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WEBINAR

ACCESS TO THE COURTS:
ASSESSING MODERN STANDING DOCTRINE
AND POTENTIAL REFORMS

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P R O C E E D I N G S

MS. BASSETTI: Hello and welcome everyone to today's discussion about standing. It is not very often that a president of the United States elevates a complex and relatively arcane area of the law and makes it the centerpiece of his plea for public sympathy, but late last year, as litigation over the election was grinding away with more than 60 cases racing up and down the state and federal dockets, President Trump complained that he wasn't having his day in court. "We're not allowed to put in our proof, they say you don't have standing," he told Fox News in late November. And the complaints that he made about standing kept coming in almost to the very last day he was in office.

So what is this standing thing that President Trump was going on about? Well, every year hundreds of thousands of people and companies make their way to a federal court to assert their rights or to try to settle various disputes. They might be trying to avoid complying with a civil investigative demand from a federal agency or they might be trying to hold a company to account for a massive data breach that has exposed their personal information to the world, or to force a company to pay them small damages, a few hundred dollars, for some injury. The variety of lawsuits knows almost no bounds. And in 2019 almost 300,000 private civil cases were filed in federal courts. In every single instance, as with President Trump, the plaintiffs had to consider a fundamental threshold question before filing suit, did they have standing? Which is the judiciary's way of asking that threshold constitutional question, do you have an actual case or controversy that a court has the power to decide?

For many litigants the answer was really easy, but for some people proving standing and getting access to the courts was remarkably difficult. Now, Brookings' Scott Anderson, who you're going to get a chance to hear from shortly, who has been my colleague in this project, he and I started looking into standing before Trump's complaint. And our project began in part out of intellectual curiosity and concern when one set of cases were embroiled in standing questions, only this time the standing issues were (inaudible) to Trump's benefits.

At the beginning of 2017 President Trump seemed to be thumbing his nose at constitutional and statutory provisions that were designed to limit his conflicts of interest in office, the most notable of them was the emoluments clause cases. And so the question arose, how was he to be

held to account? The standing questions were formidable and possibly insurmountable and they took almost four years to sort through, and they haven't even been fully sorted through yet. We'll get a chance to discuss these cases at greater length during this panel. But as we began our inquiry it became obvious that those cases where standing was such an obstacle to holding government officials to account were not rare one offs, they were really emblematic of a much larger crisis in standing and consequently in access to justice.

Carefully assessing standing and rejecting a case for its lack is often held as a bedrock judicial virtue. In 1976 Justice Lewis Powell wrote: "No principle is more fundamental to the judiciary's proper role in our system of government than standing." And I'm going to pause here for a moment, and at the risk of being a little law hornbook-ish, just kind of recapitulate the standard test for standing before the courts. So the Supreme Court has established what it calls three elements of standing, or irreducible constitutional minimums. The plaintiff must have suffered an injury in fact, it must be fairly traceable to the challenged conduct of the defendant, and it has to be redressable by a favorable judicial decision.

So everyone likes the three-part test, except in today's world it turns out there are a lot of statutes, a lot of cases, and a lot of injuries that don't quite fit into the test, like emoluments maybe, corruption related cases, and a host of information error or privacy injuries, as well as other things. Almost everyone we've spoken to in pursuing this project seems to agree that standing is a mess, that it's incoherent and inconsistent and that navigating standing questions and winning them is like trying to hit the jackpot — sometimes you do, sometimes you don't, and you can't really totally tell why you did. More than 30 years ago now Judge William Fletcher wrote that the doctrine is described as permeated with sophistry, like a word game played by secret rules and more recently as a largely meaningless litany recited before the Court chooses up sides and decides the case. That was 30 years ago. In 2015 a D.C. circuit judge, Judith Brown, wrote in deciding a major standing case that she feared that our approach to standing stifles constitutional challenges, ultimately elevating the Court's convenience over constitutional efficacy to the needs of our citizenry.

The question is whether or not the doctrine is such an empty vessel that it allows judges to make ad hoc decisions about the cases they want to rule on or to close the courthouse doors to

plaintiffs they don't like. In many cases that's because determining what an injury is, is the whole game and parsing injuries is remarkably vulnerable to the personal biases of judges.

Now, there are a lot of strands of criticism to standing law that in a forthcoming paper Scott and I wanted to focus on two things. The first is that certain classes of injury seem to be elusive in a standing complex. It might be easy to define an injury — someone gets punches, someone loses money, but in the complex 21st century there are two buckets of injury that we think are susceptible to inconsistent or even incoherent injury and fact tests. They are hidden probabilistic intangible injuries, mostly stemming from the information society, and diffuse public good, anti-corruption that are at the heart of our democracy.

No one seems to know what to do about standing other than maybe to suffer through it. Some organizations or plaintiffs grind it out on a case by case basis or they don't even bring cases to begin with because standing questions are too intractable. So that's the second thing our paper does, which is it hopes to offer some concrete solutions to some of the problems that we've identified. And that's a teaser for everyone to download the paper when it's made available recently.

This panel today is really going to focus a bit more on the scope of the problem and the asymmetric ways that standing affects access to justice. Standing can really quickly become an esoteric deep dive into weighty constitutional issues, but we think it's a core issue that everyone concerned about access to justice should know about. It impacts every one of us in ways that we don't fully understand, as President Trump came to realize late last year.

So before I turn this over to Scott, I want to thank the Brookings team for putting this event together. And we also want to thank many of the people who helped us explore this subject. We had the opportunity to speak to a lot of practitioners and a lot of academicians who explore standing, but particularly we want to acknowledge the foundational work of a former Brookings scholar, Margaret Taylor, who is now at the State Department, in shaping this program.

And, with that, I am going to turn this program over to Scott.

MR. ANDERSON: Great. Thank you so much, Victoria. I really appreciate it.

We're incredibly lucky to have an absolutely all-star panel of extremely experienced

litigators to help us talk through some of these questions about standing. Before we go to that, though, I just want to flag for those in attendance that we are going to take questions and we're reserving a fair amount of time for questions and answers towards the end of the session. So if you do have any questions, please just email them in to events@brookings.edu via email, or you can send them on Twitter by using #StandingDoctrine. Again, by email that's events@brookings.edu or via Twitter #StandingDoctrine. Send any questions using either of those mediums and we'll read them towards the end of the session, time permitting, for our panelists here.

But first let me introduce our four panelists before we come to our Q&A session. First we are joined by Allison Zieve. She is director of the Public Citizen Litigation Group, as well as general counsel for Public Citizen, one of the leading public interest legal organizations in the country. Deepak Gupta, an experienced appellate and Supreme Court litigator and the founder of the public interest law firm, Gupta Wessler, as well as a veteran of the Public Citizen Litigation Group and the Consumer Financial Protection Board. Noah Bookbinder, who is president of the Citizen for Responsibility and Ethics in Washington, another leading D.C. public interest legal organization particularly focusing on government accountability and anti-corruption. He is also a veteran of the Justice Department's Public Integrity Section, among other prior experiences. And Douglas Letter, who is general counsel for the House of Representatives and a 40-year veteran of the Justice Department prior to that, primarily finishing in the Civil Division as the director of the Appellate Staff, I believe. Doug, I should note, is appearing in his personal capacity today to speak, not in his official capacity.

