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.

EMILY W. MURPHY, 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)

SUPPLEMENTAL BRIEF OF APPELLANTS CAROLYN MALONEY, *et al.*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Other Authorities

GLOSSARY OF ABBREVIATIONS

This brief contains no abbreviations or acronyms.

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs-appellants Carolyn Maloney, *et al.*, submit this brief in response to this Court's January 21, 2020, order requesting supplemental briefing on questions relating to the role that political parties play in appointing and removing members of standing committees of the House of Representatives. The House Rules and precedents cited in the Court's order are consistent with, and reinforce, plaintiffs' core claim that the rights conferred on members of the House Committee on Oversight and Government Reform ("Oversight Committee") by 5 U.S.C. § 2954 are "personal" and that the deprivation of those rights constitutes both "personal" and "institutional" injury in fact, as those terms are used in *Raines v. Byrd*, 521 U.S. 811 (1997).

The first rule cited in the Court's order, House Rule X, clause 5(a)(1), sets forth a two-step process for appointing members to the House's standing committees. Each party's caucus selects members to serve on the committees, and Congress then votes to ratify the parties' selections. Appointments to a standing committee are for full two-year terms.

The second rule cited in the Court's order, House Rule X, clause 5(b), provides for automatic removal of a member of a standing committee when that member ceases to be a member of the "party caucus," almost invariably to switch parties. The House adopted the current Rule in 1983. *See* Precedents of the U.S. House of Representatives, H.R. Doc. 115-62, Vol. 1, Ch. 3, § 8, at 299–300 (2017). The Rule is an anti-dilution provision that ensures maintenance of an appropriate party balance on each committee. Once a member is removed, the "House *shall* fill a vacancy on a standing committee by election on the nomination of the respective party caucus or conference." *See* House Rule X, clause 5(e) (emphasis added). When a member is removed and replaced after switching party affiliation, the member, not the party, initiates the action leading to removal. *See* H.R. Doc. 115-62, Vol. 1, Ch. 3, § 8, at 299–300 & n.28 (examples of party switching and resignations from the House); *see also id*. at 309–10 (documenting party switch by Rep. Griffith).

The Court's second question also asks the parties to comment on "[p]recedents under which parties alter Committee membership as a form of discipline." The Court's order cites a passage in Deschler's Precedents, H.R. Doc. 94-661, Vol. 1, Ch. 3, § 9.5 (1994), which states that

the caucuses' committee assignment power has occasionally been used for such purposes. The only examples of such action by the caucuses cited in the precedents, however, involved three Democratic Congressmen who were stripped of their committee *seniority*, but not their committee *assignments*, because of their support for Republican presidential candidates (two supported Goldwater in 1964 and one supported Nixon in 1968). None of the members involved served on the Oversight Committee. *See id.*

Taken together, the House Rules and precedents cited by the Court make three points: (i) Party caucuses select members to serve on standing committees, and the House must approve the appointments. (ii) Members are automatically removed from standing committees when they "cease to be a member of a particular party caucus." (iii) To ensure a steady-state party balance on standing committees, the House replaces members so removed from standing committees by caucus nomination and a vote of the House.

These points support plaintiffs' argument that they have standing to enforce their rights under Section 2954. *First*, they underscore that the right Section 2954 confers on Committee members is a "personal" right

within the meaning of *Raines*. That the right is conferred by the actions of others, and may be lost under certain circumstances, does not suggest otherwise. What matters is that House members know that an appointment to the Oversight Committee comes with the power delegated to Committee members by Section 2954. Selection is not random; the party caucus makes the determination, which the House must ratify. The selection process confirms that the parties and the House consciously and carefully delegate Section 2954 authority to members whom they trust to exercise that power wisely. An agency's refusal to comply with a Section 2954 request for information constitutes a "personal" injury under *Raines* to the Committee members who made the request.

