the D.C. Circuit and, ultimately, the Supreme Court. In *Mazars*, the Supreme Court also took the unusual step of *sua sponte* requesting the parties to submit briefs on justiciability and did so only a couple of weeks before oral argument;⁷ but no party contested the justiciability of the case.⁸

¹ U.S. CONST. art. III, § 2 (emphasis added).

² *Comm. on Judiciary v. McGahn*, 951 F.3d 510 (D.C. Cir. 2020), *aff’d in part en banc*, 968 F.3d 755 (D.C. Cir. 2020); *In re Comm. on Judiciary*, 951 F.3d 589 (2020), *vacated*, *Dep’t of Justice v. House Comm. on Judiciary*, No. 19-1328, 142 S. Ct. 46, 2021 WL 2742772 (July 2, 2021) (mem.).

³ *McGahn*, 951 F.3d at 513–14.

⁴ *In re Comm. on Judiciary*, 951 F.3d at 592, 601.

⁵ *See* ROBERT S. MUELLER, III, U.S. DEP’T OF JUST., REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 1 (2019).

⁶ 140 S. Ct. 2019 (2020).

⁷ *See Trump v. Mazars USA, LLP*, No. 19-715 (S. Ct. Apr. 27, 2020) (order directing parties and the Solicitor General “to file supplemental letter briefs addressing whether the political question doctrine or related justiciability principles bear on the Court’s adjudication of this case”).

⁸ *Mazars*, 140 S. Ct. at 2031.

In interbranch cases,⁹ justiciability issues have predominated. Courts and parties have explicitly identified this category of cases in briefs and opinions and treated the category as an exceptional one for purposes of justiciability, exhibiting a palpable uneasiness with judicial resolution of interbranch disputes. But at the same time, they have treated this category of cases haphazardly as a matter of doctrine, using various doctrinal frameworks to analyze the cases' suitability for judicial review. The refrain common to the various analyses is that the two political branches should work out their disputes through their respective constitutional authorities. When Sen. Barry Goldwater and other members of Congress sued President Jimmy Carter challenging his right to unilaterally nullify the United States' treaty with Taiwan, for example, a fractured Supreme Court dismissed it on various justiciability grounds.¹⁰ Justice Rehnquist's concurrence argued that dismissal was necessary on the basis of the political question doctrine because the Court was "asked to settle a dispute between coequal branches of our Government, each of which has resources available to protect and assert its interests."¹¹ Echoing that sentiment, the Supreme Court in *Mazars* noted that "[f]or more than two centuries, the political branches have resolved" interbranch disputes over information "using the wide variety of means that the Constitution puts at their disposal."¹² The Court claimed that judicial enforcement would "transform[]" the "nature of such interactions."¹³

Numerous courts and scholars have wrestled with the basic problem that Rehnquist poses in *Goldwater*, but they have typically done so as part of

⁹ For purposes of this Article, I define an interbranch case as one that was originated to validate only the institutional interests of the executive branch or legislative branch and in which an entity or official from the executive branch is a party on the opposite side of the case from a party that is an entity or official from the legislative branch. Interbranch cases involving the institutional interests of the judicial branch have arguably also occurred. *See, e.g.,* *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 793 (1987) (concerning whether the court had the authority to appoint private counsel to prosecute a contempt action); *United States v. Klein*, 80 U.S. 128, 131, 136 (1871) (concerning whether a Congressional act which prevented individuals from using a presidential pardon as proof that they were entitled to property was a constitutional exercise of Congress's power). Cases in which the authority of the judicial branch is at issue raise distinct issues, however, and are outside the scope of this Article.

¹⁰ *Goldwater v. Carter*, 444 U.S. 996, 997–98 (1979).

¹¹ *Id.* at 1004 (Rehnquist, C.J., concurring).

¹² *Mazars*, 140 S. Ct. at 2035.

¹³ *Id.* The Court ultimately resolved the case on the merits without ever addressing its justiciability aside from grumbling that "[a]lthough the parties agree that this particular controversy is justiciable," the case was "the first of its kind to reach th[e] Court" and represented a "significant departure from historical practice." *Id.* at 2031.

an inquiry into a specific doctrinal area, such as standing or the political question doctrine, or in a single type of interbranch dispute such as subpoena enforcement actions.¹⁴ Courts have addressed—and often resolved—interbranch disputes by turning to, among other things, the political question doctrine,¹⁵ principles of equitable discretion,¹⁶ Article III standing requirements,¹⁷ the Article III case-and-controversy requirement,¹⁸ statutory subject matter jurisdiction,¹⁹ and the existence of a

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- ¹⁴ See, e.g., Amandeep S. Grewal, *Congressional Subpoenas in Court*, 98 N.C. L. REV. 1043, 1045 (2020) (discusses how the Supreme Court is unlikely to allow Congress to be able to sue the Executive Branch to enforce a congressional subpoena); Vicki C. Jackson, *Congressional Standing to Sue: The Role of Courts and Congress in U.S. Constitutional Democracy*, 93 IND. L.J. 845, 845 (2018) (recognizing that cases in which legislatures and their members sue other branches of government “present challenging questions for the federal Article III courts, whose jurisdiction has been interpreted to be bounded by ‘justiciability’ doctrines,” and focusing on congressional standing); Bradford C. Mank, *Does a House of Congress Have Standing Over Appropriations?: The House of Representatives Challenges the Affordable Care Act*, 19 U. PA. J. CONST. L. 141, 188–89 (2016) (arguing that Congress impliedly has standing to sue the executive branch when it allegedly intrudes on core legislative authority); Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1911 (2015) (discussing the historical transformation of the political question doctrine); David A. O’Neil, *The Political Safeguards of Executive Privilege*, 60 VAND. L. REV. 1079, 1083 (2007) (arguing that courts play an important role in resolving interbranch disputes between Congress and the Executive); R. Lawrence Dessem, *Congressional Standing to Sue: Whose Vote is This Anyway?*, 62 NOTRE DAME L. REV. 1, 30–31 (1986) (inquiring into whether the courts should recognize that Congress has standing to sue the executive branch); see also Daniel Epstein, *Congressional Oversight Disputes as Political Questions, Part I: The Decline of the Interbranch Accommodation Doctrine*, YALE J. REGUL. (June 8, 2020), <https://www.yalejreg.com/nc/congressional-oversight-disputes-as-political-questions-part-i-the-decline-of-the-interbranch-accommodation-doctrine-by-daniel-epstein> [<https://perma.cc/E888-KUZG>] (arguing that the accommodation doctrine used by the D.C. Circuit to resolve interbranch disputes has declined in its use).
- ¹⁵ See, e.g., *Goldwater*, 444 U.S. at 1002, 1004 (Rehnquist, C.J., concurring) (noting that the petitioners’ dispute presents a “political” question because the case is dissimilar to *Youngstown*); *Campbell v. Clinton*, 203 F.3d 19, 28 (D.C. Cir. 2000) (Silberman, J., concurring) (noting that “whether the President has intruded on the war-declaring authority of Congress fits squarely within the political question doctrine”); see also *Executive Privilege—Secrecy in Gov’t: Hearings Before The Sen. Subcomm. on Intergovernmental Relations of the Comm. on Gov’t Operations*, 94th Cong., 1st Sess. 117–18 (1975) (statement of Assistant Att’y General Scalia, Office of Legal Counsel) (arguing that information disputes between the branches constitute political questions).
- ¹⁶ See, e.g., *Riegle v. Fed. Open Mkt. Comm.*, 656 F.2d 873, 881 (D.C. Cir. 1981) (pointing out that if the plaintiff can still obtain substantial relief, then the court should use its equitable discretion to dismiss the plaintiff’s action).
- ¹⁷ See, e.g., *Blumenthal v. Trump*, 949 F.3d 14, 18 (D.C. Cir. 2020) (explaining how plaintiffs establish Article III standing); *Raines v. Byrd*, 521 U.S. 811, 818–19 (1997) (discussing the requirements plaintiffs must be to satisfy Article III standing).
- ¹⁸ See, e.g., *Comm. on Judiciary v. McGahn*, 951 F.3d 510, 515 (D.C. Cir. 2020) (*McGahn II*), *aff’d in part en banc*, 968 F.3d 755 (D.C. Cir. 2020) (discussing the Constitution’s requirement that a litigant can only bring disputes to Article III courts if the case-and-controversy requirement is satisfied).

cause of action.²⁰ The reliance on this buffet of options, however, has segregated each of these past disputes within a doctrinal silo, with *Raines v. Byrd*,²¹ for example, the canonical case on legislative standing in constitutional law and federal courts casebooks, and *Goldwater*,²² a canonical case on the political question doctrine. Existing scholarship and prominent casebooks scarcely address the relation of these two cases to one another.

This Article seeks to clarify the judicial role in resolving interbranch suits and advocates for a return to equitable principles that provide the contours of the appropriate case-by-case inquiry into the propriety of judicial review. This proposal does not require any doctrinal innovation or reversal. Indeed, it reflects the approach the Supreme Court initially took in interbranch cases that have been largely forgotten, such as *United States v. Smith*.²³ Article III extends the judicial power to all cases “in equity” arising under the Constitution.²⁴ That grant of authority includes interbranch cases in equity.

Despite the latent assumption to the contrary, the choice in interbranch disputes is not between two distinct, but neutral mechanisms of resolution: either the judicial or the political process. The use of justiciability doctrines and judicial restraint rhetoric to curb the judicial role in interbranch cases has been strategic, deployed primarily by the executive branch in recent decades to preserve constitutional advantage—achieved at times through constitutional “self-help”²⁵—and to thwart any judicial consideration and rebalancing of the respective authorities of the branches. The choice is thus whether to allow the resolution of the Constitution’s allocation of power between the two branches to depend on institutional advantage and constitutional self-help that has little to do with the relevant constitutional question—or whether to allow the third branch to establish fundamental

¹⁹ See, e.g., *Senate Select Comm. v. Nixon*, 366 F. Supp. 51, 55–61 (D.D.C. 1973) (defining the four statutory bases through which plaintiffs can obtain subject matter jurisdiction).

²⁰ See, e.g., *Comm. on the Judiciary v. McGahn*, 973 F.3d 121, 127 (D.C. Cir. 2020), *vacated en banc* (pointing out that a cause of action is required for the plaintiff to bring the present lawsuit into an Article III court).

²¹ 521 U.S. 811 (1997).

²² 444 U.S. 996 (1979).

²³ See, e.g., 286 U.S. 6, 30 (1932) (concerning whether the Senate’s consent to an appointment be reconsidered after the confirmation of the appointment by the President).

²⁴ U.S. CONST., art. III, § 2.

²⁵ See David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 3 (2014) (pointing out that intergovernmental self-help exist in American constitutional law).

constitutional guideposts for the disputes.²⁶ In other contexts, most notably the federalism balance between states and federal legislative power, the modern judiciary has refused to entrust the political process with the authority to determine constitutional limits.²⁷

Justiciability in interbranch disputes has been utilized as a mechanism to allow the branch with the institutional advantage—usually the executive branch²⁸—final authority to interpret the Constitution. But this category of cases should not be so easily banished from federal court. Absent judicial review, common ground between the branches is impossible; judicial intervention in certain interbranch cases is necessary because the two branches are operating on the basis of entirely different constitutional paradigms. Even if the judicial resolution is simply to say—on the merits—that the Constitution vests a particular branch with the final word on a particular matter,²⁹ that provides a common ground on which the two branches can negotiate and implement their constitutional authorities vis-à-vis the other branch. Whether normatively desirable or not, in the current constitutional system, both branches respect the word of the judiciary, and particularly the Supreme Court, on constitutional issues. When a

²⁶ See Elizabeth Earle Beske, *Litigating the Separation of Powers*, 73 ALA. L. REV. 823, 827, 849 n.196, 873 (2022) (discussing self-help and the “dysfunction” that necessitates judicial intervention).

²⁷ See, e.g., *Nat’l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 538 (2012) (opinion of Roberts, C.J.) (“Our respect for Congress’s policy judgments thus can never extend so far as to disavow restraints on federal power that the Constitution carefully constructed. ‘The peculiar circumstances of the moment may render a measure more or less wise, but cannot render it more or less constitutional.’”); *New York v. United States*, 505 U.S. 144, 155 (1992) (“While no one disputes the proposition that ‘[t]he Constitution created a Federal Government of limited powers,’ . . . the Court has resolved questions ‘of great importance and delicacy’ in determining whether particular sovereign powers have been granted by the Constitution to the Federal Government or have been retained by the States.”); but cf. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556 (1985) (“The political process ensures that laws that unduly burden the States will not be promulgated. In the factual setting of these cases the internal safeguards of the political process have performed as intended.”).

²⁸ See Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 438–47 (2012) (arguing that the Executive branch has more institutional power than Congress); but cf. Oona A. Hathaway, *National Security Lawyering in the Post-War Era: Can Law Constrain Power?*, 68 UCLA L. REV. 2, 83–88 (2021) (proposing the creation of a congressional equivalent to the Office of Legal Counsel to strengthen Congress’s power to resist executive branch encroachment).

²⁹ As discussed in Part III.B., this resolution draws largely from recent scholarship on the substantive nature and historical development of the political question doctrine, particularly the works of Scott Dodson, John Harrison, and Tara Leigh Grove. See Scott Dodson, *Article III and the Political Question Doctrine*, 116 NW. UNIV. L. REV. 681 (2021); John Harrison, *The Political Question Doctrines*, 67 AM. UNIV. L. REV. 457 (2017); Grove, *supra* note 14, at 1908.

constitutional rule is at issue, one that, in Professor Jamal Greene's words, "specifies the division of powers between governmental institutions," the Supreme Court already acts as a "constitutional court"³⁰ in the context of private party and other governmental disputes that raise separation-of-powers issues.³¹ The Court should do the same in interbranch cases.

Equity provides the appropriate mechanism undertaking that judicial function. This Article demonstrates that a two-part framework derived from the traditional practice of equity provides the necessary *and sufficient* test for the propriety of judicial involvement in interbranch cases. Equity jurisdiction requires two, and only two, things: 1) a proprietary governmental interest and 2) an available equitable remedy.³² If an interbranch dispute brought to the courts satisfies this historical test for equity, it necessarily satisfies the prerequisites of the various justiciability doctrines and renders an interbranch dispute an Article III case or controversy. Reaffirming this traditional inquiry and rejecting the interbranch exceptionalism that currently finds expression in various justiciability doctrines would provide much needed clarity about the availability and efficacy of judicial resolution. Such clarity, in turn, would reduce the inefficacy, controversy, and increasing litigiousness that dominate interbranch disputes. When appropriate in equity, courts should not hesitate to resolve interbranch cases and controversies—on their merits.

I. Judicial Restraint as Strategic Advantage in Interbranch Disputes

The adoption and emphasis on justiciability doctrines in various interbranch disputes largely reflects the perceived efficacy of available constitutional self-help measures. When the executive branch enjoys an institutional advantage, as it normally does, it pushes justiciability arguments to eliminate potential judicial interference with that advantage. When it does not have an advantage, the justiciability arguments disappear. As described in Part B, the most striking example of this occurred in the shift in Justice Department's view on the justiciability of executive privilege

³⁰ Jamal Greene, *The Supreme Court as a Constitutional Court*, 128 HARV. L. REV. 124, 128 (2014).

³¹ See, e.g., *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2191 ("The question before us is whether this arrangement violates the Constitution's separation of powers.") (2020); *Lucia v. S.E.C.*, 138 S. Ct. 2044, 2049 (2018) ("This case requires us to decide whether administrative law judges (ALJs) of the Securities and Exchange Commission (SEC or Commission) qualify as such 'Officers'"); *NLRB v. Noel Canning*, 573 U.S. 513 (2014) (concerning the scope of the Recess Appointments Clause).

³² See *infra* Part III.

disputes after it had engaged in self-help—in the form of an OLC opinion—to achieve a superior *ex ante* constitutional position. In 1982, the Department begged for the judiciary to intervene as the only way to resolve a “constitutional impasse” over executive privilege.³³ Three-and-a-half decades later in the *McGahn* litigation, the Department raised no fewer than four distinct arguments that the judiciary *lacked the authority* to resolve the exact same kind of dispute.³⁴ That evolution reflects not doctrinal change but the executive branch’s successful constitutional self-help to gain strategic advantage in such disputes.

A. *The Executive Branch’s Contradictory Historical Positions*

The Department of Justice strenuously—and successfully—pressed a number of justiciability arguments in defending various interbranch cases between the House of Representatives and the Trump administration.³⁵ The Department previously made many, but not all, of those same justiciability arguments during the Obama administration.³⁶ Historically, however, the Justice Department espoused a different view. The progression of the Department’s reliance on justiciability arguments in interbranch cases—and the absence of those arguments in other cases—demonstrates the way these arguments are utilized strategically. Congressional entities too have engaged in this strategic use of justiciability,

³³ Points and Authorities in Support of Plaintiffs’ Motion for Summary Judgement 1, United States v. House of Rep., No. 82-3583, 556 F. Supp. 150 (D.D.C. 1982).

³⁴ See Combined Memorandum of Points & Auth. in Support of Def.’s Mot. For Summary Judgment, Comm. on the Judiciary v. McGahn, No. 1:19-cv-2379 (Oct. 1, 2019) [hereinafter DOJ *McGahn* Summary Judgement Motion].

³⁵ See *e.g.*, Comm. on Judiciary v. McGahn, 973 F.3d 121 (D.C. Cir. 2020), *rehearing en banc granted, vacated* (D.C. Cir. Oct. 15, 2020) (concerning whether the House of Representatives has Article III standing to seek judicial enforcement of a subpoena); U.S. House of Rep. v. Mnuchin, 976 F.3d 1 (D.C. Cir. 2020), *vacated as moot sub nom*, Yellen v. U.S. House of Rep., 142 S. Ct. 332 (2021) (concerning whether the House of Representatives has standing to litigate its Appropriations Clause and Administrative Procedure Act claim); Blumenthal v. Trump, 949 F.3d 14 (D.C. Cir. 2020) (“In this case, 215 Members of the Congress . . . sued President Donald J. Trump based on allegations that he has repeatedly violated the United States Constitution’s Foreign Emoluments Clause . . .”).

³⁶ See U.S. House of Rep. v. Burwell, 130 F. Supp. 3d 53 (D.D.C. 2015) (concerning whether the House can sue Secretary of Health and Human Services); Comm. on Oversight & Gov’t Reform v. Holder, 979 F. Supp. 2d 1 (D.D.C. 2013) (concerning a subpoena brought by the Committee on Oversight and Government Reform of the United States House of Representatives).

adopting different positions historically depending on the particular dispute.³⁷

i. The McGahn and Mnuchin Position: “Essentially Political Disputes”

In the most recent round of interbranch litigation during the Trump Administration, two cases became the lead cases in the D.C. Circuit on the justiciability of these suits: *Committee on the Judiciary v. McGahn*³⁸ and *U.S. House of Representatives v. Mnuchin*.³⁹ In *McGahn*, which involved an attempt to enforce a testimonial subpoena against Trump’s former White House Counsel, DOJ’s initial brief supporting its motion for summary judgement spent 30 pages on non-merits, justiciability issues and only 24 on the merits of the claim.⁴⁰ DOJ argued that 1) the court lacked subject-matter jurisdiction under Article III; 2) the court lacked statutory subject-matter jurisdiction; 3) the committee lacked a cause of action; and 4) the court should decline to hear the case based on “separation-of-powers” concerns.⁴¹

Each of these arguments, though couched in language appropriate to the distinct doctrinal inquiries, relied on the same fundamental point—that the litigation should be dismissed because it was between the two branches. The Department’s argument that the committee lacked standing, for example, relied almost exclusively on the fact that “for nearly two hundred years the Legislative Branch never sought to invoke the power of the Judiciary to decide which side should prevail in a political battle with the Executive.”⁴² It argued that the court lacked statutory subject-matter jurisdiction not because the case did not “arise under” the Constitution, but because the “general jurisdictional statute does not apply to this sort of extraordinary inter-Branch litigation.”⁴³ In response to the argument that the action was justiciable because it involved the enforcement of a subpoena—a traditional judicial task—the Department argued that such a position “ignores fundamental separation-of-powers concerns” because this the committee suit was a “dispute[] over information between Congress

³⁷ See *infra* notes 46–47, 81–83 and accompanying text.

³⁸ *Comm. on the Judiciary v. McGahn*, 968 F.3d 755 (D.C. Cir. 2020).

³⁹ *U.S. House of Rep. v. Mnuchin*, 976 F.3d 1 (D.C. Cir. 2020), *vacated as moot sub nom*, *Yellen v. U.S. House of Rep.*, 142 S. Ct. 332 (2021).

⁴⁰ DOJ *McGahn* Summary Judgement Motion, *supra* note 34, at 18–46, 47–70.

⁴¹ *Id.*

⁴² *Id.* at 22.