Allison, I want to turn the first question towards you because you spent a good of your career heading up the Public Citizen Litigation Group that I mentioned, meaning you've done a lot of the strategic decision making that goes into determining which cases you bring, how you bring them, who you work with to bring them as a public interest law firm or litigation group.

Can you describe for us how standing doctrine, these questions that Victoria laid out for us, fits into that strategy and affects your choice of plaintiffs and the way you approach certain issues and which cases you take on?

MS. ZIEVE: Thanks, Scott.

Well, I'll start by saying that we do a lot of cases in the administrative law area. And in the 1970s and 1980s, which I'll also add was before my time, we much more freely were able to sue over inadequate agency regulations and agency failure to regulate. But today, before we sue over what we think is an unlawful government action, we spend a lot of time thinking about how we're going to show standing. And even if we think our basis is strong, we spend a lot of time thinking about whether we're going to have to litigate over standing and how much time that will take.

And I'll give you just one example of why it's so important for us to think about standing before we file a complaint. In 2016 we started hearing that then President-elect Trump was going to issue an executive order requiring agencies to rescind two existing regulations for every one new one and to zero out the costs. That is the cost of the new reg would have to be paid for by getting rid of two existing ones.

So we thought the executive order would be unlawful and we started thinking about standing even before inauguration. We decided that we could show standing, we decided that we could have plaintiffs, Public Citizen, and RDC, Communication Workers of America, had standing that we could show that we were injured by the executive order and the injury was remediable by the Court.

So we sued and what followed was three rounds of declarations and briefing on the standing issue over a period of two years. In the end the Court decided we survived a motion to dismiss standard for showing standing, but not a summary judgment standard. And so after all that time and energy the case was dismissed and we never even got to the merits. At the very first hearing the judge had indicated some sympathy with us on the merits and maybe he thought we were right, but we couldn't get there. And even if we had gotten there, it would have been after two years of litigating on other matters before we could even brief the merits.

So experiences like that illustrate why we have to think so carefully about standing as soon as we identify a problem that we might be interested in suing on because our resources and our time are limited. And unfortunately standing limitations sometimes mean that we can't sue at all, even when we think we have a slam dunk case on the merits, that an agency is clearly violating the law. And that happened several times over the past few years.

I'll emphasize that I don't think the issue is really that the cases don't pose an actual case or controversy, to use the terminology of Article III, but the hurdles created by the Supreme Court, and perhaps more so the D.C. circuit case law, make it such that we have to play this — get into this complex thing. And a lot of the DDC judges and district court judges around the country are extremely skeptical about standing I think because they're trying to predict what conservative appellate and Supreme Court judges will do.

And the last thing I want to add is that litigation against the government, we face motions to dismiss based on standing in every administration now. The Department of Justice lawyers have their standing macro at the ready, regardless of who is in the White House. So for the past 30 years or so, in every administration, we have to take extra time to develop standing arguments before we can sue and then almost always spend time addressing standing rather than getting to the merits. And so because of this many times — I'll say justice is quite delayed and sometimes totally denied.

MS. BASSETTI: So, Deepak, I think I'm going to ask you a question if I can. So one particular area where the standing issue seems to be kind of really interwoven deeply in affecting kind of access to justice in consumer rights cases where we're seeing it play a central role in recent years, and that's kind of a cross section of privacy and information era injuries and kind of the growth of the digital economy.

I'm wondering if you can like maybe talk about how standing has impacted the ability of consumers to gain remedies from data leaks and other injuries that are such a part of our everyday life at this moment. And maybe kind of talk a little bit about how this kind of injury in fact, inquiry seems to be incoherent — if that's a fair way to describe it.

MR. GUPTA: Sure. Yeah. I mean so I think when I went to law school and I learned about standing, I thought of standing as a doctrine that vindicated the constitutional separation of powers, it would come up often in cases against the government, and you could see why. Because there's at least a potential conflict between the branches. We didn't think of standing — I think most people didn't think of standing as coming up in garden variety cases involving consumers or classes of people who were seeking redress against private corporations.

So if you take, you know, a case involving some of the most important federal statutes that vindicate privacy, like the Fair Credit Reporting Act or the Fair Debt Collection Practices Act or the law that protects us against telemarketers, the Telephone Consumer Protection Act, those were not cases where articles freestanding would be raised. And the reason why is, you know, let's say I have a claim under one of the statutes, I'm going to be able to show that the statute was violated, I allege, with respect to me. And so if I'm right about that and I can show that that violation was caused by the defendant, then I'm going to get redress, I'm going to get the damages that are called for by the statute. That's not going to be a complicated case about standing. But in recent years we've seen that even these kinds of cases present standing issues quite often, and sometimes very difficult standing issues that are insurmountable. And I think that is largely a result of the Supreme Court kind of teeing up the issue, leaving it open, and then not resolving it.

I think Chief Justice Roberts really does believe that there is a distinction between injury at law and injury in fact. But if you just take a few examples, you can see sort of — garden variety examples — you can see that that distinction is hard to really see in practice. So if I step one foot over your property line I've committed a trespass. That's an injury at law. But you really haven't suffered any additional injury. Or if I breach a contract with you, but it's just a legal breach and there's nothing more, you could always sue at common law. And so that's an injury at law, but maybe not an injury in fact in the Chief Justice's view. And yet in this Supreme Court case that was decided in 2016, *Spokeo v. Robins*, a case involving the kind of scenario you described, Victoria, where somebody is saying stuff about me, putting it out on the internet, and I allege that that that violates the Fair Credit Reporting Act, the Supreme Court teed up a lot of really difficult questions about whether that's an injury.

And the new concept that the Court introduced or gave some flesh to is this concept of concreteness. So now it's not enough for me to show that you did something with respect to me, meaning it's particularized in the Supreme Court's jurisprudence, I now have to show that the thing you did to me is concrete. And it's maybe not enough to show that Congress thought that this was the kind of thing that would give me a claim, I maybe have to show something more. And I keep on saying "maybe" because *Spokeo* is this decision, it was decided after Justice Scalia died, that has a proposition and kind

of an equal and opposite proposition in the opinion. It's a decision that resolves nothing, but injects a lot of new criteria into the analysis. And so what you end up having is litigation where, believe it or not, in ordinary consumer litigation the plaintiff has to try to show maybe there was an analogy at common law, maybe in English law or early American law, you know, there was a claim that was sort of analogous. You might have to show that Congress really identified this injury and set up chains of causation. You have to analogize it to previous Supreme Court cases. And so it makes these cases extremely difficult.

And you mentioned, Victoria, data breach cases. Those are among I think the hardest because we know that there's a real risk of harm when there's a data breach or when there's some problem in the information economy where some bad information is getting out, but showing how that actually results in consequential harm is really tough. And maybe often it hasn't actually resulted in harm. The thing we're concerned about is that the company doesn't have good practices in place to prevent that harm from occurring.

