ORAL ARGUMENT HELD ON OCTOBER 22, 2019

No. 18-5305

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

CAROLYN MALONEY, *et al.*,

Plaintiffs-Appellants,

v.

KATY KALE, Acting Administrator,
General Services Administration,

Defendant-Appellee.

On Appeal from the United States District Court for the District of Columbia, No. 1:17-cv-02308-APM (Hon. Amit P. Mehta)

APPELLANTS' RESPONSE TO PETITION FOR REHEARING EN BANC

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GLOSSARY OF ABBREVIATIONS

Committee: Committee on Oversight and Reform

GSA: General Services Administration

INTRODUCTION

Plaintiffs-Appellants Carolyn Maloney, *et al.*, oppose the Petition for Rehearing En Banc filed by Katy Kale, Acting Administrator, General Services Administration ("GSA"). There is no reason for the full Court to revisit this case. The panel opinion thoroughly addresses and rejects each of the arguments GSA repeats in its petition and is fully consistent with this Court's en banc ruling in *Committee on the Judiciary, U.S. House of Representatives v. McGahn*, 968 F.3d 755 (D.C. Cir. 2020), which covers much of the same ground and rejects the arguments GSA makes here.

The only issue before the Court is whether Plaintiffs have established Article III standing to assert their statutory right to the requested information held by GSA. The statute Plaintiffs invoked, 5 U.S.C. § 2954, provides in relevant part that "[a]n Executive agency, on request of the Committee on Government Operations of the House of Representatives [now the Committee on Oversight and Reform], or any seven members thereof, … shall submit any information requested of it relating to any matter within the jurisdiction of the committee." The statute was enacted in 1928 in the wake of the Teapot Dome scandal when the political branches of government were in the hands of a single

political party. Congress provided this information-gathering authority to a critical mass of members to ensure active and robust oversight. For that reason, Section 2954 empowers not only Committee chairs, but a critical mass of Committee members—minority *or* majority—to engage in oversight without the participation, or permission, of their Committee colleagues.

Plaintiffs are members of the House Oversight and Reform Committee. They joined together in late 2016 and early 2017 to request records from GSA relating to the agency's oversight of the lease GSA entered into with the Trump Old Post Office LLC, a company formed to develop the Old Post Office into the Trump International Hotel. GSA's lease barred any federal elected official from participating in or benefiting from the lease. Before President Trump's inauguration, GSA said that the President would have to divest his interest in the hotel; after inauguration, GSA reversed course. GSA's failure to enforce the lease terms prompted Plaintiffs' concerns that legislation might be needed to ensure that elected federal officials could not benefit from leases of government property. Plaintiffs' Section 2954 requests focused

on the propriety of GSA's actions regarding the GSA lease with President Trump's company.

Plaintiffs made multiple unsuccessful efforts to engage with GSA, and in July 2017 GSA denied their requests. Plaintiffs filed suit in November 2017. Although more than three years have elapsed, GSA has refused to provide Plaintiffs with information pursuant to Section 2954. GSA now asserts that it "produced large volumes of documents" and "provided plaintiffs (through the Committee) with much of the information they had requested," *not* pursuant to Plaintiffs' Section 2954 request, but under the Freedom of Information Act (FOIA). Pet. 1, 5. Although GSA sent the Committee "approximately 15,000 pages" of documents, "the vast majority of those documents concern routine hotel administration activities such as fire alarm testing, contractor repair work, and art installations," and 9,000 of those documents were "previously produced" to a different House Committee pursuant to a different request. *See* Letter from GSA to the Clerk (Feb. 27, 2021), ("GSA Letter"), Exh. E at 2–3, Exh. C at 1. As GSA acknowledged when it called these facts to the Court's attention, GSA's partial production "does not … affect any of the issues in this appeal." GSA Letter at 1.

GSA's petition seeks rehearing on two grounds: First, GSA repeats its arguments, rejected by the panel, that Plaintiffs suffered no "personal" injury sufficient to establish Article III standing; second, GSA contends that Section 2954 is unconstitutional if it confers standing on Plaintiffs. Neither claim justifies rehearing.