⁴³ *Id.* at 30.

and the Executive, which ha[s] no established legal framework.”⁴⁴ The Department made similar arguments, grounded almost wholly in the fact that the case was an interbranch one, in arguing that the committee lacked a cause of action⁴⁵ and in making a free-floating argument for dismissal grounded in the separation of powers.⁴⁶

The House took the opposite positions in these suits, of course, contending that the suits were justiciable under the relevant doctrines. The House emphasized the necessity of judicial review given the executive branch’s positions about its unilateral authority to reject congressional subpoenas or divert appropriations and the lack of any private litigant who could challenge those assertions of authority.⁴⁷ In *McGahn* case, the “Committee ha[d] no other practicable means to obtain the information it require[d]” due to the constitutional “impasse” between the two branches and their respective institutional authority.⁴⁸

DOJ’s efforts to prevent resolution of the merits of these interbranch suits were successful. The D.C. Circuit took both of the cases en banc to address Article III subject-matter jurisdiction, and the court rejected DOJ’s arguments that the interbranch nature of the disputes eliminated Article III jurisdiction.⁴⁹ But, after remand to the original panel in *McGahn*, the panel dismissed the claim a second time after finding that the House lacked a cause of action.⁵⁰ In the parallel *Mnuchin* litigation over the border wall funding, the panel determined that the House had standing and remanded

⁴⁴ *Id.* at 36.

⁴⁵ *See id.* at 40 (“A court’s reluctance to imply such a right under the Constitution should be . . . greater still where the Judiciary is asked to imply a cause of action for the benefit of one political Branch against the other.”).

⁴⁶ *See id.* at 44 (echoing, without naming, the political question doctrine, DOJ argued that courts have declined to allow legislators to bring “essentially political disputes into a judicial forum,” a principle it claimed applied equally to “inter-branch information disputes”) (internal quotation marks and citations omitted).

⁴⁷ Application for a Preliminary Injunction, *U.S. House of Representatives v. Mnuchin*, No. 1:19-cv-00969, 2019 WL 7547191 (D.D.C. Apr. 23, 2019); Memorandum in Support of Motion for Preliminary Injunction, or, in the Alternative, for Expedited Partial Summary Judgment, *Comm. on Judiciary v. McGahn*, No. 19-cv-2379, 2019 WL 8688605 (D.D.C. Aug. 26, 2019).

⁴⁸ En Banc Brief for the Appellee, *Comm. on Judiciary v. McGahn*, No. 19-5331, 19 (D.C. Cir. Dec. 16, 2020).

⁴⁹ *Comm. on Judiciary v. McGahn*, 968 F.3d 755 (D.C. Cir. Aug. 7, 2020) (finding that the Committee had Article III standing to enforce its subpoena against McGahn); *United States House of Representatives v. Mnuchin*, 969 F.3d 353 (D.C. Cir. Aug. 7, 2020) (en banc) (mem.).

⁵⁰ *Comm. on Judiciary v. McGahn*, 973 F.3d 121, 125 (D.C. Cir. 2020).

for further proceedings.⁵¹ Both cases were largely rendered moot by the election of President Biden, however, before resolution of the other justiciability arguments raised by DOJ.⁵² Over the course of two and a half years, the House never got a precedential opinion on the merits of the constitutional dispute.⁵³

ii. *Historical Positions*

a. *United States v. Smith*: “No good reason” to keep these disputes from the judiciary

DOJ’s explicit position on this type of interbranch disputes has not always been so categorical, however. In a largely overlooked interbranch dispute, *United States v. Smith*,⁵⁴ the Senate sought to vindicate its institutional interests in the consideration and confirmation of officers. The Senate voted to confirm three presidential nominees to the Federal Power

⁵¹ *United States House of Representatives v. Mnuchin*, 976 F.3d 1, 14–15 (D.C. Cir. 2020), *vacated as moot* by *Yellen v. United States House of Representatives*, 142 S. Ct. 332 (2021).

⁵² See *Yellen v. United States House of Representatives*, 142 S. Ct. 332 (2021) (holding that Judgment of *Mnuchin* vacated as moot). On his first day in office, President Biden rescinded the declaration of emergency that the Trump administration had used to fund the border wall and that at issue in the *Mnuchin* litigation. *Proclamation on the Termination of Emergency With Respect to the Southern Border of the United States and Redirection of Funds Diverted to Border Wall Construction*, Proclamation No. 10142, 86 Fed. Reg. 7,225 (Jan. 20, 2021). After the election, the Biden Administration and the House of Representatives reached an agreement to settle the *McGahn* litigation that allowed for some testimony by McGahn. Ann E. Marimow, *Biden administration, House Democrats reach agreement in Donald McGahn subpoena lawsuit*, WASH. POST (May 11, 2021, 8:05 PM), https://www.washingtonpost.com/local/legal-issues/donald-mcgahn-subpoena-lawsuit-settled/2021/05/11/8c445dfe-b2ab-11eb-ab43-bebdc5a0f65_story.html [<https://perma.cc/2R6Z-CGGP>]; see also Jonathan Shaub, *Why the McGahn Agreement is a Devastating Loss for Congress*, LAWFARE (May 19, 2021, 11:47 AM), <https://www.lawfareblog.com/why-mcgahn-agreement-devastating-loss-congress> [<https://perma.cc/P2U7-U5CS>] (reporting that the committee and McGahn reached an agreement, committing McGahn to testify and ending the litigation).

⁵³ The House did achieve a merits determination on McGahn’s immunity in the district court, see *Comm. on Judiciary v. McGahn*, 415 F. Supp. 3d 148, 199–200 (D.D.C. 2019) (holding that the president does not have the power to prevent his aides from responding to legislative subpoenas on the basis of absolute testimonial immunity), but the Department of Justice does not regard such district court decisions as dispositive of the constitutional issue and had formerly issued opinions refusing to follow district court decisions rejecting the doctrine of absolute testimonial immunity on which OLC relied to justify McGahn’s refusal to testify. See *Testimonial Immunity Before Cong. of the Former Couns. to the President*, 43 Op. O.L.C. ___, at 12 (May 20, 2019) (refusing to follow a previous D.C. district court decision ruling absolute immunity was not available); *Immunity of the Assistant to the President & Dir. of the Off. of Pol. Strategy & Outreach from Cong. Subpoena*, 38 Op. O.L.C. ___, at 5–6 (July 15, 2014) (same).

⁵⁴ 286 U.S. 6 (1932).

Commission—including George Smith—but then sought to reconsider that confirmation within the time that the applicable Senate rules provided for reconsideration.⁵⁵ The president had already appointed Smith to his post, however, and the Attorney General issued an opinion determining that—no matters its internal deadlines—the Senate lacked the power to reconsider its approval of presidential nominees after a nominee had been formally appointed and commissioned by the president.⁵⁶ After being informed that the president intended to follow the Attorney General’s opinion and honor the appointment of Smith, the Senate sought to take the issue to the judiciary.⁵⁷

The nature of the action at issue—a common law writ of quo warranto—and representation guidelines at the time makes *Smith* a unique example of an interbranch dispute. The laws governing the writ had been interpreted to require the Attorney General or the D.C. District Attorney to initiate the action on behalf of the United States.⁵⁸ As a result, the Senate debated and adopted a resolution that requested the Attorney General to file a writ of quo warranto on behalf of the United States to vindicate the Senate’s asserted constitutional interests and that provided for the payment of private counsel to represent the Senate.⁵⁹ Confronted with the interbranch conflict and the desire of the Senate to litigate its rights in court, Attorney General Mitchell wrote to Leo Rover, the U.S. Attorney for Washington D.C., after receiving the Senate Resolution requesting that Rover file the quo warranto action on behalf of the Senate.⁶⁰ Mitchell advised Rover to “lend [his] name to the institution of the quo warranto proceedings” but then turn the litigation over to private counsel because Rover could not “be expected to take a position in court contrary to that

⁵⁵ See Legality of Appointment of Certain Members of the Fed. Power Comm’n, 36 Op. Att’y’s. Gen. 382, 382–85 (Jan. 10, 1931) (describing the factual background); see also *Senate Calls Back Confirmation of 3 on Power Board*, N.Y. TIMES (Jan. 10, 1931).

⁵⁶ Legality of Appointment of Certain Members of the Fed. Power Comm’n, 36 Op. Att’y’s. Gen. at 388.

⁵⁷ *Smith*, 286 U.S. at 29–30.

⁵⁸ Act of March 3, 1901, ch. 51, §§ 1538–40, 31 Stat. 1189, 1419–20; see also *Newman v. U.S. ex rel. Frizzell*, 238 U.S. 537 (1915).

⁵⁹ S. Res. 415, 74th Cong. 2915, 2963 (Jan. 23, 1931).

⁶⁰ Letter from William D. Mitchell, Attorney General, to Leo A. Rover, U.S. Attorney, Washington D.C. (Feb. 6, 1931), reprinted in *Representation of Congress and Congressional Interests in Court: Hearings Before the Subcomm. on Separation of Powers of the Comm. on the Judiciary, U.S. Senate 415–16*, 94th Cong., 2nd Sess. (1976) [hereinafter *Representation Hearings*].

taken by the head of the Department of Justice.”⁶¹ Mitchell supported the Senate’s desire for judicial review, however: “I know of no good reason why this Department should throw any obstacles in the way of having this question settled in the courts. On the contrary, we should do all that is necessary to satisfy the request of the Senate that the matter be adjudicated.”⁶²

The Department of Justice thus *filed* the action,⁶³ but it based solely on the Senate’s institutional interests, which were then represented by two private attorneys, whose compensation had been authorized by the Senate resolution. As the Attorney General and Solicitor General informed the Supreme Court, “the controversy [wa]s essentially one between the United States Senate and the President,” and “the right of [Smith] to hold his office depend[ed] on the power of the President under the Constitution.”⁶⁴

As a result, the executive branch filed the action against a United States official in the name of the United States but on behalf of the Senate as an institution. The Department of Justice appeared as an *amicus curiae* on behalf of Smith in the appellate courts, and the Senate’s private counsel appeared on its behalf.⁶⁵ The Department also later sought to pay the fees of Smith’s private counsel.⁶⁶

b. Support for Congress’s right to go to court: “an opportunity to have a judicial determination of their right to resist”

In the late 19th and early 20th century, the Supreme Court firmly recognized Congress’s inherent power to investigate, issue subpoenas, and hold recalcitrant individuals in contempt.⁶⁷ The Supreme Court concluded

⁶¹ *Id.*; see also Letter from John W. Davis, to U.S. Attorney General (Feb. 20, 1931) (informing the Attorney General he had been retained to represent the Senate and that he understood ““that the Department of Justice is on the other side of the case”), reprinted in *Representation Hearings*, *supra* note 60, at 416.

⁶² *Representation Hearings*, *supra* note 60, at 416.

⁶³ See *Representation Hearings*, *supra* note 60, at 418 (reprinting the quo warranto petition signed by Leo A. Rover, U.S. Attorney for the District of Columbia).

⁶⁴ *U.S. v. Smith*, Mot. for leave to file a brief amici curiae and to take part in the oral argument, reprinted in *Representation Hearings*, *supra* note 60, at 427.

⁶⁵ *Id.*; see also *United States v. Smith*, 286 U.S. 6, 14 (1932).

⁶⁶ Letter from George Wharton Pepper, to Edwin N. Griswold, Esq., Dep’t. of Just. (Nov. 23, 1931), reprinted in *Representation Hearings*, *supra* note 60, at 425.

⁶⁷ See, e.g., *Sinclair v. United States*, 219 U.S. 263 (1929) (upholding a contempt charge against a recalcitrant witness who challenged congressional authority to demand information about the Teapot Dome scandal); *McGrain v. Daugherty*, 273 U.S. 135 (1927) (holding that each House has the power to “secure needed information” through its subpoena authority); *In re Chapman*,

that Congress had an implicit power to issue subpoenas demanding information because “the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.”⁶⁸ But Congress soon recognized that enforcing the subpoena also created problems; the criminal contempt provision resulted in punishment, not it could not be used to coerce testimony.⁶⁹ Aside from revitalizing its dormant inherent contempt power, Congress had no way to coerce compliance with a legal subpoena.⁷⁰

In the 1950’s, around the same time that President Eisenhower popularized the term “executive privilege,”⁷¹ Representative and later-Senator Kenneth Keating proposed a series of bills to address Congress’s inability to compel testimony.⁷² As he explained initially, even though

166 U.S. 661, 671–72 (1897) (holding that each house has the “essential and inherent power to punish for contempt”); *see also* *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 501 (1975) (holding that the Speech & Debate Clause, U.S. Const. Art. I, § 15, prohibits the judiciary from enjoining the issuance of a congressional subpoena); *Watkins v. United States*, 354 U.S. 178, 187–88 (1957) (holding that individuals have an “unremitting obligation to respond to subpoenas, to respect the dignity of the Congress and its committees and to testify fully with respect to matters within the province of proper investigation”).

⁶⁸ *McGrain*, 273 U.S. at 174. The Court continued:

“A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed. All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry, with enforcing process, was regarded and employed as a necessary and appropriate attribute of the power to legislate—indeed, was treated as inhering in it. Thus there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised.”

Id. at 175.

⁶⁹ *See* Testimony of Rep. Kenneth B. Keating Before the House Judiciary Comm. on H.R. 4975 (July 19, 1954) (“What happens today when a witness defies a congressional committee by refusing to respond to a subpoena or by refusing to testify or produce evidence? The short answer is, in many cases, nothing.”), *reprinted in Representation Hearings*, *supra* note 60, at 556.

⁷⁰ *Id.* at 557 (calling Congress’s current tools, including the criminal contempt statutes, 2 U.S.C. §§ 192, 194, “hopelessly inadequate from the point of view of Congress”).

⁷¹ Mark J. Rozell, EXECUTIVE PRIVILEGE: PRESIDENTIAL POWER, SECRECY, AND ACCOUNTABILITY 40–41 (3d ed. 2010).

⁷² *See, e.g.*, H.R. REP. NO. 83-4975 (1954); H.R. REP. NO. 84-780 (1955); H.R. REP. NO. 85-259 (1957); S. 1515, 86th Cong. (1959); S. 2074, 87th Cong. (1961); *see also* Theodore Sky, *Judicial Review of Congressional Investigations: Is There an Alternative to Contempt?*, 31 GEO. WASH. L. REV. 399, 400–02 (1962) (discussing these proposals and the problems of criminal contempt).

Congress had authority to make referrals under the criminal contempt statute, “under no circumstances does the committee ever get what it really wants, which is the testimony or evidence . . . the most the committee can ever have as a result of a contempt citation is the very dubious satisfaction of seeing the defiant witness punished lightly long afterwards.”⁷³ His bills would have explicitly authorized either house of Congress and committees and subcommittees to invoke the aid of a federal district court to compel compliance with a congressional subpoena, an authority similar to that of some federal agencies.⁷⁴

The Department of Justice twice provided views on these proposals by Keating, and neither time raised any constitutional objection. Despite the fact that the initial bill would have allowed congressional entities to enforce subpoenas in court against private actors and executive branch officials alike, DOJ never raised any issue about the potential justiciability of such suits.⁷⁵ The Department wrote that the bill “raise[d] policy questions primarily within the purview of Congress.”⁷⁶ With respect to a later iteration of the bill, the Department noted that it would allow Congress to “obtain[] quick compliance with congressional subpoenas while affording persons resisting such subpoenas an opportunity to have a judicial determination of their right to resist.”⁷⁷ And, in support of that statement, it cited a recent clash between Congress and state governments over privilege, in which the court had found criminal contempt inappropriate when the dispute was “between different governmental units.”⁷⁸

About a decade later, in the midst of the Watergate controversy, the Senate Select committee investigating Watergate attempted to bring a civil

⁷³ *Representation Hearings*, *supra* note 60, at 557.

⁷⁴ *Id.*; see *Invoking the Aid of Courts in Compelling Testimony of Congressional Witnesses*, Report on H.R. 4975, at 2, H.R. Comm. on the Judiciary, 83d Cong. (Aug. 3, 1953) (“The purpose of this bill is to authorize either House of Congress and any of its committees, subcommittees, or joint committees to invoke by a majority vote of its actual members the aid of the United States district court in order to require the attendance and testimony of witnesses and the production of evidence in connection with a duly authorized investigation.”); see also 15 U.S.C. § 49 (vesting the Federal Trade Commission with authority to invoke the aid of courts to enforce its administrative subpoenas); Securities Exchange Act of 1933, § 22(b), 48 Stat. 86, *codified at* 15 U.S.C. § 77v (vesting the same authority for the Securities and Exchange Commission).

⁷⁵ *Representation Hearings*, *supra* note 60, at 559–60.

⁷⁶ *Id.*

⁷⁷ Letter from Nicholas de B. Katzenbach, Deputy Attorney General, to Kenneth Keating, Senator (Sept. 10, 1962), *reprinted in* 123 Cong. Rec. 2967 (Feb. 1, 1977).

⁷⁸ *United States v. Tobin*, 195 F. Supp. 588, 617 (D.D.C. 1961), *rev'd sub nom.* *Tobin v. U.S.*, 306 F.2d 270 (1962).

action against President Nixon to force compliance with its subpoenas.⁷⁹ The committee sought mandamus, a mandatory injunction, a declaratory judgment, and, echoing the *Smith* case, it purported to bring the suit in the name of the United States.⁸⁰ Nixon argued for dismissal on numerous justiciability grounds, contending, among other things, that the Committee lacked standing, that the committee lacked a cause of action, that the court lacked subject matter jurisdiction, that the suit was nonjusticiable under Article III, and that the committee had no authority to sue on behalf of the United States.⁸¹

The committee responded by appealing to the necessity of judicial review in these circumstances, dedicating the opening section of its brief to the argument that “[t]he Court has the power and responsibility to resolve the issue of executive privilege presented here.”⁸² The committee argued that the fact that it sought judicial review of the validity of its subpoena in a civil action—instead of it arising as a defense in a contempt prosecution—“cannot affect the Court’s authority to resolve th[e] issue” of privilege; the questions were identical.⁸³ And the committee emphasized that “in the circumstances presented here, it is the responsibility of the judiciary, as the neutral third branch of government, to discharge its role ‘as the ultimate interpreter of the Constitution,’ . . . and mark the respective bounds of executive and legislative power.”⁸⁴

The district court judge, Chief Judge John Sirica, concluded that the court lacked statutory subject-matter jurisdiction over the dispute because it did not meet the then-applicable amount-in-controversy requirement.⁸⁵

79 Senate Select Comm. on Presidential Campaign Activities v. Nixon, 370 F. Supp. 521 (D.D.C. 1974).

80 See Complaint for Declaratory Judgment, Mandatory Injunction, and Mandamus, Senate Select Comm. on Presidential Campaign Activities v. Nixon, No. 1593-73 (Aug. 9, 1973), reprinted in Presidential Campaign Activities of 1972, S. Res. 60, *Appendix to the Hearings of the Select Committee on Presidential Campaign Activities: Legal Documents Relating to the Select Committee Hearings* 541, 93rd Cong. (June 28, 1974) [hereinafter *Select Committee Legal Documents*].

81 See Br. of President Nixon in Opposition to the Select Committee’s Motion for Summary Judgment, *Senate Select Comm. on Presidential Campaign Activities*, No. 1593-73 (Sept. 24, 1973), in *Select Committee Legal Documents*, *supra* note 80, at 803.

82 Memorandum in Support of Motion for Summary Judgment 5-13, *Senate Select Comm. on Presidential Campaign Activities*, No. 1593-73 (Sept. 24, 1973), in *Select Committee Legal Documents*, *supra* note 80, at 691–695.

83 *Id.* at 696.

84 *Id.*

85 *Senate Select Committee v. Nixon*, 366 F. Supp. 51, 55–61 (D.D.C. 1973) (*Senate Select I*); see 28 U.S.C. 1331 (1970) (defining the minimum amount in controversy).

Less than a month after Sirica's ruling, Senator Ervin introduced a bill to remedy that jurisdictional defect.⁸⁶ The initial proposal mirrored in many ways the bills that Senator Keating had previously proposed and would have broadly conferred jurisdiction for the court to hear suits "to enforce or secure a declaration concerning the validity of any subpoena or order issued by" Congress "to any officer, including the President and Vice President, or any employee of the executive branch . . . to secure the production of information, documents, or other materials."⁸⁷ In introducing the bill, Senator Ervin emphasized that it was necessary because the amount-in-controversy requirement of section 1331 barred a civil action and because it would be inappropriate for Congress to use inherent contempt or to initiate criminal contempt against the President.⁸⁸

The bill was then amended—and narrowed considerably—at the suggestion of a Senator who feared such a provision would cast the courts "in the role of umpire or referee between Congress and the executive in disputes over the production of documents and information."⁸⁹ As a result, as ultimately passed, the bill provided jurisdiction only over suits initiated by the Watergate committee.⁹⁰ Relying on that jurisdictional grant, the Senate Select committee pursued its lawsuit against President Nixon seeking several of the Watergate tapes.⁹¹ In response, President Nixon continued to press justiciability arguments, including an argument that the political question doctrine barred judicial intervention, but the district court again rejected those arguments.⁹²

The Department of Justice participated in the case in the D.C. Circuit, filing a brief as an amicus that supported the need for executive privilege over presidential communications.⁹³ Despite the fact that numerous justiciability issues had been raised in the initial proceedings, the Department never raised any justiciability or threshold issues with the

⁸⁶ See 119 CONG. REC. 36472 (Nov. 9, 1973) (explaining the need to cure the defect in jurisdiction).