And so those are some of the most challenging cases because the Court is very unclear about what kind of probabilistic harm is going to be sufficient. I think — and we'll get into this hopefully a little later — I think there are things Congress can do to make it clear to the courts that people have standing in those circumstances. But at least right now, it's just a complete mess. And I think cases that everyone would have thought were simple 20 years ago are now getting kicked out of court based on standing doctrine and in a way that's very difficult to predict for someone who is planning to sue.

MR. ANDERSON: Thank you, Deepak.

Let me turn it to you, Noah to take line of inquiry to a slightly different set of issues, the other set of issues that Victoria mentioned, looking at public goods, in particular as a kind of case study, these questions of anti-corruption.

You, through CREW — as CREW I should note, have been litigating a number of legal issues regarding anti-corruption issues for many years, but particularly in relation to former President Trump's decision not to recuse himself from his family's business interests and the fact that they've continued to receive payments from both foreign sources and from U.S. government sources without permission of Congress or in excess of his salary, both of which — to kind of try and encapsulate a little

bit — both of which you argue are in violation of the foreign and domestic emoluments clauses of the Constitution.

How did standing impact your ability to enforce these constitutional provisions? Who were the plaintiffs you looked to coordinate with or the ways that you framed these sorts of claims to advance the argument that these were in violation and trying to get the Court to enforce that? And how effective were those efforts?

MR. BOOKBINDER: Yes. So we in November and December of 2016 looked at this situation where Donald Trump was holding onto this massive international business interest as president, which was very clearly going to create conflicts of interest that could affect, and did I think unquestionably affect, his decision making as president. And we were trying to figure out what to do about that. A lot of the criminal statutes and federal rules about conflicts of interest don't apply to the president. But what does apply to the president, as you mentioned, are these clauses in the Constitution that were wort of the original anti-corruption laws of this country that say that a federal official in the case of foreign government and that the president in the case of domestic government, can't take payments and benefits from governments beyond a salary, you know, obviously for his job. And for hundreds of years that sort of moral authority of the Constitution had been enough. And presidents just didn't do it and other government officials had — you know, there was a whole compliance regime in place at the State Department and in the military. But what the Constitution doesn't say is when you have a president who is determined to blow through this prohibition, how do you enforce it? You know, there's not an express enforcement mechanism set up in the Constitution and so we had to figure out how you brought a case.

And, you know, we were looking at this and thinking here's a president violating the Constitution from day one. He's going to get just clobbered with suits from everybody. And we spent a couple of months just really racking our brains on how to do it and somehow by the Monday after inauguration, you know, we had figured out a way that we thought worked and we filed this lawsuit and we expected all these other lawsuits to come. And it felt kind of like — there's a scene in the movie "Old School" where Will Ferrell's character yells, "We're streaking!" And he runs out into the street and he's running and eventually he looks back and there's nobody there with him. Because, you know, this whole

wave of emoluments lawsuits didn't materialize. And I think the reason that that happened was because there's a real quandary about how you make standing work in these kinds of cases. Who is the injured party when the president takes an emolument? I think in some ways the most straightforward of an injured party would be somebody who lost out policy wise because the president took an emolument and made a policy decision based on that. But there's so much you would have to prove in order to figure out even who that person is that that didn't turn out to be a particularly realistic option. So you had to find other ways of doing it. And the one that got us out of the gate was this really obscure standing doctrine that the Supreme Court created in a case called *Havens Realty*, which says that essentially a nonprofit organization which has a mission and somebody does something corruptly that so clearly implicates that mission that the nonprofit has to sort of drop its other work and respond to that, has standing to sue. That's a sort of a simplification of what it is saying there. And I think a lot of people looked at that and thought that that was a really outlandish standing theory. We continue to believe that actually it was very strongly supported by the law and it's what got us out there. Eventually working with a great team of lawyers, including Deepak and the great folks at Cohen Milstein and others, the case expanded and we added in competitors, to hotels and restaurants that competed with Donald Trump's hotels and restaurants, but couldn't offer the ability to influence a president in their services and that, you know, therefore were losing out by the president's violation under competitors' standing. And ultimately as the case went forward through a number of different levels, the *Havens Realty* piece we pulled that one out because we wanted to focus on the ones that we thought had the best chance of success. We'll talk I think a little bit later about working the states, because there was ultimately a second case brought with the state of Maryland and the District of Columbia that had other standing theories.

You know, we ultimately won on standing in the Second Circuit in the *CREW* case and the Fourth Circuit in the Maryland and D.C. case. It took almost four years to get through multiple levels of review, which I think does go to show that some of the problems with this sort of burden of having to show standing to bring these kinds of cases even though, you know, I think ultimately there was success in those cases.

I will just note one other thing really quickly, which is that *CREW* has for years been

litigating under the Federal Election and Campaign Act, which actually does provide express causes of action for outside entities that have complaints of violations. And we've actually had — you know, standing is very often an issue there, but we've got a lot — a big track record of success, particularly on the basis of kind of informational injury that the lack of information that we're entitled to legally makes it harder for us to do our job. And it kind of shows how over time you can develop these kinds of standing theories and then it stops taking so long and being an impediment. And, you know, I hope that in some of these other corruption areas, like emoluments, that there's a path forward like that over time.

MS. BASSETTI: So I'm going to turn to our last panelist, Doug Letter. Doug, your work with the House of Representatives and DOJ has kind of put you in a slightly different institutional position vis a vis standing than a lot of our other panelists. And more recently, I suppose, rather than trying to vindicate public rights writ large or intangible rights, there's been arguably some of that too, your office has been really ore involved in trying to use the courts to enforce or reinforce Congress' own exercise of its oversight or other legislative authorities. Particularly, I guess a lot of people know about the enforcement of the subpoenas that the House of Representatives issued.

And I'm just sort of curious, how has standing law, which is very complex in relation to Congress, and also kind of thin possibly in terms of case law, how has it resulted — has the resulting litigation impacted Congress' operation as an institution? And how is it factored into kind of decisions for Congress?

MR. LETTER: Thank you.

MS. BASSETTI: Big questions — sorry.

MR. LETTER: Exactly.

MS. BASSETTI: A few minutes.

MR. LETTER: Thirty seconds?

MS. BASSETTI: Exactly.

MR. LETTER: I'm going to pick up on something, a very good point that Deepak made. I've been wrestling with standing for literally — I think it's close to 43 years now in litigation. And Deepak said it's sort of a mess. And I remember I was long, long ago arguing when I was at the Justice

Department in front of the D.C. Circuit panel, I think — I believe it was the ACLU on the other side, and we had thought about running a standing argument and, you know, as Allison I think mentioned, you know, we had standing arguments on macros. We were ready for anything. But we actually decided we didn't have a good enough standing argument in that case, we didn't run it.

When my opponent was up at the lectern then Judge — to let you know how long this was — then Judge Ruth Ginsberg, said, yes, but do you have standing. And the ACLU attorney sort of his mouth dropped and he turned and looked at me, he said, “Even the government isn't arguing there's no standing here.” So then when it was my turn I stood up and of course I started arguing standing, even though we had decided not to. But it is an Article III issue. And, by the way, we ended up winning on lack of standing in an opinion written by Ruth Ginsberg. So, you know, go figure, because even the government didn't want to argue no standing there.