I. Plaintiffs Have Suffered "Personal Injury."

GSA raises several arguments that coalesce around one point, namely, that the right of access to executive agency information Section 2954 confers on Plaintiffs cannot be a "personal" right sufficient to establish Article III standing. GSA and the panel dissent argue that the informational right granted by Section 2954 is an "institutional" right belonging to the House, not to Plaintiffs, and thus that Plaintiffs are asserting an "institutional" injury, not a "personal" one. That argument is wrong.

A. As the panel opinion explains, "in the context of legislator lawsuits," an injury is "'personal' if it harms the legal rights of the individual legislator, as distinct from injuries to the institution in which they work or to legislators as a body." A19 (citations omitted). Both GSA and the dissent, asserting that this case is no different from *Raines v.*

Byrd, 521 U.S. 811 (1997), err by "adopting a sweeping definition of institutional injury that would cut out of Article III even those individualized and particularized injuries experienced by a single legislator alone." A20. Whereas the institutional injury alleged in *Raines* "'damage[d] all Members of Congress … equally,'" the "injury [Plaintiffs] claim—the denial of information to which they as individual legislators are statutorily entitled—befell them and only them." A22 (quoting *Raines*, 521 U.S. at 821).

Congress in "Section 2954 vested [Plaintiffs] specially and particularly with the right to obtain information"—a right not conferred on the Committee as a body, the House, or the Senate. *Id.* That right is uniquely theirs. For that reason, Plaintiffs' Section 2954 request "did not and could not, given their non-majority status, constitute the type of 'legislative … act' that might warrant treating them differently from private plaintiffs for standing purposes." *Id.* (citations omitted).[1]

[1] The dissent agrees that *Raines* reaffirmed the holding in *Coleman v. Miller*, 307 U.S. 433 (1939), that legislators whose votes are "completely nullified" have Article III standing to sue, A38 n.3 (quotations omitted), and *Coleman* proves Plaintiffs' point: Article III standing requires a "personal" injury. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016). The plaintiffs in *Coleman* had standing because they

B. The panel opinion follows *McGahn*'s lead in concluding that Plaintiffs' injury is "individualized" and "particularized," A20, because it affects them "in a personal and individual way," A17; *accord McGahn*, 968 F.3d at 766–67 (quoting *Spokeo*, 136 S. Ct. at 1548). Oversight Committee members who joined in the Section 2954 request invoked their statutory right to the information withheld by GSA. Plaintiffs' injury thus is not "undifferentiated" and is not "common to all members of the public," let alone to other members of the House or even other members of the Oversight Committee who did not join in Plaintiffs' request. *McGahn*, 968 F.3d at 767 (quoting *United States v. Richardson*, 418 U.S. 166, 177 (1974)). Section 2954 grants an informational right to a specific group of members meeting certain qualifications who invoke that right. GSA's denial of that right constitutes a particularized injury that is "specific to" Plaintiffs. *See id.* at 767.

As in *McGahn*, the panel opinion emphasizes that "[t]here is no 'mismatch' here" because "the body whose informational and investigative prerogatives have been infringed" (*i.e.*, Committee

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suffered a *personal* injury—nullification of their votes—that was incident to their status as legislators. Plaintiffs' standing here is no different.

members who exercised their Section 2954 right of access to executive agency information) is the "body to which the relevant" authority was assigned. *Id.* (quoting *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953 (2019)); A21–24. Because Plaintiffs made the request, they have a distinctive legal entitlement to receive the requested information from GSA. Other members of the Committee not party to the Section 2954 request have not suffered that particularized informational injury, nor has the House or Congress. Plaintiffs are the ones "whose informational and investigative prerogatives have been infringed" because they are the ones "authorized by" law to seek the information. *See McGahn*, 968 F.3d at 767.

Accordingly, GSA's "[d]enial of" information properly requested under Section 2954 injures Plaintiffs personally because they are "the distinctly injured part[ies]." *Id.* at 767–68. *McGahn* thus confirms that Plaintiffs have standing to bring this action to compel GSA's compliance with their Section 2954 request.