⁸⁷ S. 2641, 93d Cong. (Nov. 2, 1973); see also 119 CONG. REC. 36472 (Nov. 9, 1973) (Statement of Sen. Ervin) (explaining his initial proposal was "rather broad").

⁸⁸ 119 CONG. REC. 36472 (Nov. 9, 1973) (Statement of Sen. Ervin).

⁸⁹ 119 CONG. REC. 36472–73 (Nov. 9, 1973) (Statement of Sen. Hruska).

⁹⁰ Pub. L. No. 93-190 (Dec. 18, 1973).

⁹¹ Senate Select Committee v. Nixon, 370 F. Supp. 521 (D.D.C. 1974), *aff'd*, 498 F.2d 725 (1974).

⁹² *Id.* at 522.

⁹³ Brief for the United States as Amicus Curiae, Senate Select Comm. v. Nixon, No. 74-1258, in *Select Committee Legal Documents*, *supra* note 80, at 1481.

committee's suit against the president or contested the judicial resolution of the claim of executive privilege.⁹⁴

B. A Self-Help Illustration: the EPA Executive Privilege Dispute

The preceding history shows that the Department of Justice, historically, did not perceive any inherent constitutional infirmity with a congressional entity relying on the judiciary to enforce its institutional interests. Even after the litigation and extensive justiciability arguments that developed during and after Watergate, the Department of Justice continued to find no problem with judicial resolution of interbranch disputes over information. That fact was confirmed emphatically in 1982 during a dispute over records related to the Environmental Protection Agency's (EPA) enforcement practices.

i. "Judicial intervention is now urgently needed"

In 1982, a House subcommittee opened a series of hearings on environmental issues, including the EPA's enforcement of the Comprehensive Environmental Response Compensation and Liability Act (CERCLA).⁹⁵ The committee broadly requested documents and information from the EPA, and the EPA refused to provide certain documents relating to ongoing enforcement actions, noting that they were part of "open law enforcement files" and prepared in anticipation of litigation.⁹⁶ The committee then issued a subpoena to the EPA Administrator, Anne Gorsuch, directing her to produce the documents.⁹⁷ The EPA provided additional documents, but continued to withhold a set

⁹⁴ *Id.* After the experience of Watergate, the Senate returned to the issue, again considering a provision to give federal courts jurisdiction over suits brought by Congress as part of a comprehensive package of reforms aimed at ensuring government accountability and public integrity. *Representation Hearings, supra* note 60, at 61. During the hearings on these bills, the Senate subcommittee staff asked Rex Lee, the Assistant Attorney General from the Civil Division, whether the Department had any constitutional objections to such subpoena enforcement suits. *Id.* Lee replied that he "certainly would not perceive" any constitutional issues in providing district courts jurisdiction over these suits and that, in his view, "[c]ongressional enforcement of its own subpoenas . . . is such a part of the legislative function . . . that there would not be serious constitutional problems. *Id.* His opening statement also approvingly observed that such a provision would "permit[] settlement of the legal issue without the unnecessary jar of contempt proceedings." *Id.* at 8.

⁹⁵ H.R. REP. NO. 97-968, at 7 (1982).

⁹⁶ *Id.* at 15-16; 77-82.

⁹⁷ *Id.* at 15.

of documents from the committee pursuant to a claim of executive privilege by the president.⁹⁸ President Reagan instructed Gorsuch “not to furnish copies of th[at] category of documents” because “dissemination of such documents outside the Executive Branch would impair [his] solemn responsibility to enforce the law.”⁹⁹ As a result, the committee referred Gorsuch to the full House recommending she be held in contempt of Congress, and the House passed a resolution citing her for contempt on December 16, 1982.¹⁰⁰

Minutes after the contempt vote, the Department of Justice filed, in the name of the United States, a civil complaint against the House of Representatives for a declaratory judgment.¹⁰¹ The U.S. Attorney who had received the criminal contempt of Congress referral and was charged by the statute with the seemingly mandatory duty to bring the criminal referral before a grand jury¹⁰² wrote to the Speaker of the House that he would not be instituting criminal proceedings during the pendency of the civil trial.¹⁰³ And he “urged” that the House “pursue with us the use of the pending civil suit as the most effective medium in which to advance the judicial resolution of the controversy.”¹⁰⁴ The House was not convinced, however, and moved to dismiss the complaint on numerous justiciability grounds.¹⁰⁵

DOJ’s response is an unequivocal paean to the necessity and authority for judicial resolution of an interbranch dispute. The response began with an appeal to the judiciary:

By this suit, we seek from the Judicial Branch a resolution of the unprecedented constitutional impasse

⁹⁸ *Id.* at 16-18.

⁹⁹ *Id.* at 43.

¹⁰⁰ United States v. U.S. House of Representatives, 556 F. Supp. 150, 151 (D.D.C. 1983).

¹⁰¹ See Points & Authorities in Support of Plaintiffs’ Motion for Summary Judgment and In Opposition to Defendants’ Motion to Dismiss at 16, United States v. U.S. House of Representatives, No. 82-3583 (D.D.C. 1983) [hereinafter “DOJ Gorsuch Brief”], reprinted in *Examining and Reviewing The Procedures That Were Taken By The Office Of The U.S. Attorney For The District Of Columbia In Their Implementation of a Contempt Citation That Was Voted By The Full House of Representatives Against the Then Administrator of the Environmental Protection Agency, Anne Gorsuch Burford: Hearings Before the H. Comm. on Public Works and Transportation 98th Cong. 117 (1983)* [hereinafter *Hearings on Gorsuch Contempt*].

¹⁰² See 2 U.S.C. §§ 192, 194; see also *Hearings on Gorsuch Contempt*, *supra* note 101, at 2-3 (discussing whether the contempt of Congress statute imposes a mandatory duty on the U.S. Attorney).

¹⁰³ DOJ Gorsuch Brief, *supra* note 101, at 16; *id.* at 28 (statement of Stanely S. Harris, U.S. Attorney for the District of Columbia).

¹⁰⁴ *Hearings on Gorsuch Contempt*, *supra* note 101, at 13.

¹⁰⁵ United States v. U.S. House of Representatives, 556 F. Supp. at 151.

which now exists between the other two coordinate branches of the federal government. Only judicial intervention can prevent a stalemate between the other two branches that could result in a partial paralysis of governmental operations.¹⁰⁶

DOJ went on to reject every justiciability argument made by the House.¹⁰⁷ With respect to statutory subject-matter jurisdiction, the Department argued that the case fell squarely within section 1331 because it presented a federal question.¹⁰⁸ It noted that the D.C. Circuit had already found federal-question jurisdiction in a suit initiated by the Department and defended by Congress and that there was no longer any amount-in-controversy requirement as there had been during the Watergate litigation.¹⁰⁹ DOJ also specifically rejected the arguments (1) that the general federal question jurisdiction statute did not contemplate interbranch disputes and (2) that Congress's previous consideration of and failure to enact specific jurisdictional statutes such as the one proposed by Senator Keating supported a negative implication that 1331 was insufficient.¹¹⁰ In DOJ's view then—contrary to its current view—because the resolution of the suit depended directly on resolution of the Constitution, subject matter jurisdiction was appropriate.

DOJ also argued that both Gorsuch, individually, and the United States as an institution had standing to bring the declaratory judgment action.¹¹¹ Gorsuch faced criminal prosecution and, even if she never faced prosecution, she had suffered a cognizable injury because the contempt citation interfered with her “effectiveness” in executing her official duties.¹¹² The United States suffered an institutional injury sufficient to constitute standing because of the “threat to the integrity of the enforcement efforts and decisionmaking process of EPA and the Department of Justice.”¹¹³ The “uncertainty and consequent harm to the enforcement process” engendered by the contempt citation “constitute[d] an injury-in-fact to the Executive's ability to execute the law and, hence, to the welfare of the

¹⁰⁶ DOJ Gorsuch Brief, *supra* note 101, at 1–2.

¹⁰⁷ *Id.* at 19–40.

¹⁰⁸ *Id.* at 19–20.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 20–23.

¹¹¹ *Id.* at 24.

¹¹² *Id.* at 24–25.

¹¹³ *Id.* at 25–26.

general public.”¹¹⁴ Moreover, an equitable cause of action to sue “on behalf of the public welfare” existed under *In re Debs*, in the Department’s view, and the Speech or Debate Clause did not bar the action.¹¹⁵

DOJ included in its opposition to the motion to dismiss a direct argument against application of the political question doctrine even though the House had disclaimed any reliance on it—just in case “the Court raises the question *sua sponte*.”¹¹⁶ As the brief put it, “This case involves a dispute between the Executive and Legislative Branches over fundamental constitutional principles. The only way it can be resolved is through the intervention of the Judiciary.”¹¹⁷ That echoed the rhetoric of the Department’s introduction that “judicial intervention is now urgently needed, because it is the only way left to resolve in an acceptable fashion the critically important issues” at stake, namely an interbranch dispute over information.¹¹⁸

In many ways, the Department’s arguments closely mirrored those that the Senate Select Committee investigating Watergate had made a decade previously. “[T]o deny an authoritative judicial resolution of the controversy and leave the Executive and the Congress to a trial of strength by self-help might lead to near intolerable strains on the constitutional fabric.”¹¹⁹ *U.S. v. House* is the mirror-image of *Senate Select*; in fact, both suits were formally brought in the name of the “United States” and both defendants contested the authority of the plaintiff to bring suit in that name to vindicate what were wholly intrabranched interests.¹²⁰ But the executive branch’s rhetoric in *U.S. v. House* is directly contrary to the Department’s current positions as expressed in the *McGahn* litigation; but it echoes the same plea made by the House in that case. Without judicial review, the

¹¹⁴ *Id.* at 27.

¹¹⁵ *Id.* at 28, 40–52.

¹¹⁶ *Id.* at 37.

¹¹⁷ *Id.*

¹¹⁸ DOJ Gorsuch Brief, *supra* note 101, at 2.

¹¹⁹ Memorandum of Points & Authorities in Support of Motion for Summary Judgment, at 12, Senate Select Comm. on Presidential Campaign Activities v. Nixon, No. 1593-73 (Aug. 9, 1973), in *Select Committee Legal Documents*, *supra* note 80, at 541.

¹²⁰ See DOJ Gorsuch Brief, *supra* note 101, at 19 n.*; Complaint for Declaratory Judgment, Mandatory Injunction, and Mandamus, Senate Select Comm. on Presidential Campaign Activities v. Nixon, No. 1593-73 (Aug. 9, 1973), in *Select Committee Legal Documents*, *supra* note 80, at 688.

interpretation of the Constitution turns not on law but on which branch has the upper hand with respect to constitutional self-help.¹²¹

ii. Executive branch self-help

The Department of Justice’s change in position from the *United States v. House of Representatives* litigation—in which it filed the complaint and pleaded the necessity of judicial involvement—to the *McGahn* litigation—in which it moved to dismiss the complaint on the grounds of almost every justiciability and related doctrine imaginable—can be explained by a single fact: a change in the respective ex ante positions of the two branches. The language of the contempt of Congress statute is mandatory, providing it “shall be the duty” of the U.S. Attorney to bring a contempt referral before a grand jury.¹²² Congress understood this to require the U.S. Attorney to refer Gorsuch for contempt, and the executive branch refuted that by acknowledging that the language of the statute created a threat of prosecution.¹²³ The U.S. Attorney wrote to Congress explaining that he would delay his responsibility given the conflict of interest presented by the civil suit, but claimed the authority—independent of the President’s claim of privilege—to decide what course to follow.¹²⁴ In short, the United States filed suit because Congress’s ex ante ability to threaten an executive branch official with criminal contempt had the potential to coerce that official not to comply with the president’s directive to withhold information.¹²⁵

The district court in *United States v. House*¹²⁶ did not accept the Justice Department’s plea for judicial intervention. Instead, it concluded that the argument’s “difficult constitutional questions” arising “in the context of an intragovernmental dispute” should not be addressed “until circumstances indicate that judicial intervention is necessary.”¹²⁷ That interbranch dispute over privilege could come before the judiciary in the context of a

¹²¹ See, e.g., Supplemental Brief of the Comm. on the Judiciary, at 3, Comm. on the Judiciary v. McGahn, No. 19-5331 (D.C. Cir. Apr. 4, 2020) (“By depriving Congress of the judicial forum available to every other litigant to enforce subpoenas, the panel did not opt out of political disputes, but sided with the Executive. If affirmed, the panel’s decision would hamstring the legislative process and effectively eliminate Congressional oversight as we know it.”).

¹²² 2 U.S.C. §§ 192, 194.

¹²³ *Hearings on Gorsuch Contempt*, *supra* note 101, at 2, 8; DOJ Gorsuch Brief, *supra* note 101, at 18, 34.

¹²⁴ *Hearings on Gorsuch Contempt*, *supra* note 101, at 28–29.

¹²⁵ DOJ Gorsuch Brief, *supra* note 101, at 28–29.

¹²⁶ 556 F. Supp. 150 (D.D.C. 1983).

¹²⁷ *Id.* at 152.

criminal contempt prosecution of Gorsuch.¹²⁸ The district court thus exercised its equitable discretion to decline to hear a declaratory judgment action prior to enforcement of criminal contempt.¹²⁹

After the district court's dismissal, which foreclosed the possibility of judicial resolution in favor of the executive branch prior to an individual officer being prosecuted for contempt, the executive branch turned to self-help. It is easy to understand why. The ultimate goal of the executive branch was to preserve the confidentiality of the information. If an officer personally faced criminal prosecution for refusing to turn documents or information over, the officer would be much more likely to provide that information to Congress out of self-interest. The executive branch thus needed to provide certainty to its officers that they would not face prosecution to ensure they remained loyal to the President's plan to stonewall Congress.

Because it failed to achieve that immunity through the courts, the executive branch engaged in constitutional self-help; it utilized its internal doctrine to achieve an *ex ante* advantage that Congress could not overcome without turning to the judiciary. Shortly after the dismissal in *U.S. v. House*, the Office of Legal Counsel issued an opinion concluding that the executive branch had the discretion to decline to refer a congressional contempt referral to a grand jury despite the seemingly mandatory language of the criminal contempt of Congress provision.¹³⁰ In so doing, the executive branch neutralized the possibility of criminal prosecution for any executive branch official relying on a claim of executive privilege and eliminated the traditional judicial mechanism for resolution of a privilege defense to contempt.¹³¹ As a result, the executive branch now had the authority to refuse to comply with a congressional subpoena without any threats of criminal contempt of Congress or any possibility of judicial review of its constitutional position in contempt proceedings.

Strikingly, the 1984 opinion and other contemporary OLC opinions justified this conclusion, in part, by pointing to the fact that Congress could

¹²⁸ *Id.*

¹²⁹ *Id.* at 153.

¹³⁰ See Prosecution for Contempt of Cong. of an Exec. Branch Official Who Has Asserted a Claim of Exec. Privilege, 8 Op. O.L.C. 101, 101-02 (1984) [hereinafter Prosecution for Contempt of Cong.].

¹³¹ Prosecution for Contempt of Cong. at 135-42.

pursue *civil* enforcement of its subpoenas, the posture of *McGahn*.¹³² The 1984 opinion exhorted the civil remedy. In other words, in 1984, the Justice Department 1) eliminated Congress's ex ante advantage—the threat of criminal prosecution—by interpreting the language of the criminal contempt statute to place discretion in the executive branch and 2) justified the elimination of that avenue for judicial review by pointing to the potential for Congress to bring a civil remedy. But that justification was soon reconsidered: When Congress finally decided to pursue such a civil remedy in 2008, the Department turned to justiciability arguments to argue that courts could not hear the case.¹³³ By further foreclosing civil suits using justiciability arguments, the executive branch sought to ensure that its constitutional positions and claims of privilege were *never* subjected to judicial inquiry or modification. And that's precisely what the executive branch did in the *McGahn* litigation.

Unsurprisingly, the House, recognizing its new institutional incapacity, urged judicial review in *McGahn*, echoing the same pleas the executive branch made in the Gorsuch litigation that judicial review was the only mechanism for resolving the constitutional impasse. Having been deprived of the advantage of the threat of contempt to enforce a subpoena against the executive branch, the House turned to the judiciary as the only remaining means of validating its claimed constitutional right to subpoena records and testimony from the executive branch.

C. *Justiciability as Institutional Advantage*

In an interbranch dispute, only one branch needs the assistance of the judiciary to vindicate its asserted authority. That ex ante imbalance is what leads that branch to resort to the judiciary in the first place. But that

¹³² Prosecution for Contempt of Cong. at 132 n.31 (noting that “a much more effective and less controversial remedy is available—a civil suit to enforce the subpoena—which would permit Congress to acquire the disputed records by judicial order”); *id.* at 137 (recognizing that Congress “would be able to vindicate” its “legitimate and powerful interests” in obtaining documents in a “civil suit to enforce the subpoena”); *see also* Response to Cong. Requests for Info. Regarding Decisions Made Under the Indep. Couns. Act, 10 Op. O.L.C. 68, 83 (1986) (recognizing that the only method available to the House to enforce a subpoena, in the view of the executive branch, would be through “a civil suit seeking declaratory enforcement of the subpoena”); DOJ Gorsuch Brief, *supra* note 101, at 36 n.**.

¹³³ *See* Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53, 71–78 (2008) (showing the Executive's claim that “this dispute is not the sort that is traditionally amenable to judicial resolution” was inaccurate due to “clear judicial precedent . . . that the Committee has standing to pursue this action . . .”).

imbalance is also what motivates the other branch to rely on justiciability doctrines. Moreover, in a “pure” interbranch dispute, one that by definition will not ever involve private interests, a dismissal on justiciability grounds precludes the plaintiff branch from ever seeking judicial resolution of the question, cementing the constitutional imbalance in place. Or, it forces the dismissed branch to augment or reinterpret its self-help authority, as the executive branch did in the 1984 OLC opinion.

The executive branch’s position about the justiciability of these interbranch disputes has evolved over time, largely in concert with increasingly robust views of executive power and, more specifically, the implementation of unitary executive theory by the executive branch.¹³⁴ Over the course of the past fifty years, as the executive branch has developed a more coherent—and exclusive—view of its constitutional prerogatives vis-à-vis Congress,¹³⁵ it has also, unsurprisingly, altered its views on whether courts have the authority to inquire into its assertions of power. The executive branch has emphasized and developed additional threshold arguments to ensure that interbranch disputes about that constitutional authority do not reach the judiciary. Congress, meanwhile, has abandoned any previous assertions that interbranch suits are not justiciable in light of its institutional disability vis a vis the increasingly powerful executive branch.

In *Goldwater*, for example, the President had already given formal notice that the treaty with Taiwan would be terminated on January 1, 1980, and had refused to submit the termination to the Senate for approval or acknowledge any restrictions on his unilateral right to terminate the treaty.¹³⁶ The ex ante status quo thus favored the executive branch, which is almost always the case. The President can take actions in the realm of foreign affairs and diplomatic relations that quickly become irreversible, even when the constitutional foundation may be lacking. When Congress challenges these actions, the executive branch has a greater interest in

¹³⁴ See generally Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future*, 2020 SUP. CT. REV. 83 (2021); Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205 (2014); STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008).

¹³⁵ See generally Emily Berman, *Weaponizing the Office of Legal Counsel*, 62 B.C. L. REV. 515 (2021); BOB BAUER & JACK GOLDSMITH, *AFTER TRUMP: RECONSTRUCTING THE PRESIDENCY* (2020); *Developments in the Law: Presidential Authority*, 125 HARV. L. REV. 2057 (2012).