You know, now it really is this fascinating situation because for the past four years we've been dealing with a truly revolutionary administration that said we're going to ignore all subpoenas. And so the House in particular was put in this very difficult situation of realizing that we had to resort to court in order to get enforcement, that we just didn't have other good practical options. And picking up on Allison's point, I'm not even sure the litigation is a practical solution since we litigated — I won a whole batch of cases in D.C. Second, Ninth, etc., but ended up with almost no enforcement in actuality, so. And then we're still wrestling with a batch of this. So I don't know how practical the enforcement in court is.

But in the D.C. Circuit in particular, for instance in the McGahn case, where we're trying to get former White House Counsel Don McGahn to testify, you know, over and a claim of — and I'll say it — an absolutely ridiculous and stupid claim of absolute immunity by the Trump administration. We got en banc the D.C. Circuit to say that the House has Article III standing. Now, we're fighting about whether we have a cause of action and we're en banc before the D.C. Circuit on that.

So we have this subpoena cases, but, Victoria, one of the interesting things is standing case was actually in a more tangible area was our case, the Mnuchin case, where the House sued about the border wall, that the Trump administration was without appropriations, spending lots of your hard earned tax payer money to build a border wall after both House and Senate refused to provide funds for

that. So we sued and the D.C. Circuit said that in the very unique context of an appropriations clause violation claim, that the House could indeed sue on that and that the Court could reach the merits.

And, by the way, I have not forgotten your question. I'm getting to it. One of the things I just wanted to note that to me was is so interesting about this from I suppose a more academic perspective is what is it about Article III that would mean the Congress or each house can't sue? You know, why is that? And people say well, historically you haven't. Well, that's true because we hadn't historically had presidents like Trump before. But nevertheless, okay, fine, historically we haven't, for that reason, but what is it in Article III that would say that we can't sue over subpoenas or the appropriations clause.

And one of the things that comes back is well, you know, these are separation of powers issues, do they belong in the courts. And the answer to that is the courts have answered that — yes, they do. And I'm not talking about the recent like D.C. Circuit en banc win. Courts have for many, many decades adjudicated disputes over Congressional subpoenas. So you get all sorts of cases where it gets to court because the recipient of a subpoena sues and the courts end up issuing decisions about the validity of the subpoena. So we have judicial review of actions taken by the House or the Senate with regard to our power to investigate, so we know that it's not that the courts shouldn't be deciding these issues, the courts have done so for many, many decades. And so that's not it.

So what is it that says that the House can't sue? Now, we now, again going back a long time — I'm not sure how many of you remember this era — when the D.C. Circuit said that members of Congress could sue, they had standing, but then the D.C. Circuit came up with something they called equitable discretion or remedial discretion, they said but we're not going to rule on your cases. It was a fascinating doctrine that arose out of a Law Review article by then Judge McGowan, now deceased. And the D.C. Circuit applied this principle in about five or six cases. I was involved in a number of them. And then the Supreme Court in *Raynes v. Byrd* said they changed the — they stepped in and said, “No, no, no, no, individual members of Congress or small groups of members cannot sue, they don't have standing.” And so that doctrine seems to have gone out the window.

Okay, but then what about when it's the House as an institution or House committees?

And as I say, we're wrestling with that now. And it really obviously does have an impact because it's one thing if we know that we will issue a subpoena that if it's not complied with we can bring a suit immediately and get judicial enforcement quickly. Then that clearly I think would force people even like the Trump Administration to come to the table, not just say we're ignoring all subpoenas. It would be much more the tradition that I worked with for 40 years at the Justice Department of lots and lots of give and take between the executive and the legislative branches.

So if we do have the power — if it's firmly established and we do have the power to sue, or if it's sort of established — so the executive branch thinks we can bring in the courts, it's vastly more likely that there will be back to the give and take that we have had for — actually since the founding, right. These issues about the executive branch providing material to Congress, this goes back to Washington. And, in fact, in our briefs we've argued about that this is a well-established part of American government that you have these kinds of situation.

MS. BASSETTI: Sorry, Doug, didn't mean to interrupt you. Go ahead.

MR. LETTER: I'll try to wrap up very quickly. I'm sorry. This is so fascinating to me.

If by contrast you have the courts saying the House can't sue, then you remove much of an incentive for the cooperation or negotiation. Now, people say, "Oh, oh, but you can cut off all funding." Yeah, we can do that, look at what happened, you know, on the border wall when we and the Senate said, "No, we're not throwing money away on a border wall that won't work and it's an environmental disaster." And Trump said, "Fine, I'm proud to shut down the government." That's a complete and total horrible situation for the American public. It costs billions and billions of dollars. It's terrible. And so that can't — there's no way I think that the framers thought that Article III means the only way you can resolve these kinds of disputes when you have an intransigent executive branch is by shutting down the government and depriving the people of the resources and protections, et cetera of the U.S. government, so.

MS. BASSETTI: Yeah, it sets up real brinkmanship, doesn't it?

MR. LETTER: Oh, gosh, yes.

MS. BASSETTI: Yeah.

MR. LETTER: And, again, nobody wins —

MS. BASSETTI: Right.

MR. LETTER: — when we shut down the government for more than a month.

MS. BASSETTI: Allison, did you have something you wanted to add?

MS. ZIEVE: Yeah, I just wanted to say quickly that the examples that we've heard from Noah and Doug and I think my executive border example all show how standing law really threatens the sort of structural protections built into the Constitution and it makes them unenforceable, either because the clock gets run out or because you just can't sue anyway.

And if you have an administration or a potential defendant in a subpoena action or something that doesn't care about structural protections, whether it's Congress' power of the purse or the emoluments clause, then they're just words. They're just words on paper and that's a big threat from standing doctrine.

MR. ANDERSON: Well, now that we've gotten a chance to talk about some of the problems that (inaudible) has posed, I want to turn and talk a little bit about some of the solutions.

Deepak, let me turn to you first. You mentioned that — discussed this issue of data privacy issues and noted the role that Congress can play, reaffirmed in the Spokeo decision you were discussing, in helping to define some of these intangible injuries, elevate them, articulate change of causation in a way that the Court has suggested it will give substantial, if perhaps not absolute deference to in determining what constitutes an injury. Can you elaborate a little bit? What does that sort of authority suggested in Spokeo mean for the ability for Congress to enact new measures that might make it easier to establish standing and for consumer, for example, in the digital space to enforce their rights and avoid the standing barrier that's posed a problem in other cases.