C. The panel opinion applies *McGahn*'s holding that plaintiffs denied information to which they are legally entitled suffer a concrete, particularized, personal injury. *See id.* at 766–68. Relying on *FEC v.*

Akins, 524 U.S. 11 (1998), and *Public Citizen v. DOJ*, 491 U.S. 440 (1989), *McGahn* embraces "the principle that the denial of information to which the plaintiff claims to be entitled by law establishes a quintessential injury in fact." 968 F.3d at 766. The panel opinion applies the same analysis. A13–17.

GSA and the dissent argue that the panel was wrong to draw an analogy to other statutes conferring informational rights because suits to enforce those rights are "brought by private parties, not government officials, and thus involve[] injuries in which the plaintiffs (having no official, governmental interests) ha[ve] only a personal stake." Pet. 13–14 (quotation omitted). That argument fails to recognize a key point: *McGahn* relied on *Akins* and *Public Citizen* in holding that a congressional committee—not a "private part[y]," Pet. 13—suffered a "personal" informational injury. *McGahn*, 968 F.3d at 767. *McGahn* thus affirms the standing of plaintiffs who have been denied information to which they are "legally entitled," *id.* at 766, when that legal entitlement is held in an official capacity and is not shared by "private parties." McGahn's refusal to testify "denied the Committee something to which it alleges it is entitled by law," *id.* at 765, and thereby injured it "'in a

personal and individual way,'" *id.* at 766 (quoting *Spokeo*, 136 S. Ct. at 1548).

As the panel opinion drives home, Plaintiffs stand on even firmer ground. Unlike in *McGahn,* Plaintiffs' entitlement to information does not come from a House Rule, but from a statute enacted by Congress and signed into law by the President. A4, A27. Section 2954 thus authorizes the Committee *and* a critical mass of Committee members acting together to wield a specific tool in the "power of inquiry." *See McGrain v. Daugherty*, 273 U.S. 135, 174 (1927). And GSA does not question that Section 2954 imposes on it a legal obligation to produce records. By refusing to provide information in response to Plaintiffs' request, GSA has denied Plaintiffs something to which they are personally "entitled by law." As the Judiciary Committee did in *McGahn*, Plaintiffs have standing to enforce that right.

GSA's contrary position is a thinly veiled attack on the Court's en banc decision in *McGahn*. Indeed, GSA acknowledges that its real position is that *no* "legislative suits to compel disclosure of Executive Branch information" assert injuries cognizable under Article III. Pet. 8,

n.4. GSA's fundamental disagreement with a recent en banc decision of this Court provides no basis for yet another en banc rehearing.

D. The panel opinion also lays bare the flaws in GSA's invocation of the dissent's argument that Plaintiffs' injuries are not "personal" because Section 2954 is nothing more than a "practical tool" that members can use to "advanc[e] the work of the Committee." Pet. 13 (quoting A42). That argument disregards "Section 2954's express conferral of its informational right on a *minority* of committee members," which enables members to engage in active and robust oversight even when the Committee itself takes no action. A27 (emphasis in original). For that reason, "Section 2954's plain terms invest the informational right in legislators, not the legislature," A28, and thus Plaintiffs have standing to assert their "personal" informational injury.

II. Section 2954 Does Not Disturb the Separation of Powers.

GSA makes two arguments against judicial enforcement of Section 2954. To start, GSA makes the sweeping claim that Congress's power under Article I of the Constitution is too feeble to enable it to provide statutory informational rights to individual members of Congress. As a fallback, GSA contends that judicial intervention in access to information

disputes between the political branches would violate the separation of powers. GSA is wrong on both counts, and there is no need for this Court to revisit these issues.

A. GSA asserts that, because the legislative power is vested in Congress and not in any one individual, "[t]he Constitution would not permit individual members to enforce a 'personal' right of oversight even if Congress enacted a statute that said so." Pet. 11. GSA's argument is doubly flawed. First, GSA misapprehends the nature of Section 2954: the statute does not take the institutional right of oversight that belongs to the House and place it unfettered in the hands of individual members of Congress. Section 2954 creates a specific informational right that belongs only to select members; therefore, the right is limited and personal as to those members, and the injury from the deprivation of that specific informational right is personal for purposes of standing.