¹³⁶ *Goldwater v. Carter*, 481 F. Supp. 949, 951 (D.D.C. 1979), *rev'd*, 617 F.2d 697 (D.C. Cir. 1979), *vacated*, 444 U.S. 996 (1979).

winning the interbranch case on justiciability grounds than in prevailing on the merits—the former result serving to preclude any consideration of the merits that could potentially cabin future discretion. As the district court in *Goldwater* noted in finding standing for the legislators, “by the President’s unilateral action, the matter of treaty termination became less amenable to congressional control.”¹³⁷ Accordingly, the executive branch repeatedly emphasized its justiciability arguments in *Goldwater* even after prevailing on the merits, contending both that individual Senators and Representatives lacked standing to maintain a challenge to the President’s termination of the treaty and that the case presented a non-justiciable political question.¹³⁸

The executive branch’s brief in opposition to certiorari in *Goldwater* emphasized that Congress had “ample means within the political process to assert and implement its views” on treaty termination.¹³⁹ And its final argument echoed the arguments made in almost every interbranch dispute by the branch opposing judicial intervention: “In view of nearly 200 years of successful accommodation and compromise between the political branches of the government . . . the courts should decline petitioners’ invitation” to review the merits of the interbranch dispute. “Such judicial intervention would eliminate flexibility intended by the Framers for our constitutional scheme.”¹⁴⁰ In other words, the executive branch claimed it must be permitted to act as it interpreted its constitutional authority, limited only by Congress’s self-help authority to counter such action or, potentially, infringements on private rights that led to judicial review. The non-justiciability of the suits would preserve not only the action at issue but, more importantly, the institutional advantage of the executive branch is deciding the constitutionality of its actions without judicial precedent to bind those decisions.

Generally, the executive branch is better positioned in terms of constitutional self-help against the Congress than Congress is against the executive branch.¹⁴¹ The President controls the enforcement mechanisms

¹³⁷ *Id.* at 955.

¹³⁸ See Brief for Respondents in Opposition 31–36, *Goldwater v. Carter*, 444 U.S. 996 (1979) (No. 79-856). Notably, the United States did not argue that the Senate or Congress as an *institution* would lack standing, only that the individual members of Congress lacked standing “[a]bsent . . . a showing of institutional support for [their] position.” *Id.* at 32; see also *id.* at 31 (“Without institutional support for their position, petitioners lack standing to pursue this litigation.”).

¹³⁹ *Id.* at 36.

¹⁴⁰ *Id.*

¹⁴¹ See Bradley & Morrison, *supra* note 28, at 438–47.

of the State, any foreign policy actions, and the military.¹⁴² And these authorities have only increased in value with the developments of the standing army, the administrative state, and the rise of globalization. As departmentalism and the unitary executive theory have taken on more and more prominence, particularly within the executive branch,¹⁴³ the relative disparity between the executive and Congress to enforce their respective constitutional authority against the other branch has grown wider.

The executive branch can decline to enforce a law it believes unconstitutional,¹⁴⁴ can decline to defend a law in court,¹⁴⁵ can decline to prosecute criminal or civil actions or take other enforcement actions to implement a statutory scheme,¹⁴⁶ can refuse to turn over documents and

¹⁴² See generally Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control Over International Law*, 131 HARV. L. REV. 1201, 1209–17 (2018).

¹⁴³ See Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199 (1994) (recognizing this presidential authority and providing historical examples); Jack Goldsmith, *Zivotofsky II as Precedent in the Executive Branch*, 129 HARV. L. REV. 112, 114 (2015) (predicting that the Supreme Court’s decision in *Zivotofsky ex rel. Zivotofsky*, 135 S. Ct. 2076 (2015), recognizing exclusive presidential authority to recognize foreign government will equip “executive branch lawyers . . . with broad arguments for presidential exclusivity” and support arguments that a “President can ignore a foreign relations statute”).

¹⁴⁴ Scholars disputes the extent of this authority, of course, but the executive branch has long claimed it. See Aziz Z. Huq, *Enforcing (But Not Defending) ‘Unconstitutional’ Laws*, 98 VA. L. REV. 1001, 1007 (2012) (accepting that the president may decline to enforce unconstitutional laws within certain categories); Saikrishna Bangalore Prakash, *The Executive’s Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1616 (2008) (contending the Constitution requires the President not to enforce unconstitutional statutes). Indeed, this was Andrew Johnson’s principal defense in his impeachment trial. See Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020, 2049–56 (discussing the trial and the arguments put forward by Johnson’s lawyers supporting the president’s authority to decline to enforce laws he believed were unconstitutional).

¹⁴⁵ See, e.g., *United States v. Windsor*, 570 U.S. 744, 754 (2013) (noting that the President had instructed the Justice Department not to defend the Defense of Marriage Act but to continue to enforce the Act); *id.* at 786 (Scalia, J. dissenting) (“This suit saw the light of day only because the President enforced the Act (and thus gave Windsor standing to sue) even though he believed it unconstitutional. He could have equally chosen (more appropriately, some would say) neither to enforce nor to defend the statute he believed to be unconstitutional . . .”).

¹⁴⁶ See, e.g., Mem. for All U.S. Att’ys from James M. Cole, Deputy Att’y Gen., Guidance Regarding Marijuana Enforcement (Aug. 29, 2013) (adopting a non-enforcement policy with respect to state marijuana laws); Mem. from Janet Napolitano, Sec’y, U.S. Dep’t of Homeland Sec., for David Aguilar, Acting Comm’r, U.S. Customs & Border Prot., et al., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012) (adopting a policy of nonenforcement for unlawful immigrants brought to the United States as children); Zachary S. Price, *Politics of Nonenforcement*, 65 CASE W. RESV. L. REV. 1119, 1125–36 (2015) (describing examples of nonenforcement in the Reagan, George W. Bush, and Obama Administrations).

thwart congressional oversight,¹⁴⁷ can adopt broad interpretations of congressional delegations with little threat of legislative revision,¹⁴⁸ can declare emergencies and allocate funds in ways never intended by Congress, even if Congress expressly disagrees with the legal basis for the action,¹⁴⁹ and can order military or diplomatic actions that take place before Congress has a chance to approve or even weigh in.¹⁵⁰ Unsurprisingly, then, the executive branch has driven much of the development of justiciability hurdles to interbranch suits. Notably, the resolution of any *one* case would have enormous ramifications for future action, as the executive branch accepts its duty to abide by precedential judicial decisions.¹⁵¹ For that reason, strenuously asserting justiciability arguments at every opportunity is all the more necessary.

Although the strategic use of justiciability has largely been the practice of the executive branch, congressional entities have also engaged in these tactics. This dynamic explains the House's reliance on justiciability arguments in the interbranch *AT&T* litigation in the late 1970s.¹⁵² In that suit, the Department of Justice initiated a lawsuit against AT&T because AT&T had informed the president that, absent an intervening court order, it would turn over national security letters in response to a congressional subpoena.¹⁵³ President Ford had asserted executive privilege, but AT&T refused to abide by his directive to withhold the documents.¹⁵⁴ Although

¹⁴⁷ See, e.g., *Assertion of Exec. Privilege Over Documents Generated in Response to Cong. Investigation into Operation Fast & Furious*, 36 Op. O.L.C., slip op. at 2–3 (June 19, 2012); *Assertion of Exec. Privilege Over Commc'ns Regarding EPA's Ozone Air Quality Standards & Cal.'s Greenhouse Gas Waiver Request*, 32 Op. O.L.C. 1, 3 (2008); *Auth. of Agency Offs. To Prohibit Emps. from Providing Info. to Cong.*, 28 Op. O.L.C. 79, 81 (2004).

¹⁴⁸ See *U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53 (D.D.C. 2015); Curtis A. Bradley & Jack L. Goldsmith, *Obama's AUMF Legacy*, 110 AM. J. INT'L LAW 628 (2016) (detailing the broad interpretations of the 2001 and 2002 Authorizations for the Use of Military Force by the Obama Administration).

¹⁴⁹ See, e.g., *U.S. House of Representatives v. Mnuchin*, 379 F. Supp. 3d 8, 11–12 (D.D.C. 2019).

¹⁵⁰ H.R. REP. NO. 113-569 (2014).

¹⁵¹ The Office of Legal Counsel has repeatedly refused to follow the constitutional decisions set out in district court opinions, however. See, e.g., *Testimonial Immunity Before Cong. of the Former Couns. to the President*, 43 Op. O.L.C., slip op. at 17 (May 20, 2019) (declining to follow a district court decision rejecting the executive branch doctrine of absolute testimonial immunity); see also *Immunity of the Assistant to the President & Dir. of the Off. of Pol. Strategy & Outreach from Cong. Subpoena*, 38 Op. O.L.C., slip op. at 1–3 (July 15, 2014) (declining to follow a similar district court decision).

¹⁵² *United States v. AT&T (AT&T II)*, 567 F.2d 121 (D.C. Cir. 1977); *United States v. AT&T (AT&T I)*, 551 F.2d 384, 394–95 (1976).

¹⁵³ *AT&T I*, 551 F.2d at 385–86.

¹⁵⁴ *Id.* at 386–87.

the Department sued AT&T formally, the dispute involved only the institutional interests of the executive branch against those of Congress.¹⁵⁵ Moreover, after the district enjoined AT&T from turning over the documents, only Representative Moss, the chairman of the relevant subcommittee, appealed, making the case solely between the executive and legislative branches on appeal.¹⁵⁶

The *ex ante* positions of the branches in the *AT&T* litigation favored Congress. AT&T had indicated it would turn over the letters as it felt compelled to do by the congressional subpoena.¹⁵⁷ Accordingly, it was in Congress's interests to argue justiciability; the inability of the judiciary to weigh in would leave Congress in a superior institutional position to the executive branch. Despite the fact that President Nixon had raised extensive arguments about congressional standing and the justiciability of subpoena enforcement in the *Senate Select* litigation just a few years previously, the Department of Justice never raised any justiciability arguments, even when the sole party asserting standing to maintain an appeal was a congressional entity. Instead, the House raised justiciability in the form of the Speech and Debate Clause, arguing that the courts had no authority to review the merits of the dispute because the immunity granted by that clause foreclosed any judicial interference with the legislative process.¹⁵⁸

As one contemporary commentator noted, the effect of this argument was "that the executive branch would be powerless to assert its constitutional objections when Congress's subpoena is directed not at it, but rather at a third party that holds [the] documents."¹⁵⁹ The Speech and Debate Clause would bar judicial intervention. In that commentator's view, the ability of the court to review the varying interests of the branches "should not vary depending on who happens to possess the subpoenaed

¹⁵⁵ See *id.* at 385 (beginning the opinion by recognizing that the case "involves a portentous clash between the executive and legislative branches" and that the congressional committee was "the real defendant in interest since AT&T . . . has no stake in the controversy"); *id.* at 388 (noting that the "basis of the suit brought by the Justice Department was the Executive's concern over damage to the national interest"); *id.* at 391 (noting the court was facing "patently conflicting assertions of absolute authority" by "[e]ach branch of government").

¹⁵⁶ *Id.* at 385-86.

¹⁵⁷ *Id.* at 387.

¹⁵⁸ *AT&T II*, 567 F.2d 121, 128 (D.C. Cir. 1977).

¹⁵⁹ Comment, *United States v. AT&T: Judicially Supervised Negotiation & Political Questions*, 77 COLUM. L. REV. 466, 479-80 (1977).

documents.”¹⁶⁰ In practice, it does, however, because it alters which branch has the superior *ex ante* position and which branch would benefit most from the lack of judicial inquiry. When the executive branch controls the information and the means of enforcement—criminal prosecution—judicial inquiry is prohibited in its view. But when a third party controls the information and is prepared to cooperate with Congress, judicial inquiry is necessary to vindicate the executive branch’s interest. That distinction explains the evolving positions of the executive branch in these interbranch disputes over information.

That strategic disadvantage explains the notable absence of justiciability arguments in interbranch cases and other cases involving the two branches that took place contemporaneously to *McGahn* and *Mnuchin*. In the dispute over access to grand jury materials from the Mueller investigation, the Justice Department, in pressing its appeal to the D.C. Circuit and asking it to review the district court’s adverse opinion, did not raise any objections based on the fact that the case involved solely a dispute between the two branches.¹⁶¹ The House had sought grand jury information, and the Justice Department opposed the release of the information.¹⁶² Even after the D.C. Circuit *sua sponte* asked for briefing on the grand jury issue, DOJ argued that a congressional body did not need standing or an express cause of action to seek grand jury material because the release of the material was governed by the Federal Rules.¹⁶³ However, the Justice Department did argue that the appeal to the D.C. Circuit was appropriate *only* because it was the Department that had lost and appealed, rather than the House.¹⁶⁴ In its view, if the House had lost in the district court, significant questions would have arisen as to its standing to appeal.¹⁶⁵ But that jurisdictional infirmity applied only to the House. Because the executive branch had lost, it was injured by the district court order interfering with the executive branch’s law enforcement interests, thus giving the Department standing to appeal.¹⁶⁶ In other words, the executive branch’s institutional interests

¹⁶⁰ *Id.* at 80.

¹⁶¹ *In re Comm. on Judiciary*, U.S. House of Representatives, 951 F.3d 589, 609–10 (D.C. Cir. 2020) (Rao, J., dissenting), *vacated by* Dep’t of Justice v. House Comm. on the Judiciary, 142 S. Ct. 46 (2021) (mem.).

¹⁶² *Id.* at 592–93.

¹⁶³ Supplemental Brief for Appellant at 1–6, *In re Comm. on Judiciary*, 951 F. 3d 589 (D.C. Cir. 2020) (No. 19-5288).

¹⁶⁴ *Id.* at 5–6.

¹⁶⁵ *Id.* at 6.

¹⁶⁶ *Id.*

were sufficient to establish standing and create a case or controversy, but the House's institutional interests would not be. Had the House lost at the district court, that decision would not be subject to appeal. But because the executive branch lost, an appeal followed.

The executive branch's silence about justiciability in the *In re Grand Jury* was doctrinally even more jarring given that the arguments in the case were heard the same day as the *McGahn* arguments, which focused almost exclusively on justiciability.¹⁶⁷ The *McGahn* position on justiciability relied heavily on the interbranch nature of the suit to argue against judicial involvement, but those concerns with judicial interference in interbranch disputes was noticeably absent in the *Grand Jury* case.¹⁶⁸ Judge Rao explained at length in her dissent why *McGahn* demonstrated a lack of jurisdiction in the grand jury case, indicating that there were at least reasonable arguments available for that position.¹⁶⁹ But the Department of Justice never raised any of them, and, indeed, affirmatively disclaimed them when pressed by the D.C. Circuit.

Similarly, in the *Mazars* litigation, which went through the D.C. Circuit and up to the Supreme Court right before *McGahn*, the Justice Department supported the action by Trump in his private capacity against his accounting and financial firm.¹⁷⁰ Because the executive branch was on the side of the plaintiff, it never raised a question of justiciability. The Department maintained that silence even *after* the Supreme Court *sua sponte* asked the parties to address justiciability and despite the fact that no party or court in the case ever identified a cause of action.¹⁷¹ Viewing these arguments as driven by strategy, as opposed to doctrine, however, makes the contrast much more understandable.

¹⁶⁷ See *In re Comm. on Judiciary*, 951 F.3d at 618–19 (Rao, J., dissenting) (arguing that the justiciability analysis in *McGahn* should apply to the grand jury case).

¹⁶⁸ The majority concluded, rather simplistically, that the grand jury case was “unlike inter-branch disputes where Congress issued subpoenas and directed Executive Branch officials to testify and produce their relevant documents.” *Id.* at 603.

¹⁶⁹ *In re Comm. on Judiciary*, 951 F.3d at 618–19 (Rao, J., dissenting).

¹⁷⁰ *Trump v. Mazars USA LLP*, 140 S. Ct. 2019 (2020).

¹⁷¹ See Letter from Noel J. Francisco, U.S. Solicitor General, to Scott S. Harris, Clerk, U.S. Supreme Court (May 8, 2020) (concluding that “[i]n the United States’ view, these cases are justiciable,” but highlighting that the House “would not have had Article III standing to vindicate their purely institutional interests in enforcing subpoenas” in a civil action).

II. REJECTING INTERBRANCH EXCEPTIONALISM DISGUISED AS JUSTICIABILITY

Understanding justiciability arguments as strategic does not necessarily relate to their merits, of course; all litigants are acting strategically. But the desire to retain *ex ante* constitutional advantage has led the branches, particularly the executive branch, to continually add to and develop justiciability arguments against judicial involvement. The simple fact that a case is an interbranch case has found expression in the language of a number of doctrinal categories to which it in reality has no relevance.

As a doctrinal matter, interbranch cases and controversies as a category are not exceptional. The justiciability doctrines often implicated by interbranch disputes can be divided into three distinct categories. One doctrinal inquiry focuses on the form of the suit and party bringing it, principally whether that party has standing under Article III to maintain the action. A second doctrinal category focuses on the nature of the substantive dispute and includes inquiries such as the case-or-controversy requirement of Article III and the political question doctrine. These first two categories largely focus on Article III and the role of the judiciary under the Constitution. The third doctrinal category focuses on legislative or common law authorization for judicial involvement. This category includes the question of statutory subject-matter jurisdiction and whether a cause of action exists.

Within each of these doctrinal areas, there is nothing categorically unique about interbranch disputes that warrants differential treatment. Whether considering standing, the political question doctrine, or the requirement of a cause of action, courts routinely dismiss or litigants do not even raise justiciability concerns in circumstances that are doctrinally identical to the interbranch suits such as *McGahn* in which justiciability concerns dominate. Interbranch cases and controversies are categorically distinct, of course. But the unique questions they do present—addressed in the next part—should not be permitted to infiltrate these doctrinal categories. That they have done so largely represents the success of the executive branch in utilizing justiciability to cement its institutional advantage in constitutional self-help.

A. *Standing*

One of the principal objections to interbranch suits has been the asserted lack of standing of the plaintiff, particularly when an individual or

entity representing congressional interest sues.¹⁷² The Article III standing inquiry in an interbranch suit should be straightforward—does the institution suing have a cognizable injury that meets the tripartite requirement of standing doctrine.¹⁷³ Unfortunately, that inquiry has become mired in the unrelated question of which party may represent the institutional interests at stake and distorted by dicta in *Raines* about the separation of powers. Moreover, institutional standing for a congressional or executive branch entity does not undermine the constitutional principles that purportedly animate the Article III standing doctrine.

i. Raines and institutional standing

The question whether individual legislators had standing to sue executive branch and congressional entities and officers roiled the D.C. Circuit from 1974 until *Raines*.¹⁷⁴ Individual legislators brought suit to

¹⁷² See, e.g., *Comm. on Judiciary v. McGahn*, 951 F.3d 510, 516 (D.C. Cir. 2020), *rev'd*, 968 F.3d 755 (en banc 2020) (opining that “the Committee’s dispute with the Executive Branch is unfit for judicial resolution” because it is “not a private entity seeking vindication of its constitutional rights and liberties. . . .”) (internal quotation marks omitted); *Raines v. Byrd*, 521 U.S. 811 (1997). Scholars have addressed the normative and doctrinal viability of congressional standing at length. See, e.g., Jackson, *supra* note 14, at 852 (“[L]egislative standing has been upheld thus far only in quite limited circumstances”); Nat Stern, *The Indefinite Deflection of Congressional Standing*, 43 PEPP. L. REV. 1, 3 (2015) (arguing that viable congressional standing “remains theoretically possible but apparently practically unattainable”); Jonathan Remy Nash, *A Functional Theory of Congressional Standing*, 114 MICH. L. REV. 339 (2015) (arguing that congressional standing can extend to cases beyond just actual vote nullification); Tara Leigh Grove, *Standing Outside Article III*, 162 U. PA. L. REV. 131, 1314 (2014) (asserting that standing of the executive branch and the legislature cannot be determined *solely* by Article III); Anthony Clark Arend & Catherine B. Lotrionte, *Congress Goes to Court: The Past, Present, and Future of Legislator Standing*, 25 HARV. J.L. & PUB. POL’Y 209, 213 (2001) (claiming that legislators suing in their official capacity should never be granted standing).

¹⁷³ See *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (setting out the three-prong framework for standing analysis requiring that the “plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision”).

¹⁷⁴ See *Chenoweth v. Clinton*, 181 F.3d 112, 117–18 (D.C. Cir. 1999) (Tatel, J., concurring) (providing a brief summary of the pre-*Raines* standing jurisprudence in the D.C. Circuit); see also Nash, *supra* note 172, at 358–60 (describing the development of the doctrine within the D.C. Circuit prior to *Raines*); R. Lawrence Dessem, *Congressional Standing to Sue: Whose Vote Is This Anyway*, 62 NOTRE DAME L. REV. 1, 2–9 (1986) (describing the developing doctrine of “congressional standing” pre-*Raines*); Note, *Congressional Standing to Challenge Executive Action*, 122 U. PA. L. REV. 1366, 1366 (1974) (describing civil suits against the executive branch as a “new political weapon available to Congress in its efforts to curb the growing power of the executive branch” and discussing the analysis of standing in four of the early cases). Questions of congressional standing also arose in other circuits. See, e.g., *Harrington v. Schlesinger*, 528 F.2d

challenge a presidential pocket veto,¹⁷⁵ the unilateral termination of a treaty,¹⁷⁶ the constitutionality of a revenue bill that originated in the Senate,¹⁷⁷ the use of particular appropriations to fund foreign and domestic CIA activities,¹⁷⁸ and the appointment of members of the Federal Open Market Committee.¹⁷⁹ Other circuits similarly had to address legislator suits over the constitutionality of the president's decisions to order military operations in Vietnam.¹⁸⁰

Raines, the first time the Court had addressed federal, legislative standing, resolved the central question that had befuddled the courts; it held that individual legislators lacked standing to assert a general institutional injury to Congress's constitutional authority.¹⁸¹ The Court in *Raines* discussed the lack of historical interbranch disputes,¹⁸² but its central holding was that the plaintiff legislators had "alleged no injury to themselves as individuals" and that "the institutional injury they allege[d] [wa]s wholly abstract and widely dispersed."¹⁸³ The Court also "attach[ed] some importance to the fact that [the legislators] ha[d] not been authorized to represent their respective Houses of Congress in th[e] action."¹⁸⁴

In context, the meaning of this last statement is relatively obscure. Much of the opinion deals with the importance of a "legally and judicially cognizable injury" and discusses the lack of historical interbranch disputes as relevant to that discussion. But this last statement appears to suggest the standing problem is not the nature of the dispute but the authority of the individual legislators to assert the injury.¹⁸⁵ Adding to the confusion is the

455, 459 (4th Cir. 1975) (rejecting legislator standing to challenge expenditures for combat in other countries in alleged violation of law).