MR. GUPTA: Sure. So, you know, I do think it's just really worth emphasizing again how strange it is when a court kicks somebody out of court because they're alleging the very thing that Congress said gives you a right to come into court. And that's particularly strange when they're not suing the executive Branch of the government, right. In the Lujan case, the classic standing case, you know, Congress created this cause of action, you're suing the executive branch. You can see that the Court is

safeguarding the separation of powers, but how is the Court safeguarding the separation of powers when Congress has said this consumer has the right to sue over, say, this privacy violation and the Court says no, we get to decide what constitutes a harm? In my view that's sort of a philosophical question, what is a harm that society is willing to recognize as a harm. And the Congress is the branch of government that's best equipped to answer that question. It speaks for the people, it can gather facts and make empirical judgments, it can make predictions, it has relative institutional agility to do that, and it can articulate new injuries as part of new policy regimes.

The Supreme Court isn't completely blind to that. I mean it does say that Congress' role in identifying and elevating intangible harms doesn't automatically confer standing whenever a statute grants a person a statutory right and purports to authorize that person to sue and vindicate that right. Now, that's the concept that I think might have surprised a lot of people who went to law school 20 or 30 years ago. But what the Court takes with one hand it gives with the other. The Court reaffirms that in determining when an intangible harm constitutes an injury in fact, the Court says the judgment of Congress plays what it calls an "instructive and important role." Okay, well, what role? The Court says that it acknowledges that Congress is well positioned to identify intangible harms and that it can elevate the status of legally cognizable injuries that were previously inadequate at law. And really notably, the Court quotes with approval Justice Kennedy's concurrence from *Lujan* where Justice Kennedy said Congress has "the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."

So where does this leave us? I mean these sound like sort of conflicting statements. When is Congress' judgment going to be enough? And I think the Supreme Court has provided the answer in *Massachusetts v. EPA*, the climate change case, when it said Congress has to identify the injury it seeks to vindicate and relate that to the class of persons that is going to bring suit. And I think you also see a role for Congress in doing what Spokeo called identifying the chains of causation.

So what Congress can do now when it creates a new cause of action or if Congress wants to play clean up and go back and look at some of these categories of cases where consumers have been kicked out where Congress thought it was vindicating privacy interests, for example, cases

about credit reports, cases about inaccurate information on the internet or breaches, what Congress can do is be much more explicit. It can make findings and do what everyone thought in the past Congress didn't need to do and say look, when we create this cause of action this is the injury we have in mind. The reason we're doing this is because we think the following kind of harms are likely. So to make this a little bit more concrete, we're saying you have to take the following steps to safeguard people's data on the internet. If you don't do that, there is a harm that people will be subjected to identify theft. You know, we can't calculate that risk with perfect precision, but here's why we as the legislative branch make a judgment that we think that that's likely. We also think that it's going to be extremely difficult for individual consumers or classes of consumers to prove that in litigation, and so we are allowing people to sue for statutory damages. The whole point of statutory damages is to vindicate an interest where a consumer can't prove consequential damages, or it's extremely difficult to do so.

So Congress has the tools I think under the Spokeo decision and under traditional standing law to do this, it's just that people never thought Congress had to do this in the past. And so this can go in the legislative history whenever Congress passes new causes of action, it can go in the findings. And I think the courts are going to have to be deferential to that. I think it's going to be extremely difficult if Congress has kind of connected the dots for a court to say we know better, we're suspicious of that empirical judgment that Congress can have. I just think Congress has an obviously superior institutional role to play.

And so I'm actually kind of optimistic that going forward, if there's a will in Congress and the votes are there, that there is a path to get out of this. You might think because we're talking about constitutional law, that when the Supreme Court speaks or the courts speak, Congress is blocked, but this is an example in which actually the courts have acknowledged Congress' role and the constitutional standing analysis will turn quite a lot on what Congress does to allow plaintiffs to navigate what is now really a minefield.

MS. BASSETTI: That's super interesting. And I just kind of want to remind everyone who is listening right now that we're going to be taking questions after we kind of wrap up this round of questions and you can email them to Events@Brookings.edu or use Twitter to send in questions for the

panel.

And I want to ask Allison a question real quickly. So really fascinating, Deepak, and really goes to kind of consumer injuries, but corruption is another kind of weird intangible, diffuse sort of injury that's hard to tackle. And, Allison, I'm not sure if the idea that we've discussed before, which is kind of qui tam actions, are an avenue for kind of dealing with another kind of class of injuries, but we've seen a lot of Congress use kind of qui tam actions before in the context of the False Claims Act, which is kind of quasi corruption oriented. It's certainly about kind of conserving government resources and not misusing them. You know, qui tam was used much more widely in the past, it's got a long historical practice, it has been found to provide private standing. Is this the sort of avenue Congress could use to provide expanded access to the courts for certain public rights. What are its limits? And maybe we should briefly explain what qui tam is. I'm hoping most people on this kind of understand generally qui tam, but maybe quickly describe it, if that's okay.

MS. ZIEVE: Under the False Claims Act a private person can sue standing in the shoes of the government. The injury in a False Claims Act case was experienced by the government and the private plaintiff has a stake in it because they get a percentage of the damages if they successfully prove that the government was defrauded. And there's limitation on who can be the plaintiff, but that's the sort of basic rubric.

So the question we've been thinking about is whether there are other situations where Congress could use that model and create an opportunity for the — what I'll call the non-injured person — to have a stake in litigation, a stake in a controversy, so that they can sue in the name of the injured person. So, for instance, could we craft a law that addressed standing to bring an emoluments clause challenge by crafting a recruitment remedy such that the plaintiff would get a percentage of the value if they could prove that the president had received X amount of in gifts or cash or whatever. In an emoluments clause violation they could get say 10%. We have a federal law that said if the plaintiff proves a violation of the Administrative Procedure Act they would be awarded \$10,000. Would that satisfy the case or controversy requirement of Article III?

In the terms of the personal stake, I think these ideas — giving the plaintiff a personal

stake in the outcome I think they would build off the False Claims Act and work in that sense. The plaintiff would still I think have to identify someone who was injured, who were they standing in the shoes of. Just as in the False Claims Act context, the plaintiff is suing for the indisputably injured party, the U.S. government.

So as Spokeo tell us, sometimes the statutory violation or even a constitutional violation isn't enough, so we still have to think through the context in which we'd be able to identify the injured party well enough at least to satisfy the Supreme Court.

You know, another approach might be to consider whether Article III would allow some sort of tax payer standing requirement or option, as is allowed in some states like California, whether there's some way to import that into federal law in a way that's consistent with the Supreme Court standing precedent.

And the last point I wanted to make is that as to consumer cases, Spokeo had been a mixed bag for the corporations because in many instances the corporations remove a case from state to federal court on the basis of diversity or federal question jurisdiction. And then if there's no standing under Article III the plaintiff can actually move to have it remanded. So the plaintiff says in federal court I don't have standing — sort of an odd thing to be arguing you don't have standing — or the defendant removes and then seeks to get it dismissed for lack of standing. What happens in those cases, at least what several courts have held, is that the case therefor gets remanded back to state court, which is where the plaintiff wanted to be in the first place.

So in that situation, the corporation's partial success in Spokeo has sort of harmed its preference, the industry preference to be litigating in federal court instead of in state court. So although I haven't seen signs of it yet, I wonder if at some point the interests of — the public interest and consumer advocates will merge with corporations to — just in this way that there might be some cooperation in trying to find ways for Congress to actually provide standing. For us it would be so that clients can get into federal court to vindicate important violations of their rights and for them, just because they want to be in federal court, and we just want to be in court.