Second, the injury is also "institutional" under *Raines* because Section 2954's core purpose is to gather information in furtherance of the House's oversight function. The plaintiffs here—like the plaintiffs in *Coleman v. Miller*, 307 U.S. 443 (1939)—are the only legislators who may sue to vindicate the institutional interests of the House and Congress, because they alone have suffered "personal" injury as a result of respondent's denial. Although the Court's questions suggest that, under

Raines, the rights conferred by Section 2954 must be either "personal" *or* "institutional," *Raines* is best understood to hold that legislator plaintiffs seeking to vindicate an institutional injury must also have sustained injury in a way that is personal to them, not that the two categories are mutually exclusive. *See* 521 U.S. at 821–22; Pl. Br. 43–53.

Third, the House Rules cited by the Court underscore the importance of party balance on standing committees like the Oversight Committee. House Rules safeguard that balance. These Rules are consistent with the longstanding view that Congress enacted Section 2954 for two related reasons: to give the Committee swift and certain access to information in the hands of executive agencies, and to provide a tool for minority members to engage in oversight without the cooperation of the majority.

I. House Rule X, clause 5(a)(1), confirms that the right of an Oversight Committee member to demand information pursuant Section 2954 is personal and that the denial of a Section 2954 request is both a personal and an institutional injury as those terms are used in *Raines v. Byrd*.

A. Personal Injury

Only those members of the House who serve on the Oversight Committee possess a statutory right to demand and receive information

from executive agencies. The composition of the Oversight Committee is a subset of the members of the House—but not a randomly selected one. Pursuant to House Rule X, clause 5(a)(1), Oversight Committee members are hand-selected by their peers in their party's caucus and voted on by the House of Representatives.[1] Each party's caucus and the House as a whole thus determine which members will serve on the Oversight Committee and, by extension, which members will have the right to request information from executive agencies under Section 2954.[2]

Raines holds that an injury is "personal" to individuals who "have been deprived of something to which they *personally* are entitled—such as their seats as Members of Congress after their constituents had elected *them*." 521 U.S. at 821 (emphasis in *Raines*). And *Raines* makes clear what a "personal" right is not: A "personal" right, in the legislative context, is not one that belongs collectively to all members of a legislative

[1] Third party committee assignments, though rare, are determined by the majority party through the same two-step process. H.R. Doc. 94-661, Vol. 1, Ch. 3, § 9.4, at 182.

[2] This two-step appointment process was designed in 1910 to give House members a say in committee appointments and democratize the committee assignment process. Prior to that time, assigning members to committees was the sole responsibility of the Speaker of the House. H.R. Doc. 115-62, Vol. 1, Ch. 3, § 8, at 296.

body; it must be held by specific, identifiable members. *See id.* For example, *Raines* indicates that a legislator's right to ensure that his or her vote is effective is a right that belongs to individual legislators, not to the legislature as a whole. *Id.* at 821-22. The right to vote is incident to a legislator's office; it is a right that the legislator alone may exercise, and thus the right is a "personal" one.

Rights conferred by Section 2954 are no different. The right to join a Section 2954 request is a statutory right incident to a member's election by his or her peers to the Oversight Committee and belongs to that member. House members who do not serve on the Oversight Committee have no authority to make a Section 2954 request. The House entrusts only plaintiffs and their fellow Oversight Committee members to participate directly in the Committee's broad oversight activities, including by determining when a demand for information under Section 2954 is appropriate. The right to demand information thus belongs only to members of the Oversight Committee designated in the manner provided for by the House Rules, and only to those House Oversight Committee members who join with at least six others in making a Section 2954 request. It too, therefore, is a "personal" right.

That members do not acquire that right until appointed to the Oversight Committee through the Rule X process, and that they may lose the right under specified circumstances, does not mean that it is not personal to them while they are empowered to exercise it, or that they suffer no personal injury when it is denied. Nor does the right to demand information under Section 2954 "run[] … with the Member's seat," a factor that *Raines* says is sometimes indicative of a non-personal right. *Id.* at 821. An Oversight Committee member who leaves that committee (for example, by switching parties and losing committee membership pursuant to Rule X, clause 5(b)) loses the right, but not his or her seat in the House. And when an agency denies a request for information under Section 2954, only members who joined in the request suffer personal injury. *See also Fed. Election Comm'n v. Akins*, 524 U.S. 11, 21 (1998) ("[A] plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute.").