Second, GSA's argument is based on what GSA believes is absent in Article I of the Constitution, not on what Article I actually says. Article I, Section 1, assigns "All legislative Power" to Congress, and the Necessary and Proper Clause gives Congress wide latitude to enact legislation to provide Congress the tools and capabilities it needs to carry

out its information-gathering functions. U.S. Const. art. I, § 8, cl. 18. *McGrain* drives home that the Necessary and Proper Clause bestows broad authority on Congress to grant to its members statutory information rights, including the power to compel Executive Branch compliance. 273 U.S. at 160–63. As the Court explained, "before and when the Constitution was framed and adopted … 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." *Id.* at 175. *McGrain* emphasizes that Congress's "power of inquiry" must have an "enforcing process" because "some means of compulsion are essential to obtain what is needed." *Id.*

The panel opinion correctly recognizes that Congress's ability to demand information from the Executive Branch and to create legally enforceable entitlements to information is not limited to the subpoena power, A4–5, contrary to GSA's and the dissent's suggestion. *McGahn* stresses that "'[u]nless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served.'" 968 F.3d at 765 (quoting *Trump v. Mazars USA, LLP*, 140

S. Ct. 2019, 2033 (2020)). For that reason, "the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." *Id.* at 764 (quoting *McGrain*, 273 U.S. at 174). That power is "a long-recognized right, based in the Constitution." *Id.* at 765.

GSA and the dissent suggest that the power of inquiry is a lesser power because it is "auxiliary" to Congress's power to legislate. Pet. 11; A39–40. To the contrary, "[t]he scope of the power of inquiry … is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution." *Barenblatt v. United States*, 360 U.S. 109, 11 (1959). For that reason, when Congress confers on individual legislators a personal, legally protected interest grounded in the exercise of either the legislative power itself (*e.g.*, the right not to have a vote nullified, as in *Coleman*), or the accompanying investigative power (as here), the deprivation of that legally protected right is sufficient to confer standing.

B. GSA and the dissent predict that acknowledging Plaintiffs' standing will infringe on executive authority by opening a Pandora's Box of obstructionist Section 2954 requests by "errant" minority Committee members. Pet. 15–16; A45. Congress was doubtlessly aware of the

possibility that Section 2954 might be misused, but nonetheless enacted the statute and the President signed it into law. History confirms the wisdom of the Political Branches' choice. The statute is over ninety years old; it has been invoked often, and there is no evidence that it has been used to harass or distract Executive Branch officials. *See* Appellants' Opening Br. at 19–21; JA 117–45.[2]

Ironically, GSA's own petition explains why such abuse is unlikely. The petition begins by listing the many safeguards Congress built into Section 2954 that would prevent distraction and harassment of the Executive Branch: "The statutory ability to request Executive Branch information arises only because of one's Committee membership; lasts only as long as that membership endures; depends on the concurrence of

[2] As GSA acknowledges, there has been litigation under Section 2954 in rare instances where agencies resisted requests and the Political Branches were unable to resolve the disagreement. In *Waxman v. Evans*, 2002 WL 32377615 (C.D. Cal. Jan. 18, 2002), the congressional plaintiffs prevailed in the district court. The decision was vacated as moot after the Ninth Circuit ruled in *Carter v. Dep't of Commerce*, 307 F.3d 1084 (9th Cir. 2002), that the records at issue were subject to disclosure under FOIA. *See* No. 1:17-civ-02308, ECF-9 (9th Cir. Jan. 9, 2003) (unpublished order). In *Waxman v. Thompson*, 2006 WL 8432224 (C.D. Cal. July 24, 2006), the district court ruled for the government, but again disclosure of the records at issue mooted the appeal.

at least six like-minded members; and is constrained by (*inter alia*) the Committee's substantive jurisdiction." Pet. 2.