MR. ANDERSON: Doug, I saw you have your hand raised. Do you have something to

add on there?

MR. LETTER: Yes, very briefly wanted to pick up on some things Allison said. And, by the way, just for anybody who is joining right now, Scott said it, but I wanted to emphasize I'm here and I'm appearing in my personal capacity, not as my official capacity as general counsel of the House.

You know, in Allison's discussion of the qui tam mechanism, note that there I was heavily involved in this. The Justice Department was fully defending the Article III standing of qui tam relators. And one very interesting question that came up, a number of the judges who said that qui tam was — you know, there was Article III standing, they felt — because the case was in various courts of appeals before it went to the Supreme Court in the Vermont case, they thought that it was essential to the Article III standing point that the attorney general could intervene in the case and dismiss it. So that was something that was instrumental in allowing there to be Article III standing. I just want to note on that something that we at the Justice Department argued was the original — at least False Claims Act — and qui tam provisions preceded the False Claims Act by — actually in Britain I think in the 13th century they first arose — the original qui tam, the original False Claims Act in 1862 did not provide for any intervention by the attorney general. So at least Congress — and earlier provisions — there were qui tam provisions — I think something like eight of them passed in the first several Congresses — did not have that kind of protection for the (inaudible).

So I just wanted to make that point.

MR. ANDERSON: Thank you, Doug. I appreciate it. That's a useful point.

Noah, I want to come to you next because there's another avenue that we've seen, plaintiffs particularly public interest law firms pursue in trying to vindicate certain public rights. Now, you mentioned having pursued in your earlier responses, and that is collaborating with states. The 50 states have been provided what the Supreme Court described in one case as special solicitude on at least certain types of standing questions or in certain circumstances. And we've seen this incredible growth in state attorneys general acting as essentially public interest plaintiffs in a variety of cases, but that are often caught up in a degree of politics. Sometimes even seem more of vehicle for sending a political message than actually for vindicating legal rights, and therefore often end up fairly controversial

What was your experience like working with states in the context of the emoluments clause litigation and other litigation? And how does the states factor, the ability of their role that seems broader than other potential plaintiffs to establish standing, play into both strategies for potential litigants and then also the actual vindication of rights, the contours of the outcomes of these cases?

MR. BOOKBINDER: Sure. I mean I think one of the real advantages of working with states, and we were very fortunate to work in second emoluments clauses lawsuits with Attorney General Brian Frosh in Maryland and Attorney General Karl Racine in the District of Columbia, which in addition to the 50 states also has that ability.

So one of the real advantages is a wider variety of standing theories to choose from. And so I mentioned when working with private plaintiffs brought an emoluments clause lawsuit it was primarily reliant as it went up on competitor standing. Well, working with Maryland and D.C., there were a whole bunch of different standing theories that we were able to incorporate with them. There was a similar kind of competitor theory of standing, which was based on the proprietary interest of the states. So D.C. owns and operates a convention center and event space throughout the City which can compete for events that foreign governments or domestic governments might throw. Maryland has a hotel and event center in Bethesda, among others, another one in College Park. So they're competitors who might lose out to Donald Trump's hotel, but there are also other bases for them to potentially be plaintiffs. They are sovereigns that — you know, the state of Maryland entered — you know, was one of the original states to sign onto the Constitution, which was based on an expectation of certain kind of behavior by the president. Maryland and D.C. also have the potential to argue quasi sovereign and *parens patriae* theories of standing where basically they are standing in for the rights of their citizens who may have economic harms, they may lose jobs, they may — you know, the economy of those jurisdictions may suffer, they may lose out based on corrupt conduct of the federal government. And so when Maryland and D.C. brought that case with, you know, obviously CREW supporting them and Deepak and others supporting them, we were able to argue kind of a multitude of different standing theories, which as sort of obscure and untested as the standing theories in our initial CREW emoluments case, in some ways the state ones were even more so. I mean nobody had ever brought a lawsuit, you know, even in the

ballpark of this one. But because you had more of them, there was also more room for error. You didn't have to have all the bases of standing, but there was a better chance that you were going to have a basis of standing. And that's I think a real advantage that states as plaintiffs have, is a lot of different ways to assert standing.

You know, the other thing that is a huge, huge plus in working with states and with D.C. is they bring their own resources, they bring their own platform, they're just tremendous, tremendous lawyers in both of those offices. And you sort of mentioned that these kinds of cases can be more political. You know, as we thought about it in these corruption cases, obviously we wanted to win in court, but also a really important thing was raising public awareness of this massive, massive instance of corruption that was going on. And the kind of voice that these really powerful, you know, voices of these attorneys general bring helps to have that kind of impact as well.

It certainly is more complicated. These are elected officials who have to think about their constituents, they have their own interests, they have their own strong ideas. We were in that case very, very lucky to be working with Attorney General Racine and Attorney General Frosh, who were just terrific partners, but obviously it becomes a big team and it's complicated. But it worked out really, really well.

There are also some geographic limitations there. That we're looking at Donald Trump's corruption all around the country and unless you could get Florida involved you probably weren't going to be able to get at Donald Trump's corruption at Mar-a-Lago or at Doral. And unless you could get New York or a bordering state involved, you were going to lose out on some of Donald Trump's violations in New York City. But for the violations that we could get to geographically, we had this tremendous team and this really strong set of bases for standing.

So I think it's definitely a really important avenue going forward for having a greater chance of success, both in terms of litigation and in terms of impact at vindicating these kinds of rights.

MS. BASSETTI: Yeah, I just know I'm going to pop in and sort of mention the Texas v. Pennsylvania case that happened last year, which was another odd effort by Texas to assert standing over some kind of some varied kind of issues, but the Supreme Court booted the state and says no standing. So it can be a complex question at time, can't it?

MR. BOOKBINDER: Absolutely. I mean I think that, you know, courts take very seriously the question of how does this affect Maryland, how does this affect D.C., how does this affect Texas. And for Texas to come in and say that how Pennsylvania administers its laws is something that Texas has a legal right to dispute, you know, that's — I think that that appropriately got tossed out.

But where you actually can draw a specific kind of geographically based argument that this state or this district is being directly affected, there's some real possibility for moving forward there.

MS. BASSETTI: Doug, I see — can I — let me turn to you, Doug, and I'm going to ask you a question and also ask you to — I know you want to say something about that, so this is — we're going to turn to audience questions after you, Doug, so just to remind everyone to ask their questions if they've got any.

And let me, Doug, also ask so the House just won a pretty — you mentioned the Mnuchin case, which is where the House managed successfully to assert that it had standing to challenge the Trump administration's reprogramming of appropriations that Congress made. I'm not sure if reprogramming is — yeah, exactly, yay, victory — but there may be some other executive actions that were not clear whether or not Congress has standing to deal with, you know, where the executive is accused in acting in contravention of a statute, although some states have had the ability to bring that. I'm thinking in particular some of the immigration cases where states have had standing.