¹⁷⁵ *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974).

¹⁷⁶ *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir. 1979).

¹⁷⁷ *Moore v. U.S. House of Representatives*, 733 F.2d 946 (D.C. Cir. 1984).

¹⁷⁸ *Harrington v. Bush*, 553 F.2d 190 (D.C. Cir. 1977).

¹⁷⁹ *Riegle v. Fed. Open Mkt. Comm.*, 656 F.2d 873 (D.C. Cir. 1981).

¹⁸⁰ *Mitchell v. Laird*, 488 F.2d 611 (D.C. Cir. 1973).

¹⁸¹ *Raines v. Byrd*, 521 U.S. 811, 821–26 (1997).

¹⁸² *Id.* at 826–29.

¹⁸³ *Id.* at 829.

¹⁸⁴ *Id.*

¹⁸⁵ In a footnote elaborating on this point, the Court cited *Bender v. Williamsport Area Sch. Dist.*, which had held that an individual school board member lacked standing to file an appeal when he had not been authorized to represent the board as an institution. 475 U.S. 534, 543–44 (1986); see also *Raines*, 521 U.S. at 829 n.10. The *Raines* footnote also relied on *United States v. Ballin*, 144 U.S. 1, 7, 12 (1892), for the proposition that the power of Congress is not vested in any one individual member "but in the aggregate of the members who compose the body" and that the action of a

fact that, as Justice Souter's concurrence recognized, the Solicitor General conceded in *Raines* that "an injury to official authority may support standing for a government itself or its duly authorized agents" and that an impairment of certain powers related to the performance of its constitutional functions may support standing for Congress as a whole or one of the two Houses as an institution.¹⁸⁶

In its next legislative standing opinion, the D.C. Circuit interpreted *Raines* not to necessarily overrule every aspect of its existing legislative standing jurisprudence but instead to "require [the court] to merge [its] separation of powers and standing analyses."¹⁸⁷ That merger—along with the *Raines* dicta about interbranch suits in general—became the heart of the Justice Department's standing argument in interbranch cases.¹⁸⁸

This merger distorts standing doctrine in the context of interbranch disputes. The Supreme Court's more recent standing jurisprudence emphasizes that the doctrine arises out of the separation of powers; the doctrine keeps the judiciary in its assigned role.¹⁸⁹ The argument against the standing of a congressional entity in an interbranch dispute relies heavily on this concept; recognizing standing in an interbranch suit would be contrary to the judicial role and intrude into matters left to the other branches, as the argument goes.¹⁹⁰ But that argument is completely divorced from the concept and purposes of standing. Outside of the

house of Congress "is not the action of any separate member or number of members, but the action of the body as a whole." *Raines*, 521 U.S. at 829 n.10.

¹⁸⁶ *Raines*, 521 U.S. at 831 n.2 (Souter, J., concurring).

¹⁸⁷ *Chenoweth v. Clinton*, 181 F.3d 112, 115 (D.C. Cir. 1999); see also *Campbell v. Clinton*, 203 F.3d 19, 20–24 (D.C. Cir. 2000) (applying *Raines* and *Chenoweth* to a suit alleging President Clinton had violated the War Powers Clause of the Constitution and the War Powers Resolution in authorizing airstrikes against then-Yugoslavia).

¹⁸⁸ See, e.g., *Comm. on Judiciary v. McGahn*, 951 F.3d 510 (D.C. Cir. 2020), *rev'd*, 968 F.3d 755 (en banc 2020) (relying heavily on *Raines* to accept the Justice Department's argument that the Court lacked subject-matter jurisdiction).

¹⁸⁹ See, e.g., *Spokeo, Inc. v. Robins*, 578 U.S. 330, 337 (2016) ("In order to remain faithful to th[e] tripartite structure, the power of the Federal Judiciary may not be permitted to intrude upon the powers given to the other branches."); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408–09 (2013).

¹⁹⁰ See *McGahn*, 951 F.3d at 517–19 (describing the dangers of judicial involvement in political interbranch disputes); Jackson, *supra* note 14, at 854–60 (identifying specific reasons for justiciability limits including lack of judicial competence, exclusive competence in another branch, and avoiding harms to courts and political branches).

interbranch context, standing focuses on injury—the nature of the injury, its cause, and its redressability by judicial action.¹⁹¹

The language that *Raines* relied on to claim interbranch disputes are different looks at whether the dispute is one “traditionally thought to be capable of resolution through the judicial process.”¹⁹² That language originates in *Flast* in discussion why Article III does not permit the judiciary to issue advisory opinions.¹⁹³ The question focuses on the concreteness of the injury and the propriety of the plaintiffs in bringing the case. Outside the context of interbranch disputes, there is no other area in which the *defendant* in the suit influences standing or in which the *nature* of the issue presented factors into the sufficiency of the injury. As Professor Jaffe put it in several decades ago, “the character of the plaintiff and his claim for justice have very little relation to the kind of issue to be decided and the fitness of the judicial process for disposition of the issue.”¹⁹⁴

Justice Scalia, one of the principal architects of the modern, robust standing doctrine,¹⁹⁵ recognized this fact while on the D.C. Circuit. In *Moore v. U.S. House of Representatives*,¹⁹⁶ a case in which members of the House of Representatives challenged the constitutionality of a fiscal act as violating the Origination Clause, Scalia advocated for incorporating into

¹⁹¹ See, e.g., Jackson, *supra* note 14, at 846 (“[U]nder current standing law, Article III courts cannot adjudicate claims unless the party invoking their jurisdiction has ‘standing’ to do so.”) (emphasis added); Nash, *supra* note 172, at 346 (“Standing limits the ability of *plaintiffs* to bring lawsuits in the federal courts.”) (emphasis added); Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 245 (1990) (“Standing focuses on the litigant’s ability to initiate a suit”); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982) (“Proper regard for the complex nature of our constitutional structure” means that a federal court should not “hospitably accept for adjudication claims of constitutional violation by other branches of government where the *claimant* has not suffered cognizable injury.”) (emphasis added).

¹⁹² *Raines*, 521 U.S. at 819 (quoting *Flast v. Cohen*, 392 U.S. 83, 97 (1968); see also *McGahn*, 951 F.3d at 516 (citing *Allen v. Wright*, 468 U.S. 737, 752 (1984)) (“We must ask whether . . . the claim is ‘traditionally thought to be capable of resolution through the judicial process.’”).

¹⁹³ *Flast*, 392 U.S. at 97.

¹⁹⁴ Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1041 (1968).

¹⁹⁵ See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1143–44 (1993). Even before he joined the Supreme Court, Justice Scalia gave a lecture on standing that became influential among conservatives seeking to curb the judicial power. See Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 18 SUFFOLK L. REV. 881 (1983); see also David H. Gans, *How Scalia Made It Difficult to Bring Cases to Court*, THE ATLANTIC (Aug. 1, 2016), <https://www.theatlantic.com/politics/archive/2016/08/scalia-access-to-courts/493592> [https://perma.cc/LAB8-7YTM].

¹⁹⁶ 733 F.2d 946 (D.C. Cir. 1984).

standing doctrine consideration of the fact that a suit was an interbranch case involving only institutional interests.¹⁹⁷ The majority accused him of an “extreme expansion of the political question doctrine in the context of standing.”¹⁹⁸ Scalia rejected this assertion, arguing that he was focused on the injury, not the nature of the question, but he acknowledged that “the considerations I rely upon to mark the boundaries of the doctrine of standing are similar to considerations that may invoke the political question doctrine.”¹⁹⁹ After *Raines*, that incorporation has been solidified. Although several courts within the D.C. Circuit have found congressional suits justiciable after *Raines*,²⁰⁰ others have not.²⁰¹ Most importantly, however, all have had to address the Justice Department’s strident argument that the fact that the case involved an interbranch dispute negated standing—prolonging the litigation and focusing it singularly on justiciability until a subsequent election rendered the merits of the suit largely moot.²⁰²

ii. Institutional representation

The Justice Department’s broad interpretation of *Raines* and the Court’s discussion of interbranch disputes in *Raines* has obscured the underlying question of representation. As Professor Grove has recognized, the question of authority to represent a particular institutional interest of the United States has often been described as a question of standing, even though it might appear to be a question analytically distinct from whether a cognizable injury exists.²⁰³ The question of representation—whether individual members of Congress had standing to assert institutional

¹⁹⁷ See *id.* 956–961 (Scalia, J., concurring).

¹⁹⁸ *Id.* at 953.

¹⁹⁹ *Id.* at 961 n.6 (Scalia, J., concurring).

²⁰⁰ See, e.g., *Comm. on the Judiciary v. McGahn*, 968 F.3d 755 (D.C. Cir. 2020) (en banc); *U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53 (D.D.C. 2015); *Comm. on Oversight and Gov’t Reform v. Holder*, 979 F. Supp. 2d 1 (D.D.C. 2013); *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008).

²⁰¹ *Blumenthal v. Trump*, 949 F.3d 14 (D.C. Cir. 2020); *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000); *Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999).

²⁰² See Jonathan Shaub, *Why the McGahn Agreement is a Devastating Loss for Congress*, LAWFARE (May 19, 2021, 11:47 AM); Josh Chafetz, *Congress Can’t Rely on the Courts to Enforce its Subpoenas. Don’t Panic*, WASH. POST (Mar. 2, 2020, 12:08 PM).

²⁰³ Tara Leigh Grove, *Standing Outside of Article III*, 162 U. PA. L. REV. 1311, 1316–17 & nn. 16–19 (2014). For arguments that these two inquiries—representation and injury—are distinct, see Brianne J. Gorod, *Defending Executive Nondefense and the Principal-Agent Problem*, 106 NW. U. L. REV. 1201, 1248 (2012); Abner S. Greene, *Interpretive Schizophrenia: How Congressional Standing Can Solve the Enforce-but-Not-Defend Problem*, 81 FORDHAM L. REV. 577, 582, 595–97 (2012).

injuries—was the question that troubled the D.C. Circuit prior to *Raines*,²⁰⁴ and the inability of individual legislators to assert institutional interests was the specific holding of *Raines*.²⁰⁵ *Raines* did not address the validity of institutional interests since the individual legislators were not authorized to represent them. But it has been read to foreclose them.²⁰⁶ After *Raines* muddied the interbranch standing inquiry, the Department began to argue that even a direct institutional injury was insufficient on the ground that the interbranch nature of the suit itself rendered that institutional interest non-cognizable.

Outside of the context of interbranch suits, the courts have been more than willing to recognize standing based on institutional interests the plaintiff is authorized to represent. The most striking example is the executive branch itself. In the congressional suit seeking disclosure of the grand jury material from the Mueller investigation, the Department argued that *it* had standing to appeal the adverse district court verdict because disclosure would interfere with the executive branch's ability to perform its law enforcement functions.²⁰⁷ But that interest was, by definition, solely an interest of the executive branch; the legislative branch was on the other side. The Supreme Court in *Nixon*²⁰⁸ relied on a similar rationale to find that the “intra-branch” dispute between the special prosecutor and President Nixon was justiciable.²⁰⁹ The need of the special prosecutor for

²⁰⁴ See *Chenoweth v. Clinton*, 181 F.3d 112, 114–16 (D.C. Cir. 1999) (describing this background).

²⁰⁵ *Raines v. Byrd*, 521 U.S. 811, 829–30 (1997); see also *McGahn*, 968 F.3d at 775–76 (summarizing the holding of *Raines*). As the executive branch noted in its briefing in *Raines*, the question of who may represent governmental, institutional injury to the judiciary is not limited to actions involving Congress. See Brief for the Appellants at 28, *Raines v. Byrd*, No. 96-1671, 1997 WL 251415 (May 9, 1997) (arguing that Executive Branch officials would not have standing to litigate on behalf of the agency at which he worked without authority). An executive branch official may not bring suit to vindicate the institutional interests of an agency or the United States if she has not been authorized to do so. See *Potential Litigation Between the Dep't of Labor & the U.S. Postal Service*, 35 Op. O.L.C. 152 (2011) (concluding that the Attorney General had authority to allow the U.S. Postal Service to represent itself in litigation against the Department of Labor and that the suit would be justiciable); *Fed. Election Comm'n v. NRA Political Victory Fund*, 513 U.S. 88 (1994) (holding that the Federal Election Commission did not have authority to independently litigate any matters not expressly authorized); Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CALIF. L. REV. 255 (1994) (discussing the Solicitor General's control over litigation before the Supreme Court).

²⁰⁶ *Comm. on Judiciary v. McGahn*, 951 F.3d 510, 516 (D.C. Cir. 2020).

²⁰⁷ See Supplemental Brief for Appellant at 1–6, *In re Comm. on Judiciary*, U.S. House of Representatives, 951 F.3d 589 (D.C. Cir. 2020).

²⁰⁸ *United States v. Nixon*, 418 U.S. 683 (1974).

²⁰⁹ *Id.* at 692–97.

the withheld evidence as part of a criminal prosecution provided the “concrete adverseness” necessary for jurisdiction.²¹⁰ Similarly, in the *AT&T* litigation, the Justice Department asserted standing based on the potential harm to authority specific to the executive branch, i.e. the ability to withhold sensitive national security documents.²¹¹

The institutional standing of the “United States,” typically represented by the Justice Department pursuant to its statutory authority, is rarely questioned, even when the action is based solely on the interests of a single branch. In the *Smith* case, for example, the United States brought the action at the Senate’s behest; but the interests asserted were solely those of the Senate.²¹² The Solicitor General, on behalf of the executive branch, argued against the “United States” in the Supreme Court. In the *Senate Select* case, the committee filed suit in the name of the “United States” against President Nixon in his official and personal capacities.²¹³ The Solicitor General submitted an amicus brief in the D.C. Circuit taking issue with the committee’s attempt to sue on behalf of the United States but never questioned the standing of the committee to raise the institutional interests of the Senate.²¹⁴ Moreover, in numerous cases, the Court has accepted the existence of an injury that satisfies Article III, either at the outset or for purposes of pursuing an appeal, even when that injury is, by definition, only an injury to a single agency or institution within the government and even when the party on the other side is also a government agency or entity.²¹⁵ No court or party questions the standing

²¹⁰ *Id.* at 697 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

²¹¹ *United States v. AT&T*, 567 F.2d 121 (D.C. Cir. 1977); *United States v. AT&T*, 551 F.2d 384, 394–95 (1976).

²¹² *See supra* Part I.A.ii.a.

²¹³ Complaint for Declaratory Judgment, Mandatory Injunction, and Mandamus, *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, No. 1593-73 (Aug. 9, 1973), *reprinted in* *Presidential Campaign Activities of 1972*, S. Res. 60, *Appendix to the Hearings of the Select Committee on Presidential Campaign Activities: Legal Documents Relating to the Select Committee Hearings* 541, 93rd Cong. (June 28, 1974).

²¹⁴ *See supra* Part I.A.ii.b.

²¹⁵ *See Nebraska v. Wyoming*, 515 U.S. 1, 20 (1995) (holding that Wyoming had standing based on its allegation that the United States caused injury to the state by failing to adhere to its agreement); *National League of Cities v. Usery*, 426 U.S. 833, 836–837 (1976) (noting that cities and states had standing to sue federal government over alleged infringement of “‘a constitutional prohibition’ running in favor of the States as *States*”), *overruled on other grounds*, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *Young v. United States ex rel. Vuitton et fils*, 481 U.S. 787 (1987) (upholding a District Court’s right to appoint a private attorney to prosecute a contempt action); *Gravel v. United States*, 408 U.S. 606 (1972) (holding that a federal grand jury subpoena to a congressional aide violated the Speech and Debate Clause); *Sixty-Seventh*

of the Department of Justice to appeal adverse decisions in interbranch disputes, including in *U.S. v. Nixon*, and in the recent *McGahn* and *In re Committee on the Judiciary* cases, despite the fact that the constitutional injury that formed the basis for standing to appeal was an injury solely to the institutional interests of the executive branch in preserving confidentiality.

A governmental plaintiff seeking to establish standing must point to a cognizable institutional interest *and* authorization to assert that interest. As Professor Grove has persuasively argued, at the federal government level, that inquiry should focus more on Articles I and II of the Constitution, which establish the institutional authorities and interest of the two branches, than on Article III.²¹⁶ But it is quite clear that a government institution *can* have a concrete injury to its official interests sufficient to satisfy Article III. That fact is confirmed by the Court's recognition of standing for state government agencies and institutions, including a state legislature.²¹⁷ As the Court explained in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, the state legislature had standing as "an institutional plaintiff asserting an institutional injury," and the legal action had been authorized by the legislature, eliminating any standing problems related to representation.²¹⁸

Standing focuses on the injury to a plaintiff or appellant and the authority to represent that injury, whether an individual or an institution. Standing in an interbranch case should have the same focus. Otherwise, the inquiry becomes unmoored from any doctrine and unmoored from the principles that animate standing, namely to ensure the concrete, adversarial presentation of discrete legal issues. The fact that the case involves only the

Minnesota State Senate v. Beens, 406 U.S. 187, 193–95 (1972) (holding that an injunction that directly affected the state senate gave the senators a right to intervene); *FTC v. Guignon*, 390 F.2d 323 (8th Cir. 1968) (holding that the FTC could seek enforcement of its subpoenas only if it obtained consent of the U.S. Attorney General); *South Carolina v. Katzenbach*, 383 U.S. 301, 307–08 (1966) (noting that the court invited all States to participate in the proceeding); *United States ex rel. Chapman v. Fed. Power Comm'n*, 345 U.S. 153, 154–56 (1953) (holding that the Secretary of Interior had standing to press a claim against the Federal Power Commission for alleged infringement of the Secretary's role); *United States v. Interstate Com. Comm'n*, 337 U.S. 426, 430–32 (1949) (holding the issue justiciable even though it is the government as a shipper suing the government as the ICC); *In re Debs*, 158 U.S. 564 (1895) (upholding the government's right to seek injunction); *Massachusetts v. Rhode Island*, 37 U.S. 755 (1838); *Osborn v. Bank of United States*, 22 U.S. 738 (1824); see generally Michael Herz, *United States v. United States: When Can the Federal Government Sue Itself?*, 32 WM. & MARY L. REV. 893 (1991).

²¹⁶ Tara Leigh Grove, *Standing Outside of Article III*, 162 U. PA. L. REV. 1311 (2014).

²¹⁷ See *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 799–804 (2015).

²¹⁸ *Id.* at 2664.

institutional interests of the two political branches and has governmental entities on opposing sides is not relevant to standing.

B. The nature of the question – amendable to judicial resolution?

Interbranch cases and controversies, by definition, involve difficult questions about the separation of powers between the two branches. Often these questions are unresolved and have been the subject of considerable debate and controversy for decades or longer. But those facts, alone do not make interbranch cases and controversies categorically unique in any relevant way. Nor do interbranch cases and controversies warrant special, categorical treatment under the political question doctrine, which often looms in the background.

i. The modern, constitutional court²¹⁹

Over the past 100 years, the Supreme Court has consistently resolved cases on the merits that pit the institutional interests of the two branches against one another. The first set of these cases arose in the 1920s. With the Supreme Court deciding the long-simmering question of the President's removal power in *Myers v. United States*,²²⁰ and then the constitutionality of the pocket veto in 1929.²²¹ Three years later, the Court would decide *U.S. v. Smith*,²²² the quo warranto action brought by the Attorney General on behalf of the Senate testing the Senate's authority to rescind its confirmation of an executive branch official within a certain time period. All of these actions, of course, involved an interested private party—the officeholders in *Myers* and *Smith* and the Native American plaintiffs in the *Pocket Veto Case* who would have benefitted from the bill the president declined to sign. But the two branches appeared on both sides of each of these cases, with congressional representatives participating as amici in *Myers* and *The Pocket Veto Case* and the Solicitor General participating as an amicus in *Smith*.²²³

²¹⁹ See Greene, *supra* note 30, at 124–27.