If Section 2954 were abused in future cases, not yet before the court, then Congress could amend or repeal the statute and would have a strong incentive to do so, especially if the abuse came at the hand of "errant" members acting "contrary to the will of their committee, the will of their party, and the will of the House." Pet. 15 (quoting A45). The Political Branches, not the Courts, should decide through the legislative process whether the statute strikes the appropriate balance.[3]

C. The panel opinion explains why recognizing Plaintiffs' standing advances the separation of powers: "When the Political Branches duly enact a statute that confers a right, the impairment of which courts have long recognized to be an Article III injury, proper adherence to the limited

[3] On this point, GSA cites an *amicus* brief filed by the Bipartisan Legal Advisory Group of the U.S. House of Representatives in *Waxman v. Thompson*, *supra*, which GSA refers to as the "House brief." Pet. 15. That brief, however, was signed only by Republican members, then in the majority. JA 32 n.1. A separate *amicus* brief filed by the House Democratic Leadership explained why the concerns raised in the "House brief" were off-target and could be addressed legislatively if Congress chose to do so. *See* JA 146–89.

constitutional role of the federal courts favors judicial respect for and recognition of that injury." A33.

McGahn explains how the availability of judicial intervention in disputes like this one reduces, not exacerbates, friction between the branches. 968 F.3d at 776–78. This Court's precedents have recognized the judicial enforceability of congressional information demands for decades, *see id.*, and the resulting possibility of litigation is part of the "*status quo ante*" that motivates the Executive Branch to negotiate, rather than refuse outright, valid, legally binding requests for information from legislators, *id.* at 778. The Executive Branch's unwillingness to concede that congressional subpoenas are judicially enforceable, notwithstanding *McGahn*, *see* Pet. 8 n.4, underscores the importance of potential judicial involvement in preventing interbranch impasses.

That courts have not featured prominently in the history of information exchanges between the other branches reflects "the history of Presidential cooperation," which "has meant that there have been few occasions necessitating resort to the courts." *McGahn*, 968 F.3d at 777. Removing the possibility of judicial intervention, on the other hand,

would also erode the Executive Branch's incentive to negotiate, and therefore curtail or nullify Plaintiffs' statutory right to information in GSA's possession. GSA's intransigence in this case bears out that concern. As in *McGahn*, the threat of an "enforcement lawsuit may be an essential tool in keeping [GSA] at the negotiating table." *Id.* at 771. Entertaining Plaintiffs' lawsuit thus "safeguard[s] the separation of powers" by "ensur[ing] the continuation of the 'established practice' of accommodation." *Id.* at 778.

That GSA, like McGahn, has not challenged the validity of Plaintiffs' requests or asserted any constitutional objection to producing the records sought reinforces the absence of any threat to separation of powers if the courts play their normal role in resolving legal disputes involving concrete informational injuries. As in *McGahn*, enforcing Plaintiffs' request for records poses "minimal" risks to the judiciary because it does not require weighing in on any "political dispute" between the branches or on a direct clash between Congress and the President; it only involves applying a law establishing Plaintiffs' entitlement to information. *McGahn*, 968 F.3d at 773–74.

Although *McGahn* understandably focuses on subpoena enforcement, the Court's separation-of-powers analysis applies with equal force to Congress's other information-gathering tools. These include, most notably, statutes that require Executive Branch officials to submit information to Congress, congressional committees, or members thereof. As the Supreme Court noted in *Nixon v. Administrator of General Services*, "there is abundant statutory precedent for the regulation and mandatory disclosure of documents in the possession of the Executive Branch." 433 U.S. 425, 445 (1977).

The word "mandatory" is not surplusage. It conveys the point that when Congress enacts statutes like Section 2954 to impose a duty on an agency to provide information, Congress expects the agency to comply. Indeed, courts "'ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command.'" *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) (quoting *Bowen v. Mich. Acad. of Family Physicians,* 476 U.S. 667, 681 (1986)).

If GSA's arguments were correct, Congress could pass a dozen new laws requiring production of information, and each one could be ignored—just as GSA is ignoring its obligations under Section 2954. Holding that Section 2954 requesters lack standing to seek redress for violations will deprive Plaintiffs in this case of any effective remedy for the deprivation of information to which they are entitled by law. *See* A33. For Plaintiffs, it is judicial enforcement or nothing.

CONCLUSION

This Court should deny GSA's petition for rehearing en banc.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation set forth in this Court's order of March 18, 2021, because it contains 3,688 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in a proportionally spaced typeface using word Century Schoolbook type-style with a 14 point type.

/s/ David C. Vladeck
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CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2021, a copy of the foregoing was served via the Court's ECF system on all counsel of record.

/s/ David C. Vladeck
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