So to go back to the separation of powers kind of questions, what do you think standing is going to mean for Congress' ability to litigate in defense of its constitutional authority in the future? And also you can talk about that in regard to state standing, which sometimes there's an interesting overlap, sometimes there isn't.

MR. LETTER: Thank you, Victoria. You tied those together very well actually. And so the comment I was going to make fits in with precisely what you asked.

The question of state standing was, for instance, in the challenge to DACA back in the Obama administration, Texas was found to have standing. This issue might be addressed by the Supreme Court in the Affordable Care Act case because there California intervened to defend the Affordable Care Act, as did the House when the democrats regained the majority in 2018. But the

challenge then has been made by us to the standing of Texas, etc., to attack the constitutionality of the Affordable Care Act. So we may get a ruling from the Supreme Court there.

On your specific point, Victoria, you're absolutely right, there are big questions left unanswered. The Mnuchin case we told the D.C. Circuit, and the D.C. Circuit really picked up on this, Judge Sentelle in his opinion for the court, we said we're making a very narrow argument. We're saying that the appropriations clause is special. We made clear we were not saying that any time the Congress thinks that the executive is not properly executing the law, that Congress or the House can sue when we're very worried about fueling a floodgates problem. And the courts have made clear that they are not going to recognize the ability of Congress to sue, saying, you know, Mr. President, we know what this law means and you're not following it. And so, as I say, we very clearly in our briefs said we were not making any kind of argument along those lines. Whether there are areas beyond the appropriations clause and subpoena enforcement where Congress or individual parts of it can sue is totally unclear. We'll have to see.

And the other thing, Victoria, in response to your question, where there's now major area of lack of clarity ties in with what Allison mentioned, the Rule 7 case. What is the story now with what I'll call individual members suing? Except we know it's not individual members. For instance, *Raynes v. Byrd* where the Supreme Court said they couldn't. It wasn't just Byrd, I think there were seven members there too. I guess seven is some sort of magic number. And now we — both the — some senators, some members from the House. But we have even now in a case we're waiting for the D.C. Circuit to rule on, when the House instituted remote voting procedures because of the pandemic, we didn't want members of Congress to have to die in order to vote because it's hard to vote when you're dead. So the speaker put in measures so that people could — very, very closely controlled measures so that members of Congress could vote without — and represent their constituencies without being in danger in Washington, D.C. or at the Capitol. A very large number of Republican House members, led by Minority Leader McCarthy, sued. I forget the exact number — 100 and something. So we argued there that they couldn't sue, one, because of the speech or debate clause, which the District Court agreed with us, but also we said they don't have standing. So, again, I just want to make clear, it's not just — individual

doesn't mean one member doesn't have standing, it meant we think under *Raynes v. Byrd*, when it's less than a majority of the full House, and therefore can sue as the House or as a committee that is authorized, our position is there is not Article III standing for a large group of members to sue as in that remote voting context, which by the way, is quite different from what the case that Allison is talking about where there's a statutory authorization. There's no such statutory authorization.

So these are areas that are up in the air. We think *Raynes v. Byrd* is still valid and still answered that question, but we don't know, and, as Allison says, we'll see what happens with the seven member case. It's going to be fascinating to watch.

MR. ANDERSON: Well, thank you all so much. I think we're going to take these last few minutes and try and turn to some audience questions and answers. As Victoria mentioned and I mentioned at the top, if you do have any questions please just send them to us at events@brookings.edu via email or on Twitter by using #StandingDoctrine. We'll try to get them in, as many as we have time for.

Let me start with one from Will Dobbs-Allsopp, who's a legal policy analyst at Governing for Impact, who says he's particularly interested in the administrative law context where standing doctrine appears to benefit regulated entities rather than a rules intended beneficiaries.

Can you, meaning the panel, highlight some cases where advocates attempting to challenge regulations or deregulatory moves have lost on standing and/or are there examples where you or other litigants have chosen not to bring a suit altogether to avoid or due to standing concerns?

Allison, maybe I'll turn to you first because I know you do a lot in the administrative law space and you're probably well situated to kick off the answer to this.

MS. ZIEVE: So the observation is certainly correct, that industry regulated, which is generally the regulated entity, has a lot easier time showing standing because the regulations are directly requiring them to do something and if they don't want to do it, they can sue.

There have been a number of instances, particularly over the past four years, when the administration did something and we did not sue because we didn't think we could show standing. One example is USDA started giving waivers to poultry processing plants of the rule that limits how quickly they can process the birds on the line, the BPM, birds per minute limitation. And there is a regulation

what addresses when a poultry processing plant can get a waiver, but from early on in the Trump administration they were, we thought, violating this and just inviting companies to get waivers, to apply waivers and giving it to them when they didn't apply. And the problem for us was that the vast majority of poultry processing plants are not unionized, which would mean the people with standing would be poor people working in horrible conditions that have no job protection. Those are not people that generally would want to invite to be a plaintiff because they could just get fired for being a plaintiff. So we actually did eventually sue and some larger poultry processing manufacturing plants took advantage of this waiver option. But it delayed us about two years before we could do that.

There is one way in which standing law sometimes can hurt industry, though this may be unique to D.C., which is that D.C. also still seems to apply a prudential standing requirement. And there have been a couple of instances where industry sued in D.C. and because they weren't the directly regulated party, even though they had what I would consider irrefutable injury, or at least impact, from whatever the rule was, the D.C. Circuit wouldn't let them sue. I'm thinking of one in particular that had to do with — it was an energy rule or an environmental rule and the parties that sued were going to be — because of transportation costs they were going to be impacted, but they weren't directly affected. So we actually supported them when the industry filed a cert petition. We supported them saying they should have had standing, but the court didn't take that case.

So it can be a double edged sword, but by and large industry would be much happier in the administrative law context with standing because it keeps us out and allows them in.

MR. GUPTA: Yeah, I mean I strongly agree with Allison. I think you could write a whole Law Review article that just — the thesis is that that's like the animating explanatory principle for the standing doctrine is that regulated entities get to sue and the people who are the beneficiaries of the regulation don't get to.

You know, Noah mentioned that in the emoluments clause case we used the competitor standing doctrine and we prevailed on that basis in the Second Circuit. One reason we used the competitor standing doctrine is that it is a surprisingly easy doctrine to avail yourself of. All you have to show is that you are in the arena, in the market of people that's regulated by a particular regulation. And

so long as that's the case, and it may — the regulation may benefit others and thereby confer a competitive disadvantage on you, you can get into court and causation requirements are relaxed, redressability is relaxed. And the whole reason for that is I think it's clear the courts are pretty solicitous of claims by industry that are challenging regulation. It's rare that anyone other than an industry challenger is going to avail themselves of that doctrine. And the emoluments clause was an unusual situation in which we were able to do so.

And, you know, I can think of a few cases that I've done in recent years where it just didn't seem that there were any kind of good government or public interest groups that could bring the relevant challenge, but we were able to do so with states, to illustrate another point Noah made about the ability of states. So we did one case where we challenged the Trump administration rule. This was an IRS rule about reporting of dark money. And there was just nobody who could get into court, but we were able to get into court representing the state of Montana and the state of New Jersey because they have to administer their tax reporting systems and so they were hurt by this.