²²⁰ 272 U.S. 52 (1926).

²²¹ The Pocket Veto Case, 297 U.S. 655 (1929).

²²² 286 U.S. 6 (1932); *supra* note 54.

²²³ *Id.* at 14; Pocket Veto Case, 297 U.S. at 673 (noting the Court granted a member of the House Judiciary Committee leave to appear as amicus “[i]n view of the public importance of the question presented”); *Representation Hearings*, *supra* note 60, at 397 (noting that Senator Pepper argued in *Myers* on behalf of the Senate at the Court's invitation); *Myers*, 272 U.S. at 176.

That trend has only accelerated in recent times, with the Supreme Court continuing to decide the merits of cases that involve the constitutional interests of the executive branch against those of Congress or a congressional entity. *INS v. Chadha*²²⁴ is the paradigmatic example, in which the Court considered the constitutionality of the legislative veto, which was defended by Congress and challenged by the executive branch.²²⁵ Because his deportation hung in the balance, Jagdish Chadha had a paramount interest in the proceedings and prevailed below.²²⁶ But the dispute was fundamentally about the respective authorities of the two branches.²²⁷ And no private interest existed that would have allowed the case to go up to the Supreme Court; Chadha prevailed below.²²⁸ Other cases have similarly resolved longstanding disputes about the respective authorities of the two branches in cases involving private interests—typically monetary—but that are fundamentally between the executive branch and Congress.²²⁹ Indeed, the Court decided to opine directly the

²²⁴ 462 U.S. 919 (1983).

²²⁵ *Id.* at 929–31, nn.4, 5 (noting that both Houses of Congress contend the Court is without jurisdiction to entertain INS).

²²⁶ *Id.* at 927–28, 939–40, n.12.

²²⁷ Notably, Congress made a number of justiciability arguments in *Chadha* to try to prevent judicial intervention. See *Chadha*, 462 U.S. at 929–44 (discussing these arguments); Brief of Petitioner U.S. House of Representatives, Nos. 80-1832, 80-2170, 80-2171, *Chadha*, 1981 WL 388493, at 41–50 (Nov. 19, 1981); Brief of Petitioner U.S. Senate, Nos. 80-1832, 80-2170, 80-2171, *Chadha*, 1981 WL 388494, at 17–28 (Nov. 19, 1981). Those arguments reflect the same strategic arguments discussed *supra* Part I.D. If the judiciary were not permitted to opine on the constitutionality of the legislative veto, Congress would retain the ex-ante advantage as the executive branch had, to that point, indicated it would comply with the legislative veto absent a court order striking it down as unconstitutional. *Chadha*, 462 U.S. at 940 n.12. If Congress had succeeded in preventing judicial consideration of the legislative veto, the executive branch would undoubtedly have considered the possibility of self-help, i.e. refusing to enforce the legislative veto based on the executive branch’s constitutional view, likely supported by an OLC opinion. That was the same approach it took to the question of prosecution for criminal contempt. See *supra* Part I.C. Because the Court rejected the justiciability arguments of the House and Senate and resolved the issue, however, no self-help was necessary.

²²⁸ *Id.* at 930 (finding that the INS was “aggrieved” by the lower court decision prohibiting it from taking action); see also *id.* at 931 n.6 (finding that an Article III controversy exists “because of the presence of the two Houses of Congress as adverse parties”); *id.* at 939 (noting “Congress [wa]s the proper party to defend the constitutionality” of the law and a “proper petitioner” under the statute governing the Supreme Court’s certiorari jurisdiction (emphasis added)).

²²⁹ See, e.g., *Seila Law LLC v. Consumer Fin. Protection Bureau*, 140 S. Ct. 2183 (2020) (holding that for-cause restriction of President’s executive power to remove CFPB’s single Director violated constitutional separation of powers); *Lucia v. S.E.C.*, 138 S. Ct. 2044, 2047 (2018) (discussing whether SEC’s administrative law judges are constitutionally appointed subject to the Appointments Clause); *N.L.R.B. v. Noel Canning*, 573 U.S. 512 (2014) (interpreting the President’s authority to make recess appointments for the first time); *Greene*, *supra* note 30, at

balance of power between the branches in an area of foreign relations—a long-contested area of constitutional authority—in a case in which a private individual’s sole interest was whether his passport included the word “Israel.”²³⁰

These cases have involved private parties who will be affected by the ruling, but that fact is relevant only to the question of standing and Article III injury. And in some cases, such as *Chadha*, that personal injury has not been relevant to jurisdiction to hear the appeal because the individual prevailed in the lower court.²³¹ Institutional interests have permitted the case to move forward, and those conflicting constitutional interests of the branches are the fundamental question in the case. In terms of the *nature* of the question at issue, then, those case are not in any way distinct from interbranch cases and controversies that do not involve a private interest. Outside of standing doctrine, whether or not an individual will be affected by a particular allocation of constitutional authority between the branches has never been relevant to the ability of the judiciary to consider the constitutional question. The question involved in these cases is identical to that involved in a purely interbranch dispute—how does the Constitution allocate power.

Nor are the questions presented in an interbranch case in equity distinct in any material way from difficult constitutional questions that have arisen between governmental institutions and that the Court has resolved on the merits. In *Missouri v. Holland*,²³² the interests asserted were the institutional interests of the state against the executive branch of the United States,

126–28 (discussing *Noel Canning* as settling a dispute that had existed since the 18th century and involving a claimed constitutional injury “to the Senate and its institutional prerogatives”); *Bond v. United States*, 564 U.S. 211 (2011) (holding that an individual had standing to raise constitutional claims about the powers reserved to states); *Dep’t of Com. v. U.S. House of Representatives*, 525 U.S. 316 (1999) (holding that the Census Act prohibits the proposed uses of statistical sampling to determine the population for congressional apportionment purposes); *Gravel v. United States*, 408 U.S. 606 (1972) (permitting Senator Gravel to intervene and appeal to raise institutional interests in the Speech & Debate Clause).

²³⁰ *Zivotofsky v. Kerry*, 576 U.S. 1 (2015); *see also* *Zivotofsky v. Clinton*, 566 U.S. 189 (2012) (reversing the D.C. Circuit’s decision to dismiss the action as a political question); *id.* at 193–94 (noting that the D.C. Circuit reversed the lower court determination that the plaintiff’s interest in having “Israel” on his passport was insufficient to provide Article III standing).

²³¹ *See Chadha*, 462 U.S. at 930 (noting that the lower court set aside *Chadha*’s deportation); *Gravel*, 408 U.S. at 613 (the United States petitioned for certiorari); *cf.* *United States v. Windsor*, 570 U.S. 744, 757–58 (2013) (noting that the United States retained a sufficient interest to support Article III jurisdiction on appeal because it had been ordered to pay money by the lower court).

²³² 252 U.S. 416 (1920).

represented by the U.S. game warden Holland, who had no personal stake in the controversy. In *New York v. United States*,²³³ the Court had to address the authority of the federal government to mandate particular actions by states in the context of a dispute between the state of New York and the United States. And there are numerous other examples of the Court addressing unresolved constitutional questions about the proper allocation of authority in the context of purely institutional interests, with no private interest involved.²³⁴ *Shelby County v. Holder*²³⁵ involved the institutional interests of the county against the executive branch in the form of Attorney General Holder and the question of Congress's constitutional authority to adopt differential remedial methods under the Fourteenth and Fifteenth Amendments.²³⁶

The nature of the dispute in an interbranch case or controversy—one that involves purely institutional interests and unresolved or difficult questions of constitutional authority—thus does not categorically render it different from disputes the Court has not shied away from resolving.²³⁷

²³³ 505 U.S. 144 (1992).

²³⁴ *See, e.g.*, *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966) (upholding the constitutionality of the Voting Rights Act in an original equitable action brought by South Carolina).

²³⁵ 570 U.S. 529 (2013).

²³⁶ *Id.* at 536, 544, 560.

²³⁷ As Aziz Huq has explained, the Court has been particularly willing to address constitutional questions about the separation of powers between the executive branch and Congress on the merits when raised by regulated entities. *See* AZIZ Z. HUQ, *THE COLLAPSE OF CONSTITUTIONAL REMEDIES* 140–50 (2021). That is particularly true with respect to cases involving the Appointments Clause. *See, e.g.*, *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183 (2020) (for-cause restriction of President's executive power to remove CFPB's single Director violated constitutional separation of powers); *Lucia v. S.E.C.*, 138 S. Ct. 2044 (2018) (administrative law judges are constitutionally appointed subject to the Appointments Clause); *N.L.R.B. v. Noel Canning*, 573 U.S. 513 (2014). As Huq describes, the Court has been less and less willing to provide constitutional remedies to individuals asserting violations of fundamental rights, typically using many of the justiciability doctrines discussed *supra* Part I such as the necessity of a cause of action. Huq, *supra*, at 105–35; *see also* Beske, *supra* note 26, at 873–76 (arguing that the Court has been too willing to recognize standing for private plaintiffs in separation-of-powers disputes and should be more willing to grant standing to governmental institutional litigants). Even in the constitutional cases the Court has heard, however, its willingness to entertain suits brought by regulated businesses and industries has not translated into a willingness to provide meaningful remedies to those entities. As Rachel Bayefsky recognizes, the remedies in cases such as *Seila Law* and *Free Enterprise Fund*, the court declined to provide full relief to the parties but instead severed the unconstitutional provision to preserve the authority of the agency to regulate. Rachel Bayefsky, *Judicial Remedies and Structural Constitutional Violations*, BALKANIZATION (Feb. 10, 2022), <https://balkin.blogspot.com/2022/02/judicial-remedies-and-structural.html> [<https://perma.cc/B475-ABRD>]. The Court's concern has thus been to address and resolve the fundamental constitutional dispute between the two branches about the allocation

ii. The political question doctrine

Another justiciability inquiry that focuses on the nature of the question is the political question doctrine.²³⁸ In discussing interbranch cases, however, that focus often shifts to the *parties*, i.e., the fact that the two branches are opposite one another as opposed to the traditional doctrinal inquiry. In this way, interbranch exceptionalism in the context of the political question doctrine is the inverse of the exceptionalism inherent in the standing inquiry. Whereas the traditional standing inquiry focuses on the *parties*, specifically the plaintiff, its application in interbranch cases has begun to focus more on the nature of the dispute, an interbranch one. And whereas the traditional political question doctrine's focus is on the nature of the *dispute*, interbranch exceptionalism has expanded that focus to include the fact that the two branches are *parties*.

The most important factor in the modern political question doctrine is whether there has been a textually demonstrable commitment of the particular question at issue to another branch of government.²³⁹ But this inquiry is no different in an interbranch case than in a case brought by a private party. Indeed, in the context of an interbranch case, the decision that a particular issue is textually committed to one of the branches is, in effect, a resolution of the merits of the dispute, which is a contest between the branches over the resolution of a constitutional issue. To categorically say that all interbranch disputes are political questions because of such a

of power and *not* to provide redress to an individual party harmed by the alleged constitutional violation. The Court's willingness to resolve these constitutional disputes so long as there is some purported private interest, no matter how minimal, stands in stark contrast to the hesitancy with which courts approach interbranch cases and controversies involving similar constitutional issues.

²³⁸ The test for the political question doctrine was famously articulated in *Baker v. Carr* and looks at six factors: "[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] or a lack of judicially discoverable and manageable standards for resolving it; [3] or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] or an unusual need for unquestioning adherence to a political decision already made; [6] or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." 369 U.S. 186, 217 (1962).

²³⁹ See Dodson, *supra* note 29, at 696 (finding that the Court has relied "almost exclusively on the first two factors" in *Baker v. Carr*); see also *Nixon v. United States*, 506 U.S. 224, 237-38 (1993) (applying *Baker v. Carr* to determine whether a word in the Impeachment Trial Clause provides an identifiable textual limit on the Senate's authority).

textual commitment is thus impossible; the determination of that question depends on what the dispute is about.²⁴⁰

The other central inquiry of the modern political question doctrine²⁴¹ is whether an issue can be resolved through judicially manageable standards.²⁴² That question focuses on the issue—such as political gerrymandering²⁴³—and the status of the two parties as governmental branches is unrelated. The case would be nonjusticiable even if a private party brought it because the same issue would be involved.

The mere fact that a case involves an interbranch suit thus has no relevance to the modern political question doctrine. But the development of the political question doctrine provides valuable insight into the appropriate judicial approach to interbranch cases. As described in Part III.B., recent scholarship on the political question doctrine demonstrates the case-by-case inquiry necessary to decide the judicial role in a particular interbranch case arising in equity.²⁴⁴ If anything, courts should be *more* hesitant to deploy the modern doctrine in an interbranch case because a dismissal on political question doctrine grounds is often indistinguishable from a decision on the merits of the constitutional question but does not require any analysis of the remedial and equitable inquiries that should inform the judicial role in interbranch cases in equity.

C. *Statutory authorization for interbranch disputes*

In addition to the justiciability requirements drawn from Article III, judicial review of an interbranch case must also be authorized by Congress or the common law. That requirement arises in the context of arguments against the courts' statutory subject-matter jurisdiction and arguments against the existence of a cause of action. The Department of Justice made

²⁴⁰ As discussed *supra*, this determination can—and this Article suggests, *should*—be made on the merits in an interbranch dispute in which the plaintiff branch has a legitimate institutional interest and there is a controversy over which branch has the ultimate authority to decide the constitutional question.

²⁴¹ See Dodson, *supra* note 29, at 696 (noting that “since *Baker*, the Court has relied almost exclusively on the first two factors in applying the political question doctrine”).

²⁴² See *Nixon*, 506 U.S. at 228–29 (looking at whether there are manageable standards together with whether there is a textually demonstrable commitment); Dodson, *supra* note 29, at 696–98.

²⁴³ See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2491, 2506–07 (2019) (finding that partisan gerrymandering claims are not justiciable because they present political questions beyond the reach of federal courts).

²⁴⁴ See *infra* Part III.B.

both of these arguments in the *McGahn* litigation²⁴⁵—it did so despite the fact that the Department had conceded statutory subject matter jurisdiction just a few years previously in subpoena-enforcement cases indistinguishable from *McGahn*²⁴⁶ and had affirmatively claimed statutory subject-matter jurisdiction and a cause of action in the earlier *United States v. House of Representatives* litigation.²⁴⁷

Again, there is nothing relevant about interbranch disputes as a category that warrants differential treatment under these established doctrines. The general federal question statute allows for subject-matter jurisdiction over any claim that “arises under” the Constitution or laws of the United States.²⁴⁸ No party has ever argued that an interbranch case in equity concerning the respective powers of the legislative and executive branches does not involve a sufficient federal question that appears on the face of the complaint. Instead, the Justice Department has now adopted the argument that general federal question jurisdiction does not cover

²⁴⁵ Comm. on Judiciary v. McGahn, 415 F. Supp. 3d 148, 163–64 (D.D.C. 2019), *vacated by* 951 F.3d 510 (D.C. Cir. 2020). The Justice Department first made the argument that subpoena-enforcement suits by a house of Congress did not fall with § 1331’s grant of jurisdiction in the litigation over President Obama’s assertion of executive privilege over documents related to the Justice Department’s response to congressional oversight into the failed Fast & Furious operation. See Comm. on Oversight & Gov’t Reform v. Holder, 979 F. Supp. 2d 1, 17–20 (D.D.C. 2013) (“Notwithstanding its previous concession, the Department of Justice now insists that subject matter jurisdiction is lacking.”). The Justice Department’s argument in the *Holder* and *McGahn* litigation relies on the express grant of jurisdiction in 28 U.S.C. 1365 over actions instituted by the Senate that do *not* involve assertions of executive privilege to argue that Congress never intended courts to have jurisdiction over such actions. See *id.* (“The first problem with the defendant’s argument is that section 1365 specifically states that it does not have anything to do with cases involving a legislative effort to enforce a subpoena against an official of the executive branch withholding records on the grounds of a governmental privilege.”); *McGahn*, 415 F. Supp. 3d at 174–76 (rejecting the DOJ’s argument that section 1365 limited section 1331 jurisdiction). But the legislative history that the OLC opinion points to clearly makes that interpretation untenable. See S. REP. NO. 95-170 at 91–92 (1977) (“This exception in the statute is not intended to be a Congressional finding that the Federal courts do not now have the authority to hear a civil action to enforce a subp[er]ona against an officer or employee of the Federal government.”).

²⁴⁶ Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53, 64 (D.D.C. 2008).

²⁴⁷ See DOJ Gorsuch Brief, *supra* note 101, at 18–20. The Justice Department’s brief in *U.S. v. House* directly rejected the argument that the Justice Department would make in *McGahn*, i.e., that 28 U.S.C. § 1331 does not provide subject matter jurisdiction over interbranch cases because there is no legislative history indicating Congress intended § 1331 to cover such suits. Compare DOJ Gorsuch Brief, *supra* note 101, at 21, with DOJ *McGahn* Summary Judgement Motion, *supra* note 34, at 30–33.

²⁴⁸ 28 U.S.C. § 1331.

interbranch disputes because they are interbranch disputes.²⁴⁹ It reads an exception into general federal-question jurisdiction given the fact that opposing branches are on opposite sides of a case, arguing that Congress did not intend to provide jurisdiction in these suits.²⁵⁰ In no other area, however, does the Court or the Department of Justice *presume* that Congress meant to exclude a case clearly covered by the literal terms of the jurisdictional grant without affirmative evidence to the contrary.²⁵¹ The executive branch has sought to upend traditional statutory interpretation—because a case involves an interbranch dispute in which it holds an ex ante self-help advantage. It has done so *despite* both litigating positions and express statements in past OLC opinions that directly address—and reject—its justiciability argument.²⁵²

The question of cause of action reflects a similar exceptionalism. In the *McGahn* litigation, after the en banc court reversed the panel’s initial opinion finding a lack of Article III subject-matter jurisdiction, Judge Griffith, on remand, again reasoned the suit should be dismissed, this time because the House lacked a cause of action.²⁵³ The House had argued that it could bring the action under traditional principles of equity and under the Declaratory Judgement Act.²⁵⁴ But Griffith’s majority opinion concluded that it needed more.²⁵⁵ In doing so, the majority adopted a longstanding argument of the Department of Justice, previously rejected by several district courts,²⁵⁶ that reeks of interbranch case exceptionalism.²⁵⁷

²⁴⁹ See DOJ *McGahn* Summary Judgement Motion, *supra* note 34, at 30 (arguing that the “general jurisdictional statute” in § 1331 “does not apply to this sort of extraordinary inter-Branch litigation.”).

²⁵⁰ *Id.* at 30–33.

²⁵¹ See DOJ Gorsuch Brief, *supra* note 101, at 21 (arguing that the failure of Congress to pass a specific statute providing jurisdiction over subpoena-enforcement suits—despite considering several proposals to do so—is hardly surprising in view of the broad grant of jurisdiction created by § 1331.”).

²⁵² See *Response to Cong. Requests for Info.*, 10 Op. O.L.C. 68, n.31 (1986) (taking the position that the “legislative history” of the relevant jurisdictional statutes “counsels against th[e] conclusion” that courts should interpret § 1331 not to apply to interbranch subpoena-enforcement actions).

²⁵³ *Comm. on the Judiciary v. McGahn*, 973 F.3d 121, 125–26 (D.C. Cir. 2020).

²⁵⁴ *Id.* at 124–25.

²⁵⁵ *Id.*

²⁵⁶ See, e.g., *U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53, 77–78 (D.D.C. 2015) (finding that the House could pursue a remedy under the Declaratory Judgement Act); *Holder*, 979 F. Supp. 2d at 22–24 (finding that invocation of the Declaratory Judgement Act was sufficient when the case presents an actual controversy which the court can exercise subject matter jurisdiction over); *Miers*, 558 F. Supp. 2d at 80–94 (finding the Declaratory Judgement Act was often used in cases and found to be sufficient).

Consider the contemporaneous *Mazars* litigation, which also involved a suit regarding a congressional subpoena in which the Justice Department and the House were on opposite sides.²⁵⁸ The Department of Justice joined the suit supporting the private claims of Trump, but the issue of whether a cause of action existed never arose. No party and no court brought it up, even after the Supreme Court *sua sponte* asked for supplemental briefing on the political question doctrine and “any other” justiciability issues.²⁵⁹ No statute gave Trump authority to sue his accounting and financial firms to prevent them from turning over information to Congress. But no one really cared. And no one explained why.²⁶⁰ The existence of a cause of action has either been accepted without discussion or explicitly permitted when (1) states have asserted institutional, governmental claims in equity;²⁶¹ (2) when, in the name of the United States, the executive branch has sued over injuries to its institutional interests;²⁶² and (3) when private plaintiffs have raised constitutional claims for equitable relief without any cause of

²⁵⁷ The crux of Judge Griffith’s majority opinion concluding that the Committee lacked a cause of action was the fact that the suit was an interbranch suit against the executive, a type of suit that did not have a tradition in equity. *McGahn*, 973 F.3d at 123–25. In so concluding, Griffith focused not on the nature of the cause of action itself—a subpoena enforcement action—but the fact that it involved an interbranch dispute. See Jonathan Shaub, *The D.C. Circuit Got History Wrong in its McGahn Decision*, LAWFARE (Sept. 3, 2020, 10:10 AM).

