SUPREME COURT OF THE UNITED STATES

RS_HUDSON ET AL. *v.* HOUSE OF REPRESENTATIVES

ON PETITION FOR WRIT OF REVIEW TO THE UNITED STATES GOVERNMENT

No. 07–20. Decided June 25, 2019

The petition for a writ of review is denied.

JUSTICE BORK, with whom JUSTICE CHASE joins, concurring in the denial of review.

I concur in the denial of review in light of the fact that the contested subpoenas have been unilaterally rescinded by the House, making any intervention by this Court unnecessary. See Supp. Record, Doc. 5 (comment of PITNEY, J.), available at https://secure.link/LabTkwzf. I write separately to note that this Court's denial should not be interpreted as endorsing the initial legality of those subpoenas. To the contrary, in my view, those subpoenas were constitutionally problematic. In a future case, this Court may be called on to address the constitutionality of subpoenas issued to judicial officers in response to their rulings. At that time, this opinion may prove helpful in discerning the law.

I

The Constitution does not expressly grant Congress a "subpoena" power; that power has only been *implied* from the Necessary and Proper Clause. *McGrain* v. *Daugherty*, 273 U. S. 135, 161 (1927). To ensure that we do not allow *implication* to override the core constitutional design "of a government of limited powers," *NFIB* v. *Sebelius*, 567 U. S. 519, 552 (2012) (opinion of Roberts, C. J.), we must enforce appropriate boundaries on the scope of Congress' ability to issue subpoenas. From that premise, this Court has allowed only subpoenas which are "related to, and in furtherance of, a legitimate task of Congress." *Watkins* v.

United States, 354 U. S. 178, 187 (1957). Indeed, a "congressional investigation . . . is invalid if unrelated to any legislative purpose," because it is "beyond the powers conferred upon Congress by the Constitution." *Id.*, at 198. Consideration under this standard suggests to me that ruling-responsive subpoenas similar to those challenged in this case are unconstitutional.

I can think of only three possible legislative justifications for a ruling-responsive subpoena. None ultimately pan out.

A

First, it might be argued that a ruling-responsive subpoena is valid pursuant to Congress' lawmaking role. After all, judicial rulings typically rest on the application of Acts of Congress. Thus, Congress might subpoena a judge to gather insight into how they interpreted an Act of Congress a certain way so that Congress can make an informed decision on how to possibly change that law going forward.

This justification, though it does have its merits, is flawed. A judge's written opinion will usually set forth the full explanation their court has elected to offer for its legal conclusions, including the process going into its interpretation of a statute. The opinion of a court "rationalizes issues, explains facts, and settles disputes."[1] Indeed, the very purpose of an opinion is to "make a judgment credible to a diverse audience of readers."[2] In some situations, a court will choose to provide an extensive explanation of its conclusions; in others, it may not. Context dictates the appropriate scope of the explanation.[3] Making this assessment is a fundamental aspect of the judicial power vested in the various courts of our Nation; "judges command no army and control no purse," but certainly have

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[1] Curtin, Opinion Writing, 21 Georgetown J. L. E. 237, 237–38 (2008).

[2] Stevenson, Writing Effective Opinions, 59 Judicature 134, 134 (1975).

[3] Lebovits, The Weight of Authority, 76 NYSBA Journal 64, 64, 60–61 (2004).

charge of their "words."[4]

Congress lacks a legitimate legislative purpose in insisting a judge explain their interpretive process beyond the explanation they have already chosen to provide in their written opinion. If a judge's interpretation is unsound, the appropriate recourse is for a qualified party to file an appeal. Congress may exercise its power to amend the law, to be sure, but it must do so without questioning a judge as to their interpretive process.

B

Second, it might be argued that Congress' asserted power to issue a ruling-responsive subpoena is an incident of its impeachment power. This argument, unlike the previous one, is entirely meritless. It is well established and incontestable that Congress' impeachment power does not authorize it to act in "retaliation for . . . judicial acts." *Cursive* v. *United States*, 7 U. S. ___, ___, n. 6 (2019) (slip op., at 15, n. 6) (quotation marks and citation omitted). It is therefore inconceivable Congress could derive a legitimate legislative purpose from its impeachment function in issuing ruling-responsive subpoenas.

C

Finally, one could attempt to defend a ruling-responsive subpoena under Congress' so-called "informing function." This Court has intimated in the past that this function authorizes Congress to "inquire into and publicize corruption, maladministration or inefficiency in agencies of the Government." *Watkins*, *supra*, at 200, n. 33. So the argument goes, Congress can subpoena a judge in response to one of their rulings in order to investigate possible motives relating to corruption, maladministration, or inefficiency. But this doctrine is dubious as an original matter: at the time of the

[4] Curtin, *supra*, at 237.

founding, Congress was not understood to serve any "informing function." Even accepting the function as a given, however, it has always been cabined to "*agencies* of the Government." *Ibid*. Its justifications are simply inapplicable with respect to Article III *courts*, which were established with independence as a forefront concern.[5]

Indeed, as "text and . . . precedent confirm, Article III is 'an inseparable element of the constitutional system of checks and balances' that 'both defines the power and *protects the independence* of the Judicial Branch.'" *Stern* v. *Marshall*, 564 U. S. 462, 482–483 (2011) (quoting *Northern Pipeline* v. *Marathon Pipeline*, 458 U. S. 50, 58 (1982) (plurality opinion)). Extending Congress' informing function beyond its agency-based scope (where its rationale has some force) to include Article III courts (where it has none) would be irresponsible and inconsistent with the Constitution.

II

I have analyzed the three most plausible legislative justifications for ruling-responsive subpoenas and none, in my judgment, are sufficient. While it is possible that another justification I have not considered may arise in full adversarial proceedings, I am skeptical one exists. It may become our duty in a future case to hold this questionable breed of subpoenas unconstitutional.

But for the reasons described earlier, today I concur in the denial of review.

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[5] Landis, Constitutional Limitations on the Congressional Power of Investigation, 40 Harv. L. Rev. 153, 168–194 (1926).