And we did another case where we challenged the Bureau of Land Management, the appointments clause. And I think environmental groups were having trouble getting standing, but a state — it was much easier to get in with a state.

So I do think that the story here is that standing doctrine, it's not neutral, it favors certain kind of plaintiffs over others. And that reflects the political commitments of the judiciary.

MR. ANDERSON: Thank you for that addition, Deepak.

Let me to go the next question here. This is from Gabe Roth, who is executive director of Fix the Court, which is an organization that does interesting work around term limits. And he's posing what I think is a very good brain teaser about standing that I thought is interesting to bring forward on the surprisingly related term limits, asking if Congress passed a prospective term limits law, who if anyone would have standing to sue? Which is a little bit of a teaser of the justices themselves, but obviously that may cause a problem?

Does anyone have any thoughts about that? It's a little off base, but I thought it was interesting enough to put forward.

MS. ZIEVE: So that question sort of reminds me of when George Bush II did some recess appointments for a judge in the 11th Circuit and there were one or two lawsuits about it. I think it might have been Senator Kennedy that sued, if I remember correctly, and lost when the Supreme Court denied cert. And we thought in that instance that the entity or person that would have the right to sue would be someone who was appearing before him if he was unlawfully serving. And that judge by the way was later confirmed by the Senate.

And I think something similar would be here. So if I had a case presiding in front of a lower court judge and he now termed off, then maybe I would have standing. Or in the Supreme Court, whoever came up first if I had a case pending in the Court at that time, and someone who wanted to challenge the law could easily find someone who had a case pending in a court, then they could potentially have standing because they would have their right to have their — the theory would be that they were injured because that person wasn't sitting on their case or because their case wasn't being decided by a court that complied with the Constitution. I mean I'm skeptical that these laws are unlawful, so it's a little hard for me to describe the injury. But I think it would have to somehow be — that the extent there would be a cause of action and extent anyone is injured, it would be someone with a case pending before whoever was being termed off.

MR. ANDERSON: Doug, do you have something you want to add on there?

MR. LETTER: Just very briefly to emphasize what Allison said. I've always thought that it was clear that if somebody was, for instance, criminally convicted in a case where a judge's status could be challenged, you know, if it was somebody was recess appointment or something, it seemed to me absolutely clear that that person had a due process right to challenge. Similarly, I think — I'm not sure Allison mentioned this — but I think you could — somebody could probably argue — and again, this is in my personal capacity — could argue that they're entitled to have a judge in their case with life tenure and therefore subject to no other influences of any kind. You know, the judge was facing being kicked off the court shortly and therefore felt that he or she had to rule a particular way — something like that.

So I would think that that there would be a strong argument for standing.

MR. ANDERSON: Thank you.

MS. ZIEVE: I'll just add real quick, I hope we get the opportunity to find out. (Laughter)

MR. ANDERSON: I'm sure Gabe is happy to hear that.

Let me go to a third question from Elaine Mittleman, who is a retired attorney. And she asks what I think is actually kind of a framing question for this whole subject. But I actually think it's a good one perhaps to close on as we're almost out of time. Which is the question are courts simply too likely to find that there is not standing? And that is in the views of the four of you, is the question here a court that is too stingy on standing? Or is the problem about standing doctrine being misaligned? It is maybe over applied in some cases, under applied in some cases, but it has a valid role to play.

And I think it gets at some of the ideological questions that kind of underlie a lot of the standing doctrine about assumptions about case maintenance and other prudential values in addition to constitutional values.

Noah, why don't we start with you, just because we haven't gotten to hear from you on the Q&A yet.

MR. BOOKBINDER: Yeah, I mean I think — look, I think there is a place for standing doctrine. That it would be impossible I think to administer a system where anyone could sue about anything. It just would be — you know, courts would be overrun, it would be potentially unfair to defendants. But I think that as a lot of this discussion has demonstrated, we have moved too far in the other direction.

So there is balancing that should be done, but it's hard for me to think of examples where there is too much standing and easy to think of examples where there is too little standing. Others who are doing this kind of civil litigation every day may have different ideas on that on this panel. But I think that obviously the corruption context is the one I think about every day and the types of circumstances where it is possible to find somebody who can bring a lawsuit against a corrupt official, like with the kind of conduct that we saw from Donald Trump in the emoluments context, but lots of others as well, they're very limited circumstances where there's somebody who can bring a lawsuit. You know, we again and again saw situations where there were laws being violated and we said what can we do about this. We can't sue because we don't have standing and we can't even think of anybody who would. And if there

was even an argument for it, we were all over that. You know, we were not afraid to lose if there was a credible argument to be made, but I think that there is a realignment that needs to happen and that Congress needs to think about this issue in a much more deliberate way in terms of how can we make it possible for people to assert their own rights, to assert the public's rights in court.

MR. ANDERSON: Thank you, Noah.

Allison?

MS. ZIEVE: I just wanted to add in response to the first part of what you asked, Scott, that I think that the district courts are particularly stringent about standing because they see the appellate courts as cutting back on standing and so they're trying to guess right and see it as sort of safer for them to be extra restrictive. So we see judges even that we sort of expect to be more sympathetic giving us a really hard time and sometimes ruling against us when we think we've got a pretty decent argument. And I think it's because they're making predictions in their heads about what the appellate courts will do.

I remember a few years ago saying something to a district court judge who I ran into outside of court about one of the standing decisions that he had written and I said something like, "Oh, I've just been writing about that in a motion I'm preparing," or something and he said — so he had been reversed, so he said, "Yeah, you know, the law of standing is whatever the D.C. Circuit says in any given case," which I took to mean that like he was at a loss. Like is there standing, is there no standing. Because he had found no standing and been reversed, which we thought was great, but for him it was like I'm just trying to guess what you want and I can't figure it out.

MR. ANDERSON: All right. Thank you so much, Allison.

I think we are just about at time and so I'm going to take a moment to just thank you all for joining us today. This is a really phenomenal group of four people who really are living at the cutting edge of public interest litigation, particularly over the last few years. And it has been an absolutely wonderful conversation and opportunity to benefit from all your insights, from all your experiences, both here and in our prior private discussions. It has been incredibly useful for Victoria and I.

Thank you as well to the audience for joining us today on line. If you all have found this conversation interesting, please stay in touch, be sure to register if you haven't already for the event if

that's still an option, or reaching out to Victoria or I via Twitter or via email. We are doing additional work on this that's going to be coming out in the near future. So please let us know and we will keep you in the loop on that as that's available. Also just keep an eye on our Twitter accounts @BrookingsGov Twitter account for additional information on those.

Otherwise, I hope everyone has a good afternoon and thank you again for joining.

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CERTIFICATE OF NOTARY PUBLIC

I, Carleton J. Anderson, III do hereby certify that the forgoing electronic file when originally transmitted was reduced to text at my direction; that said transcript is a true record of the proceedings therein referenced; that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were taken; and, furthermore, that I am neither a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

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