²⁵⁸ The *Mazars* litigation was not, under this Article’s definition, an interbranch case because it was brought by Trump in his personal capacity to vindicate his personal interests. See *Trump v. Mazars USA LLP*, 140 S. Ct. 2019, 2028 (2020). The named defendants—Trump’s accounting firm and banks—“took no positions on the legal issues in these cases,” but the House intervened to defend. *Id.* The Department of Justice also supported the institutional interests of the presidency as amicus curiae. See Brief for the United States as Amicus Curiae Supporting Petitioners at 1, *Trump v. Mazars USA LLP*, 140 S. Ct. 2019 (2020) (Nos. 19-715, 19-760), 2020 WL 563912 (noting that the United States had an “substantial interest in safeguarding the prerogatives of the Office of the President”).

²⁵⁹ See Order, *Trump v. Mazars*, No. 19-715 (Apr. 27, 2020) (“The parties and the Solicitor General are directed to file supplemental letter briefs addressing whether the political question doctrine or related justiciability principles bear on the Court’s adjudication of these cases.”); *Mazars USA LLP*, 140 S. Ct. at 2031 (noting the “parties agree that this particular controversy is justiciable”).

²⁶⁰ The same phenomenon occurred in *Trump v. Vance*, in which Trump, in his personal capacity, sought declaratory and injunctive relief against the enforcement of a New York grand jury subpoena based on his role as president. 140 S. Ct. 2412 (2020). No party ever disputed the existence of a cause of action, and no court discussed it. *Id.*

²⁶¹ See *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. 518, 596 (1851) (finding the state of Pennsylvania had a just cause of action); *Rhode Island v. Massachusetts*, 37 U.S. 755 (1838).

²⁶² See, e.g., *United States v. House of Representatives*, 556 F. Supp. 150 (D.D.C. 1983); *United States v. AT&T*, 567 F.2d 121 (D.C. Cir. 1977); *United States v. California*, 332 U.S. 19, 26–29 (1947).

action.²⁶³ But the last word in the *McGahn* case was that interbranch disputes should be treated differently, without any explanation of why the fact that the dispute arose in the context of an interbranch case was material to the inquiry and distinguished it from other equitable actions.²⁶⁴

The silence of *Mazars* about justiciability, even in the face of the high-profile justiciability arguments in the parallel *McGahn* proceedings, is thus not the exception; it is typical. In case after case, the Supreme Court and lower courts have been willing to entertain constitutional cases without an express cause of action. As explained in Part III, the reason for that is rather straightforward: these cases arise under the courts' equity jurisdiction.²⁶⁵ The Court has, of course, addressed the scope of its equity jurisdiction, including in cases brought by governmental entities,²⁶⁶ and it should continue to do so in interbranch cases as well. But the approach of the majority in *McGahn*—following the Justice Department's lead—corrupted the traditional equitable inquiry into a complete circularity by concluding that the interbranch nature of the suit itself precluded equity. Rather than ask how traditional principles of equity applied to the interbranch case, the court concluded that the traditional principles did not apply *because* it was an interbranch case.

D. Normative Arguments against Judicial Involvement

In interbranch disputes, the temptation to retreat to “passive virtues”²⁶⁷ of judicial deference is strong, perhaps irresistible. And there has been a growing critique grounded in democratic theory against the supremacy of the judiciary in constitutional interpretation, particularly in its exercise of judicial review.²⁶⁸ Interbranch cases do not fit neatly into that analysis,

²⁶³ See *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010); *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Powell v. McCormack*, 395 U.S. 486 (1969); *Harmon v. Brucker*, 355 U.S. 579 (1958); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Santa Fé Pac. R.R. Co. v. Payne*, 259 U.S. 197, 198–99 (1922).

²⁶⁴ *Comm. on the Judiciary v. McGahn*, 973 F.3d 121, 124–26 (D.C. Cir. 2020).

²⁶⁵ See *supra* Part III.A.

²⁶⁶ See, e.g., *In re Debs*, 158 U.S. 564 (1895); *Georgia v. Stanton*, 73 U.S. 50 (1867).

²⁶⁷ Alexander Bickel, Foreword: The Passive Virtues, *The Supreme Court*, 1960 Term, 75 HARV. L. REV. 40, 75–76 (1961).

²⁶⁸ See, e.g., Ryan D. Doerfler & Samuel Moyn, 109 CAL. L. REV. 1703, 1708 (2021) (advocating the need to “diminish the [Supreme Court]’s power in favor of popular majorities”); Allan C. Hutchinson, *A ‘Hard Core’ Case Against Judicial Review*, 121 HARV. L. REV. 57, 58 (2008); KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* (2007) (discussing

however, because they often represent a breakdown in the functioning of the democratic process and, absent judicial intervention, are resolved through constitutional self-help rather than by the acts of a representative legislature.²⁶⁹ A dismissal on justiciability grounds is, in effect, a decision on the merits of the constitutional question; it resolves the case in favor of that branch that has superior political capital and has been most effective at creating institutional power through self-help. The reason justiciability doctrines have taken on such prominence in interbranch disputes is the incentive of one branch—typically the executive branch—to keep its superior position vis-à-vis the other and prevent judicial involvement.

Numerous scholars have advocated against a judicial role in interbranch suits and some have begun to question the role of the judiciary in resolving disputes about the allocation of powers between the branches more generally, even when private parties are involved.²⁷⁰ Professors Nikolas Bowie and Dapha Renan have recently argued that the judicial adjudication of separation-of-powers disputes has usurped the more normatively valuable settlement of these disputes by statute by the

how judicial review empowers the presidency); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006); Mark V. Tushnet, *Non-Judicial Review*, 40 HARV. J. LEGIS. 453 (2003) (advocating for constitutional decisionmaking outside of the judiciary and describing institutions that undertake that inquiry); *but see* Erin Delaney, *The Federal Case for Judicial Review*, OXFORD J. LEGAL STUDIES (2022) (responding to Waldron); Richard Fallon, *The Core of an Uneasy Case For Judicial Review*, 121 HARV. L. REV. 733 (2008) (arguing that limited judicial review can further democratic principles by establishing an additional check or veto on legislation).

²⁶⁹ Both Congress and the executive branch, when the plaintiff against the other branch, have made this argument expressly in pressing for judicial intervention as necessary to preserve their constitutional authority. *See* DOJ Gorsuch Brief, *supra* note 101, at 2 (“[J]udicial intervention is now urgently needed, because it is the only way left to resolve in an acceptable fashion the critically important issues that give rise to this unique suit.”); En Banc Brief for Appellee at 22, *McGahn*, 973 F.3d 121 (No. 19-5331) (“[W]here McGahn’s conduct has hamstrung core Article I powers, and the Committee lacks other adequate redress, judicial process is necessary and proper.”). This same logic—that absent a judicial forum a necessary constitutional power would be rendered impotent—led the Court to conclude the judiciary has inherent authority to prosecute contempt of Court charges without the involvement of the executive branch, the precise action Congress cannot take due to the executive branch’s control of the enforcement of the contempt of Congress criminal provision. *See Young v. United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787, 796 (1987).

²⁷⁰ *See, e.g.,* Bowie & Renan, *supra* note 144, at 1–3 (arguing against judicial supremacy in deciding separation-of-powers disputes); MARK J. ROZELL, EXECUTIVE PRIVILEGE: PRESIDENTIAL POWER, SECRECY, AND ACCOUNTABILITY 196–208 (3d ed. 2010); Neal Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal—Do Nothing*, 48 ADMIN. L. REV. 109, 110 (1996); Peter M. Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress*, 71 MINN. L. REV. 461, 465–66 (1987); Archibald Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1433 (1974).

democratically accountable legislature.²⁷¹ Their argument against the “juristocratic” understanding of the division of powers among the branches applies to *all* separation-of-powers cases, and mostly focuses on cases involving private parties, such as removal cases.²⁷² As Part III demonstrates, there is no reason to treat interbranch cases and controversies as categorically distinct from other separation-of-powers cases. If the judiciary is empowered to resolve separation-of-powers cases generally, whether normatively desirable or not, there is no reason to exempt interbranch cases.

More fundamentally, arguments against judicial involvement typically focus on the need, grounded in democratic theory, to give Congress, composed of the elected representatives of the people, more authority. Bowie’s and Renan’s contend that separation-of-powers disputes, such as the President’s ability to remove an agency head, should be resolved through the legislature, by statute.²⁷³ In a similar vein, Josh Chafetz has advocated against judicial review in interbranch disputes over information because turning to the judiciary empowers the courts at the expense of congressional authority.²⁷⁴ Instead, he, along with a growing chorus frustrated by executive branch resistance to congressional subpoenas, suggest have suggests Congress should exercise its inherent constitutional authority.²⁷⁵

The fundamental problem with this approach—relying on congressional authority—is that in many interbranch disputes, Congress

²⁷¹ See Bowie & Renan, *supra* note 144, at 76–77 (arguing for a “republican separation of powers” that “look[s] to *statutes* to construction constitutional meaning” and that “embraces an older perspective that ‘Congress must necessarily decide’” the structure of government (quoting *Luther v. Borden*, 48 U.S. (7 How.) 1, 35 (1849)).

²⁷² *Id.* at 76–91.

²⁷³ *Id.*

²⁷⁴ See Josh Chafetz, *Nixon/Trump: Strategies of Judicial Aggrandizement*, 110 GEORGETOWN L.J. 125 (2021).

²⁷⁵ See, e.g., MORTON ROSENBERG, *THE CONSTITUTION PROJECT, WHEN CONGRESS COMES CALLING: A STUDY ON THE PRINCIPLES, PRACTICES, AND PRAGMATICS OF LEGISLATIVE INQUIRY* 24–25 (2017); Kia Rahnama, *Restoring Effective Congressional Oversight: Reform Proposals for the Enforcement of Congressional Subpoenas*, 45 J. LEGIS. 235, 237 (2018); Josh Chafetz, *Congress Can’t Rely on the Courts To Enforce Its Subpoenas. Don’t Panic.*, WASH. POST (Mar. 2, 2020, 12:08 PM), <https://www.washingtonpost.com/outlook/2020/03/02/congress-cant-rely-courts-enforce-its-subpoenas-dont-panic> [<https://perma.cc/DU42-DUJF>]. It is not clear, however, that Congress has the ability to engage in this type of self-help given the executive branch’s constitutional positions. See, e.g., Jonathan David Shaub, *The Executive’s Privilege*, 70 DUKE L.J. 1, 34–55 (2020) (arguing that Congress lacks any real mechanism for enforcing its subpoenas).

lacks any real authority to assert its constitutional view.²⁷⁶ And in those areas, the executive branch has most strenuously pressed its justiciability arguments. If, through self-help or an interpretation of implied constitutional power, the executive branch can gain a constitutional advantage over Congress and then, through justiciability doctrines, preclude any judicial review, then the allocation of constitutional authority between the branches has been decided by the executive branch alone.²⁷⁷ There are of course normative arguments in support of such robust departmentalism and giving primacy to the executive branch on some constitutional questions.²⁷⁸ But those are not the arguments scholars are making against judicial authority. In short, advocating that Congress should, by statute or through inherent authority, resolve separation-of-powers disputes is, in practice, often the same as advocating that the executive branch's constitutional view should prevail.

The normative question is whether to encourage the branches to continue engaging in an escalating game of self-help and constitutional hardball, including by advocating physical confrontations between congressional officers trying to arrest executive branch officers,²⁷⁹ and to reward strategic justiciability arguments *or* whether to accept judicial resolution of fundamental disagreements about disputed constitutional rules, no matter which side it favors, when an interbranch case arises under the Constitution according to established doctrinal principles of justiciability and equity.

²⁷⁶ See Bradley & Morrison, *supra* note 28, at 438–47 (2012).

²⁷⁷ See Tushnet, *supra* note 268, at 468–79, nn.127–31 (noting the role of the Office of Legal Counsel in resolving constitutional issues, recognizing that its analysis is not disinterested but favors the institutional power of the executive branch and the presidency, and justifying that by reference to the concept of self-help: “A President whose staff provides disinterested interpretation of the President’s powers will be at a disadvantage when Congress and the courts interpret the Constitution to advance their institutional interests.”); see also Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1707–23 (2011) (describing the role of the Office of Legal Counsel as the final constitutional arbiter inside the executive branch).

²⁷⁸ See, e.g., Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RESV. L. REV. 905, 924 (1989); Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347 (1994); Paul Brest, *The Conscientious Legislator’s Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975); Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1304 n.1 (2000) (collecting literature).

²⁷⁹ Cf. *Comm. on the Judiciary v. McGahn*, 968 F.3d 755, 776 (D.C. Cir. 2020) (en banc) (finding the prospect of the House dispatching its Sergeant at Arms to arrest an executive branch official “vanishingly slim”).

A coherent theory of interbranch cases would ensure that the institutional advantages of one branch do not allow it to encroach on the authority of the other branch—and then rely selectively on justiciability doctrines to cement that encroachment. There is no principled basis on which to distinguish interbranch cases as a categorical matter from other cases and controversies implicating the separation of powers between the two branches. Although some may advocate a more cabined approach to judicial power altogether, those objections should be addressed on the merits of each individual dispute. Courts should stop dismissing interbranch disputes as raising discrete issues related to judicial authority. They should start treating them like the individual cases and controversies that they are.

III. INTERBRANCH EQUITY

Interbranch disputes arise in equity, seeking declaratory or injunctive relief against the other branch.²⁸⁰ And the traditions of equity—including its approach to “causes of action” and the availability of a remedy—are the only inquiry necessary to determine whether the dispute should be considered an Article III case appropriate for judicial review, or should be left to the political branches. As Professor Richard Fallon has demonstrated, the considerations of equity are often confused with questions of justiciability.²⁸¹ This is particularly true in interbranch cases and controversies, and care should be taken to separate the two. As Professors Samuel Bray and Paul Miller have recently explained, justiciability in legal claims “is a threshold,” that, once crossed, disappears in the considerations of remedies.²⁸² “But in equity, it all connects.”²⁸³ The remedies are tied to the grievance and the courts’ authority to hear the case.

Two historically grounded equitable inquiries—and those inquiries alone—answer the question whether an interbranch dispute should be

²⁸⁰ See, e.g., *McGahn*, 968 F.3d at 768; *Goldwater v. Carter*, 617 F.2d 697, 701 (D.C. Cir. 1979), vacated by 444 U.S. 996.

²⁸¹ Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 VA. L. REV. 633 (2006)

²⁸² Samuel L. Bray & Paul B. Miller, *Getting into Equity*, 97 NOTRE DAME L. REV. 1763, 1797 (2022).

²⁸³ *Id.*

decided by an Article III court.²⁸⁴ These inquiries into (1) the interest asserted and (2) the propriety and availability of a remedy are not only appropriate but also sufficient to decide the proper judicial role in an interbranch case.

The first inquiry into equitable jurisdiction is whether plaintiff authorized to represent what Bray and Professor Aditya Bamzai have called a proprietary interest of their governmental institution that is cognizable in equity.²⁸⁵ This inquiry includes and subsumes the justiciability inquiries into Article III standing and the question of a cause of action.²⁸⁶ The second inquiry into the remedial power addresses whether an equitable remedy is permissible and appropriate given the specific dispute. This familiar and historical equitable inquiry asks whether alternative remedies exist and whether an exercise of judicial remedial power would interfere with the discretion given another governmental institution. This remedial inquiry overlaps in many respects with the modern political question doctrine as currently understood.

If both equitable jurisdiction and an equitable remedy are available and appropriate, the interbranch dispute is a “Case[], in . . . Equity, arising under this Constitution.”²⁸⁷ It is a case to which the judicial power “shall extend.”²⁸⁸ This is not to say that justiciability doctrines are inapplicable to interbranch cases. But these two equitable inquiries subsume the relevant doctrines, such that, if the two equitable conditions are satisfied, the other applicable requirements of justiciability are necessarily satisfied as well. Strategic arguments seeking to preserve constitutional advantage should not be permitted to obscure this straightforward, historical inquiry.

²⁸⁴ See I JOHN NORTON POMEROY: A TREATISE ON EQUITY JURISPRUDENCE § 133 (1918) (noting equity has two distinct requirements: “primary rights, estates, and interests which equity jurisprudence creates and protects and (2) the remedies which it confers”).

²⁸⁵ Aditya Bamzai & Samuel L. Bray, *Debs and the Federal Equity Jurisdiction*, 98 NOTRE DAME L. REV. 699, 704 (2022).

²⁸⁶ See Ernest A. Young, *Standing, Equity, and Injury in Fact*, 97 NOTRE DAME L. REV. 1885, 1886–88 (2022) (recognizing the overlap between standing doctrine and equity and concluding that “[e]quitable grievances . . . look a lot like injury in fact”).

²⁸⁷ U.S. CONST. art. III, § 2.

²⁸⁸ *Id.*

A. Equitable Jurisdiction

The Constitution extends the judicial power to cases in law and in equity,²⁸⁹ and the Judiciary Act of 1789 implemented that jurisdictional grant in part by giving federal courts to hear “all suits of a civil nature at common law or in equity, where . . . the United States are plaintiffs, or petitioners.”²⁹⁰ The Supreme Court has interpreted the statutory authorization to hear cases in equity to confer the “equity jurisdiction . . . of the English Court of Chancery in 1789.”²⁹¹ And it has recognized that the use of equitable jurisdiction to review governmental conduct “reflects a long history of judicial review of illegal executive action, tracing back to England.”²⁹²

The question whether an individual or entity has a right to bring a claim under the equitable jurisdiction of a court as understood in English chancery practice is not a question of whether they have a “cause of action.”²⁹³ In Bray’s and Miller’s words, a cause of action is “not an organizing principle for equity.”²⁹⁴ Instead, for “getting into equity,” the *grievance* claimed is paramount.²⁹⁵ And where a governmental entity is the plaintiff, whether or not the grievance is sufficient depends on the nature of the interest asserted, i.e., whether or not there is a connection between the relief sought and a “proprietary interest” of the government.²⁹⁶ In other words, equitable jurisdiction does not require a showing that a recognized legal “right” has been violated but only that “the interference of the judicial power is necessary to prevent a wrong.”²⁹⁷

As Professor Ernest Young has recently recognized, equity looks at the particular grievance at issue, an inquiry that is “roughly comparable” and

²⁸⁹ *Id.*

²⁹⁰ Judiciary Act of 1789, § 11, 1 Stat. 78, *recodified at* 28 U.S.C. § 1345; *see* Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308 (1999).

²⁹¹ Marshall v. Marshall, 547 U.S. 293, 308 (2006); *see* Grupo Mexicano, 527 U.S. at 318, n.3; Guar. Tr. Co. v. York, 326 U.S. 99, 105 (1945) (“The suits in equity of which the federal courts have had ‘cognizance’ ever since 1789 constituted the body of law which had been transplanted to this country from the English Court of Chancery.”).

²⁹² Armstrong v. Exceptional Child Center, Inc., 575 U.S. 320, 327 (2015).

²⁹³ Bray & Miller, *supra* note 282, at 1.

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ Bamzai & Bray, *supra* note 285, at 737.

²⁹⁷ Patrick Devlin, *Equity, Due Process and the Seventh Amendment: A Commentary on the Zenith Case*, 81 MICH. L. REV. 1571, 1586 (1983).

overlaps with the injury-in-fact requirement of standing.²⁹⁸ Equity courts do not “ask whether there is an ‘equitable cause of action.’”²⁹⁹ Nor should a court hearing an interbranch case in equity. The question is not, for example, whether the House has a cause of action to sue the Attorney General or the Secretary of Health and Human Services. The court should recognize that the House is petitioning for judicial recognition of its grievance with the executive branch in light of its inability to seek relief elsewhere. The court should then apply the traditional equitable inquiry to determine whether an equitable remedy is available and appropriate for the alleged grievance, i.e., the refusal to comply with a subpoena.

As discussed in Part II, the judiciary has resolved numerous constitutional disputes by exercising its equitable powers and without requiring a statutory cause of action.³⁰⁰ In *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, the Court made clear that a “private right of action directly under the Constitution” exists “as a general matter.”³⁰¹ The Supreme Court has also repeatedly recognized both the ability of states and the federal government to “get into equity” to protect various types of institutional, governmental interests without any inquiry into the existence of a cause of action.³⁰²

The question of what constitutes a proprietary interest would have to be addressed in each case.³⁰³ But these past cases and historical practices in equity provide ample precedent on which to build. The fact that a case involved the two branches does not categorically alter the judiciary’s equitable jurisdiction. As the Supreme Court recognized in 1838 in an equitable action by Rhode Island against Massachusetts, if the controversy is “one of an ordinary judicial nature, of frequent occurrence in suits between individuals,” then it falls within the court’s equitable jurisdiction if the dispute is brought to a court of equity.³⁰⁴ With respect to equitable

²⁹⁸ Young, *supra* note 286, at 1903–05.