B. Institutional Injury

The denial of information properly sought under Section 2954 also constitutes an "institutional" injury as *Raines* uses the term. Although *Raines* does not define "institutional" injury, it clearly contemplates that

an "institutional" injury is one that, like the allegedly illegal nullification of votes of certain Kansas legislators in *Coleman*, damages or threatens to damage the institutional body of which the personally injured legislators are a part. *Raines*, 521 U.S. at 821–22 (citing *Coleman*, 307 U.S. at 438).

Access to information is essential for the House to perform its role in the constitutional system of checks and balances, as the Court in *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927), drove home. An agency's refusal to comply with a request hinders the Oversight Committee's ability to do its job effectively. This injury also impedes the House and Congress's constitutional mission of drafting and voting on proposed legislation. The deprivation of information that a statute—enacted by Congress and signed into law by the President—mandates be disclosed not only causes institutional injury to the Committee, the House, and Congress, but also threatens to erode Congress's ability to perform its constitutional responsibility to ensure that executive agencies faithfully execute the law.

Raines confirms that the injury here is not only "institutional" but also concretely felt by plaintiffs—the legislators who made the

Section 2954 request for information at issue. Vote nullification, *Raines* and *Coleman* make clear, is an institutional injury. *Raines* also makes clear that only the legislators who alleged that their votes were nullified, and not their colleagues, have standing to seek redress in court because the institutional injury also injures them, and only them, personally. 521 U.S. at 821–22.

Likewise, only Oversight Committee members who are designated pursuant to the House Rules to exercise the institution's oversight powers under Section 2954 and who joined in the Section 2954 request "have a plain, direct, and adequate interest in" enforcing compliance with their request. *Id.* (quoting *Coleman*, 307 U.S. at 438). Like the plaintiffs in *Coleman*, plaintiffs here "have alleged that they [signed] a specific [request for information], that there were sufficient [signatories] to [effectuate the request], and that the [request] was nonetheless [denied]." *Id.* at 824 (describing why the *Coleman* plaintiffs personally had standing to redress an institutional injury). Only plaintiffs—not other members of the House—therefore have standing to redress the institutional injury caused by respondent's denial of their Section 2954 request.

II. House rules protect the rights of minority party members.

As noted above, House Rule X, clauses 5(b) and (e), work together to ensure that the removal of a member of a standing committee, for party switching or any other reason, prompts the replacement of that member through the appointment process spelled out in clause (5)(a). This anti-dilution protection ensures that the loss of a minority committee member will not undermine the ability of minority members on the Oversight Committee to exercise their right to make requests under Section 2954.

These rules are relevant here because Section 2954 reflects Congress's judgment that partisanship might undermine Congress's core oversight function. Section 2954's delegation of the right to make requests not just to the Committee, but also to seven or more Oversight Committee members, demonstrates Congress's judgment that entrusting the authority to demand information under Section 2954 only to the majority would be shortsighted. After all, Congress enacted Section 2954 in 1928, while the repercussions of Teapot Dome—a scandal that unfolded when the same party controlled the Presidency and both Houses of Congress—were still reverberating. The Supreme Court's 1927 opinion in *McGrain* demonstrates that Congress's oversight was integral in

implicating two Cabinet Secretaries, the Secretary of the Interior and the Attorney General, in the scandal. And *McGrain* quite emphatically holds that Congress is entitled to exercise its authority under Article I of the Constitution to allocate its "power of inquiry, with enforcing process," as it sees fit. 273 U.S. at 175. Section 2954 allocates that power to both the Committee and seven or more of its members. This Court should uphold Congress's judgment and rule that Section 2954 means what it says: that an executive agency "shall" comply with proper requests made pursuant to the statute.

CONCLUSION

For the reasons set out above and in plaintiffs' prior submissions, this Court should reverse the district court's judgment and remand the case to the district court for further proceedings.

Respectfully submitted,

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January 31, 2020

* Counsel wish to acknowledge the assistance of Georgetown University Law Center students Alexis Christensen and Christopher Felton in the preparation of this brief.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation set forth in this Court's January 21, 2020, supplemental briefing order because it contains 2,355 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/ Scott L. Nelson
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CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2020, a copy of the foregoing was served via the Court's ECF system on all counsel of record.

/s/ Scott L. Nelson
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