²⁹⁹ Bray & Miller, *supra* note 282, at 38.

³⁰⁰ See *supra* Part III.C.ii.

³⁰¹ 561 U.S. 477, 491 n.2 (2010).

³⁰² See *supra* Part II.B.

³⁰³ This inquiry would undoubtedly overlap with the inquiry into standing. One lens for examining the interest may be to turn to the powers granted in Article I and Article II—rather than justiciability doctrines arising out of Article III—to determine whether or not a branch has a sufficient proprietary interest. That inquiry would map onto the standing inquiry proposed by Professor Grove, which recognized Congress would likely have standing to enforce its subpoenas. See Grove, *supra* note 172, at 1319–62, n.209.

³⁰⁴ *Rhode Island & Providence Plantations v. Massachusetts*, 37 U.S. (12 Pet.) 657, 736 (1838).

jurisdiction in interbranch disputes, the “nature of the case is everything, the character of the parties nothing.”³⁰⁵

Importantly, this inquiry into proprietary interests would be equally applicable no matter which branch was asserting the interest. If the interests of a grand jury in receiving information are sufficient interests to invoke the Court’s equity jurisdiction—which they were in *United States v. Nixon*—they should be enough when a congressional entity asserts its entitlement to records that are being wrongfully withheld by the executive branch. The focus of this initial equitable inquiry is on the alleged grievance. As Bray and Bamzai acknowledge in their discussion of *In re Debs* and its application in modern suits such as *United States v. Texas*,³⁰⁶ courts will have “to decide which traditional equitable principles to carry forward and develop.”³⁰⁷ But, as they point out, “that is exactly what the Court has been doing in all of its new equity cases.”³⁰⁸ It should do the same in interbranch cases and controversies.

Professor Jim Pfander and Jacob Wertzel’s work on the common law origins of *Ex Parte Young* also supports equitable jurisdiction in interbranch cases and controversies.³⁰⁹ As they demonstrate, traditional common law prerogative writs such as mandamus and prohibition have been incorporated into modern equitable jurisdiction as a mechanism for holding government officials accountable.³¹⁰ *Powell*, as an example, was originally brought, in part, as an mandamus action,³¹¹ and the same is true of the Senate Select Committee’s complaint in its attempt to get the Watergate tapes from Nixon.³¹² The Court in *Powell* explicitly referred to mandamus,

³⁰⁵ *Cohens v. Virginia*, 19 U.S. 264, 393 (1821).

³⁰⁶ *United States v. Texas*, No. 21-50949, 2021 WL 4786458 (5th Cir. Oct. 14, 2021), *cert. grant dismissed*, 142 S. Ct. 522 (2021).

³⁰⁷ Bamzai & Bray, *supra* note 285, at 736.

³⁰⁸ *Id.*

³⁰⁹ James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of Ex parte Young*, 72 STAN. L. REV. 1269 (2020).

³¹⁰ *Id.* at 1277 nn.31–34, 1283 nn.53–58.

³¹¹ See *Powell v. McCormack*, 266 F. Supp. 354, 354 (D.D.C. 1967), *aff’d in part and rev’d in part*, 395 U.S. 486 (1969).

³¹² See Compl. for Declaratory J., Mandatory Inj., and Mandamus, Senate Select Comm. on Presidential Campaign Activities v. Nixon, No. 1593-73 (D.D.C. Aug. 9, 1973), *reprinted in* Presidential Campaign Activities of 1972, S. Res. 60, *Appendix to the Hearings of the Select Committee on Presidential Campaign Activities: Legal Documents Relating to the Select Committee Hearings* 541, 93d Cong. (June 28, 1974).

historically a common law writ, as “equitable relief.”³¹³ The House’s action against McGahn sounds in this mandamus tradition: the suit asks the Court to order a governmental official, or a former one in this case, to abide by his legal duty, one he has no discretion to decline.³¹⁴ Bray and Miller support Pfander and Wertzels account, noting that “[i]f law is not static, the equity that corrects and supplements it cannot be static either.”³¹⁵ Prerogative writs such as mandamus now form the equitable foundation by which the courts hold government officials accountable through *Ex Parte Young* actions based on grievances.³¹⁶ They should perform that same function in equity when a cognizable governmental grievance is at stake.³¹⁷

As discussed in Part II, courts must be careful to separate out the question of representation from the question of grievance. Even if a grievance is cognizable in equity, it must be a grievance belonging to the individual or entity asserting it. The Court has recently been careful to guard against unauthorized representation of government interests by private individuals or unauthorized governmental institutions, typically under the doctrine of standing.³¹⁸ That inquiry should not be confused with an inquiry into whether the grievance is appropriate for getting into equity.

³¹³ *Powell v. McCormack*, 395 U.S. 486, 550 (1969). The Court has (mis)characterized mandamus as a type of relief traditionally available in equity in other cases as well. *See, e.g.,* *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 215 (2002); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993).

³¹⁴ *See* Pfander & Wertzels, *supra* note 309, at 1278 nn.33–34, 1280 nn.45–47.

³¹⁵ Bray & Miller, *supra* note 282, at 38.

³¹⁶ Pfander & Wertzels, *supra* note 309, at 1332–33.

³¹⁷ This fact becomes even more clear when one considers that mandamus could be sought by a relator on behalf of the public as a whole, without any need to demonstrate individualized injury. *See* Pfander & Wertzels, *supra* note 309, at 1310, 1336; *see also* *Union Pac. R.R. Co. v. Hall*, 91 U.S. 343, 355 (1875) (“There is, we think, a decided preponderance of American authority in favor of the doctrine, that private persons may move for a *mandamus* to enforce a public duty, not due to the government as such, without the intervention of the government law-officer.”). One of the primary roles of mandamus was thus to enforce the “public duty” owed by a government official. Pfander & Wertzels, *supra* note 309, at 1316–17. It is somewhat ironic, then, that an equitable action against a government official to compel compliance with a legal duty might be deemed justiciable if a private party suffering particularized injury brings it, *see Powell*, 395 U.S. at 512–18, but *not* if the suit is brought by a representative, congressional entity acting on behalf of the public that elected it.

³¹⁸ *See, e.g.,* *Bethune-Hill v. Va. St. Bd. of Elec.*, 137 S. Ct. 788 (2017); *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (discussing unauthorized representation of government interests).

B. Equitable Remedies

There is no neat division between equitable jurisdiction and equitable remedies. The question of whether a plaintiff can bring a suit in equity is inextricably intertwined with the question of what remedy the plaintiff is seeking.³¹⁹ Indeed, the flexibility and scope of the equity court's remedial power is in many ways the defining characteristic of equity.³²⁰ Because of that flexibility, the difficulty is often defining what limits there are on that expansive remedial power.³²¹ Scholars have criticized the standard equitable requirement that there be "no adequate remedy at law" as not a limiting principle at all but rather subject to manipulation.³²² The majority rejected the dissent's position in *Grupo Mexicano* precisely because it appeared to lack adequate limitations to cabin the equity power.³²³

Grupo Mexicano confirms that history provides limitations on the equity power.³²⁴ And those limitations should be applied to interbranch cases and controversies on a case-by-case basis. The problem occurs when courts, such as the panel in *McGahn*, reject the availability of an equitable remedy outright simply on the basis that the case involves an interbranch suit.

The most relevant historical limitations on the equitable remedial power and prerogative writs such as mandamus is the traditional inability of courts to interfere with discretionary governmental decisions.³²⁵ Courts asked to grant what is now classified as equitable relief—including mandamus—have declined to issue relief if doing so would venture outside the judicial role and involve a question of public policy, or a "political

³¹⁹ Bamzai & Bray, *supra* note 285, at 735.

³²⁰ See Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. Rev. 530, 570 (2016) (describing the flexibility in the scope of equity).

³²¹ Bamzai & Bray, *supra* note 285, at 735 (noting that this problem is particularly true in what they term "nonstatutory suits" in equity).

³²² Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 699 (1990).

³²³ *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 321-22 (1999).

³²⁴ *Id.* at 322.

³²⁵ See *Decatur v. Paulding*, 39 U.S. 497, 516 (1840) ("The interference of the Courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them."); *Marbury v. Madison*, 5 U.S. 137, 175-76 (1803) ("The authority, therefore, given to the supreme court . . . to issue writs of mandamus to public officers, appears not to be warranted by the constitution . . .").

question,” the resolution and execution of which was entrusted to other governmental entities, including a state government.³²⁶

Undertaking this traditional inquiry in the context of an interbranch case can be understood in part as of a kind with recent scholarship re-examining the nature of the political question doctrine. As Professor Scott Dodson has recognized, the modern political question doctrine is better understood as a source of substantive law, one that determines which cases are within the judicial power and which have been allocated to other branches.³²⁷ Understood this way, the political question doctrine is a merits determination—as reflected in historical “political question” doctrine cases catalogued both by Dodson and Grove in which the finding of a political question did not result in dismissal for lack of jurisdiction but was resolved on the merits.³²⁸ “An appeal to the equity jurisdiction” of the Court “is an appeal to the sound discretion which guides the determinations of courts of equity,” and the “essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case.”³²⁹ This flexibility mirrors that of the political question doctrine, which provides for judicial abstention when a remedy would invade the province of another governmental entity or when the question is not suited to judicial resolution.

The equitable inquiry would ask (1) whether the dispute involves disagreement over a constitutional rule suitable for judicial decision that neither branch has the exclusive authority to decide and (2) whether other adequate remedies exist. If the answer to the first question is “yes” and the answer to the second “no,” the court should address the merits of the constitutional dispute, such as the question of whether close presidential

³²⁶ See Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 948 (2011) (stating that in mandamus, courts “exercised independent judgment in determining whether a government official had violated a nondiscretionary duty”); *United States v. First Nat’l City Bank*, 379 U.S. 378, 383 (1965) (“And our review of the injunction as an exercise of the equity power. . . must be in light of the public interest involved.”); see also *Virginian Ry. Co. v. Sys. Fed’n No. 40*, 300 U.S. 515, 551 (1937) (recognizing that “a court may exercise its equity powers, or equivalent mandamus powers . . . to compel courts, boards, or officers to act in a manner with respect to which they may have jurisdiction or authority” but “will not assume to control or guide the exercise of their authority.”).

³²⁷ Dodson, *supra* note 29, at 715-21.

³²⁸ *Id.* at 691-93; Grove, *supra* note 14, at 1909-35.

³²⁹ *Hecht v. Bowles*, 321 U.S. 321, 329 (1944) (quoting *Meredith v. City of Winter Haven*, 320 U.S. 228, 235 (1943)).

advisers enjoy absolute immunity that was at issue in *McGahn* or the question of whether the Senate can rescind its confirmation of a presidential appointee who has already received his commission that was at issue in *Smith*. If the answer to the first question, however, is that the Constitution commits a particular decision to the discretion of one of the branches—such as the decision to deploy troops, terminate a treaty, or assert executive privilege—then the judiciary can issue a decision to that effect *on the merits*, which provides for the clear resolution of an interbranch case just as much as a decision on the merits of the constitutional question itself. Deciding which branch decides in an interbranch dispute is, in effect, resolving the controversy.

The equitable inquiry would thus result in resolution of interbranch cases in one of two ways; either the court would decide on the merits that no equitable remedy is available because final discretion over the decision is vested in one of the branches (rendering that branch's decision final) *or* the court would decide the merits of the constitutional disagreement at issue. Neither side could manipulate justiciability doctrines to prevent the courts from addressing either of these merits questions. And future interactions between the branches would be centered on the judicial foundation provided in the interbranch case rather than left to manipulation and an ever-escalating game of constitutional self-help.

In equity, the concerns unique to interbranch disputes can be addressed on the merits and in light of traditional equitable principles. Currently, they are camouflaged and indirectly discussed within the ill-fitting language of general justiciability doctrines.

C. Illustration

Applying this two-step inquiry to past interbranch cases demonstrates the benefits it would provide by allowing the courts to consider the unique questions raised in interbranch cases directly rather than creating specialized sub-doctrines within justiciability law. Moreover, if courts had been treating interbranch cases as they should have—the same as any other case arising in equity—then there would almost certainly be precedential judicial opinions establishing legal rules to govern interbranch disputes, particularly in cases involving executive privilege and related doctrines. But because the courts have become mired in justiciability, there has not been a

single precedential opinion addressing, for example, the merits of a claim of executive privilege or a related claim such as the absolute testimonial immunity at issue in the *McGahn* litigation.³³⁰

In numerous past interbranch cases, the plaintiffs have almost certainly asserted a propriety interest sufficient to invoke equity jurisdiction. In actions in which a house of Congress has attempted to enforce a subpoena—such as the *McGahn* litigation, the litigation over census documents during the Trump administration, the litigation over President Obama’s assertion of executive privilege related to the Fast and Furious investigation, and the *Miers* litigation, among others—the congressional body is seeking to enforce its proprietary right to information. The Supreme Court has recognized that each house, individually, has the constitutional authority to demand information. And that authority constitutes a proprietary interest that the government body can vindicate in equity. Indeed, even scholars who are generally skeptical of congressional standing acknowledge that a house should have standing to enforce its subpoenas.³³¹ But the inquiry ultimately should not be about standing. It should be about whether the house has a sufficient propriety interest to invoke a court’s equitable jurisdiction. If they do, the standing requirement of Article III is necessarily satisfied.³³²

Similarly, specific constitutional authority given to a governmental entity grants that entity a propriety interest in the exercise of that authority. And the deprivation of such authority would be sufficient to invoke equity jurisdiction seeking a remedy. The *Smith* action—a suit by the Senate to vindicate the alleged violation of its constitutional authority to decide whether to confirm a nominee—involved a sufficient propriety interest.

³³⁰ See Jonathan Shaub, *Executive Privilege is Lawless*, THE ATLANTIC (Jan. 20, 2022), <https://www.theatlantic.com/ideas/archive/2022/01/executive-privilege-does-not-have-to-be-lawless/621315/> [<https://perma.cc/4ZBV-QWTB>] (arguing that the lack of judicial resolution of interbranch disputes over privilege and related doctrines such as testimonial immunity have led to abuse of the doctrine and the inability of any party to point to controlling legal principles).

³³¹ See, e.g., Tara Leigh Grove, *Government Standing and the Fallacy of Institutional Injury*, 167 U. PA. L. REV. 611, 643 (2019) (“Each chamber’s standing to enforce compliance with subpoenas can be justified as an extension of its inherent contempt power.”); Tara Leigh Grove & Neal Devins, *Congress’s (Limited) Power to Represent Itself in Court*, 99 CORNELL L. REV. 571, 627-28 (2014) (“To make this power effective, the House and the Senate must at times seek judicial enforcement of subpoenas and other internal rules.”).

³³² See Young, *supra* note 286, at 1904-10 (“Happily, we have somehow arrived at a basic predicate for standing—injury in fact—that seems basically similar to the grievance necessary for getting into equity.”).

The same is true of *Goldwater*; the Senate asserted a constitutional proprietary interest in opining on the termination of a treaty. A decision that the Senate had no such interest is a *merits* decision about its constitutional authority. It should not be considered a justiciability question. Of course, equity allows a court the flexibility to do as Justice Powell did—delay ultimate resolution until the constitutional dispute solidified into a true impasse.³³³ Other specific constitutional authorities granted to a single house of Congress or to the executive branch—such as the appropriations power,³³⁴ the pardon power, the impeachment power, among others—would also constitute a propriety interest sufficient to invoke equity jurisdiction if the other branch sought to deprive the relevant entity of that power.³³⁵

That does not mean the Court should necessarily resolve all of these disputes. The second step of the traditional inquiry asks whether equitable relief is available and appropriate. In some contexts, equity has long provided such a remedy. For example, there is a long history of equity enforcing discovery of information through, for example, a bill of discovery; thus a house of Congress seeking information is asking for a remedy well-established in equity. It would still need to demonstrate, however, that other remedies are not available.

Other traditional equitable doctrines provide that an equitable court cannot provide relief when a decision on the matter at issue has been committed to the discretion of another entity.³³⁶ Thus, in a case such as *Goldwater* but brought by the entire Senate as an institution, the court might recognize the Senate's proprietary interest in having the case resolved, but decide that, as a matter of constitutional interpretation, the executive branch is vested with the ultimate authority over whether to terminate a

³³³ That approach mirrors the approach the D.C. Circuit took in the *AT&T* case initially—retaining jurisdiction over the case in equity but withholding decision on the core constitutional dispute and remanding with instructions to Congress and the executive branch to attempt to resolve their differences through negotiation and compromise. *United States v. AT&T*, 551 F.2d 384, 394–95 (D.C. Cir. 1976).

³³⁴ See *U. S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53 (D.D.C. 2015) (holding that the House of Representatives has standing to challenge alleged improper appropriation by the executive branch).

³³⁵ See generally Tara Leigh Grove, *Standing Outside of Article III*, 162 U. PA. L. REV. 1311 (2014) (recognizing interests of the branches derived from their constitutional authorities in the context of standing).

³³⁶ See *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 551 (1937) (discussing entities with jurisdiction over equitable controversies in intergovernmental affairs).

treaty. The equity court then has no power to order a remedy, and it would deny relief to the Senate. The result would be the same as *Goldwater* itself—the executive branch wins. But the equitable decision would be a *merits* decision, and the two branches could order their operations and interactions in the future with the understanding that the ultimate discretion lies with the executive branch. Importantly, particularly to departmentalists who disfavor judicial supremacy, an exercise of equitable jurisdiction in a case such as *Goldwater* (but brought by the Senate as a body) would not necessarily mean the court would become the final arbiter of the Treaty Clause. A decision grounded in traditional principles of equity that the Constitution grants the discretion to make that determination to the executive branch would make the president responsible for the decision whether Senate approval is necessary. Instead of obscuring constitutional decisionmaking behind opaque justiciability doctrines, a judicial approach that confronts and addresses the issue in equity squarely answers who has the final authority to interpret the Constitution in a particular context and renders that branch responsible to the voters.

Another instance in which a governmental entity has a proprietary interest sufficient to sue arises when a statute gives the entity such a right. In the litigation involving President Trump's tax returns,³³⁷ for example, the relevant statute gave the Committee on Ways and Means an unqualified right to receive the returns it request from the Treasury Department.³³⁸ The Treasury Department in the Trump Administration refused to provide the returns, citing constitutional and statutory objections to the committee's authority to seek the returns of a sitting president.³³⁹ The committee has a statutory right—a propriety interest—in the tax returns, and it should be able to invoke equity to protect that right. The remedy it seeks is a traditional equitable remedy and the executive branch does not appear to have the final discretion to decide whether a congressional subpoena is valid. Thus, equity jurisdiction and an equitable remedy are appropriate if the court agrees with the committee's arguments on the merits.

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³³⁷ *Comm. on Ways & Means v. U.S. Dep't of Treasury*, 575 F. Supp. 3d 53 (D.D.C. 2021).

³³⁸ 26 U.S.C. § 6103(f)(1).

³³⁹ *See* Congressional Committee's Request for the President's Tax Returns Under 26 U.S.C. § 6103(f), 43 Op. O.L.C. 1 (June 13, 2019) (describing the Treasury's denial of the committee's request).

The holistic equitable inquiry into the grievance asserted and the remedy sought would thus address the various concerns that arise when considering whether an interbranch dispute constitutes a “case” arising under the Constitution. But they do so in a way that provides flexibility for the courts to fashion appropriate remedies in light of the unique concerns raised in these disputes, typically concerns related to one branch infringing on the other’s authority. The historical inquiry subsumes the various justiciability requirements that often frustrate these cases and confound the judiciary. If an interbranch dispute constitutes a “case, in equity . . . arising under the Constitution,” it meets all the necessary justiciability requirements—a sufficient injury exists in the institutional grievance asserted, subject-matter and statutory jurisdiction exists under the Court’s equity jurisdiction, and there is no need for statutory “cause of action.” The Court must consider its equitable power to order an equitable remedy in light of the discretion and textual authority of the other branch. But the case presents a justiciable question falling within the judicial power of Article III.

The judicial power “shall extend” to cases arising in equity, including interbranch cases. Interbranch cases in equity are not all alike. Actions by the House to enforce its subpoenas raise distinct issues in equity from those by the Senate to stop the President’s unilateral termination of a treaty. A suit by the president to halt an impeachment trial would raise distinct issues from a suit by the Senate contesting the appointment of an officer who had not gone through the advice-and-consent process. Equity should be allowed the flexibility to address the need for judicial review and remedy in each individual action on the merits. Interbranch cases and controversies should not be categorically dismissed based on ill-fitting justiciability doctrines that one branch uses strategically to further constitutional advantage.