CONGRESS GOES TO COURT: THE PAST, PRESENT, AND FUTURE OF LEGISLATOR STANDING

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The phenomenon of litigation directly between Congress and the President concerning their respective constitutional powers and prerogatives is a recent one. It was unknown through more than a century and three quarters of our jurisprudence . . . .

—Judge Robert Bork[1]

I. INTRODUCTION

On March 24, 1999, the United States and other members of the North Atlantic Treaty Organization (NATO) began air strikes against selected targets in Yugoslavia.[2] In an address that evening, President Clinton told the American people that the United States was undertaking these actions "to protect thousands of innocent people in Kosovo from a mounting military offensive, . . . to prevent a wider war, to diffuse a powder keg at the heart of Europe that has exploded twice before in this century with catastrophic results . . . [a]nd . . . to stand united with our allies for peace."[3] Given the recent tragedies in Bosnia, the President contended that the U.S. and its allies were seeking to act decisively before the Milosevic regime could perpetrate "ethnic cleansing" against the ethnic Albanians living in the Province of Kosovo.[4]

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1. Barnes v. Kline, 759 F.2d 21, 41 (D.C. Cir. 1985) (Bork, J., dissenting).

2. For a general discussion of the Kosovo conflict, see *Contemporary Practice of the United States Relating to International Law*, 93 AM. J. INT'L L. 628 (Sean D. Murphy ed., 1999) (discussing the nature of NATO actions, congressional reaction and the domestic and international legal arguments regarding the actions).

3. Presidential Address to the Nation on Airstrikes Against Serbian Targets in the Federal Republic of Yugoslavia (Serbia and Montenegro), 11 PUB. PAPERS 451, 451 (Mar. 24, 1999), *available at* http://abcnews.go.com/sections/world/DailyNews/Kosovo_clinton_transcript2.html (last visited Nov. 21, 2001).

4. The President explained:

> We learned some of the same lessons in Bosnia just a few years ago. The world did not act early enough to stop that war, either. And let's not forget what happened . . . a quarter of a million people killed, not because of anything they have done, but because of who they were. Two million Bosnians became refugees. This was genocide in the heart of Europe—not in 1945, but in 1995; not in some grainy newsreel from our parents' and grandparents' time, but in our own time, testing our humanity and our resolve. At the time, many people believed nothing could be done to end the bloodshed in Bosnia . . . . But when we and our allies joined with courageous Bosnians to stand up to the aggressors, we helped to end the war. We learned that in the Balkans, inaction in the face of brutality simply invites more brutality, but firmness can stop armies and save lives. We must apply that lesson in Kosovo before what happened in Bosnia happens there, too.

While the Kosovo conflict may have had support from many members of Congress, it was authorized by neither a declaration of war nor other specific statutory authorization. In a letter provided to Congress on March 26, 1999, the President explained that he had "taken these actions pursuant to [the President's] authority . . . as Commander in Chief and Chief Executive."[5] During the course of the conflict, Congress considered several legislative actions related to the conflict[6]– some aimed at authorizing the use of force, others seeking to circumscribe the actions of the President. The only such legislative measure to be adopted by Congress and signed into law was an emergency supplemental appropriations bill. This appropriations bill merely provided additional funds necessary for the continuing prosecution of the conflict and did not "contain a statement that it [was] intended to constitute specific statutory authorization within the meaning of the War Powers Resolution."[7] Consequently, Congress had provided no *explicit*

Id. at 451-452.

5. Letter to Congressional Leaders Reporting on Airstrikes Against Serbian Targets in the Federal Republic of Yugoslavia (Serbia and Montenegro), 35 WEEKLY COMP. PRES. DOC. 528 (Mar. 26, 1999), *cited in* Campbell v. Clinton, 203 F.3d. 19, 22 (D.C. Cir. 2000).

6. The first measure was a concurrent resolution to authorize the President "to conduct military air operations and missile strikes" against Yugoslavia. The Senate adopted this resolution on March 23, 1999 by a vote of 58-41, but it failed in the House on April 28, 1999 by receiving a tie vote of 213 to 213. S. Con. Res. 21, 106th Cong. (1999). That same day, the House considered three other measures. One was a joint resolution declaring a state of war between the United States and Yugoslavia, introduced by Congressman Campbell. It received two votes in favor and 427 against in the House of Representatives and was not considered in the Senate. H.R.J. Res. 44, 106th Cong. (1999). The second item considered was a concurrent resolution introduced by Campbell, which sought to direct the President to remove troops from Yugoslavia under § 5(c) of the War Powers Resolution. This resolution also failed, by a vote of 139-290. H.R. Con. Res. 82, 106th Cong. (1999). The House did, however, adopt a bill prohibiting the use of funds to send ground troops into Yugoslavia. It passed the House by a vote of 249-180, but was not considered in the Senate. H.R. 1569, 106th Cong. (1999).

7. Campbell v. Clinton, 52 F. Supp. 2d 34, 39 (D.D.C. 1999). The War Powers Resolution provides that:

> Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred–
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> (1) from any provision of law (whether or not in effect before the date of the enactment of this joint resolution), including any provision contained in any *appropriation act*, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of this chapter....

50 U.S.C. § 1547 (1973) (emphasis added).

authorization for President Clinton's actions by the time the military actions ended.

In the wake of this congressional inaction, Congressman Tom Campbell of California and other members of the House of Representatives brought suit against President Clinton seeking a declaratory judgment that the President's actions in the Kosovo crisis were unlawful because they violated both the War Powers Clause of the Constitution[8] and applicable provisions of the War Powers Resolution.[9] In *Campbell v. Clinton*, both the District Court for the District of Columbia[10] and the D.C. Circuit Court of Appeals[11] found that the plaintiffs lacked standing to bring this suit and, thus, never reached the merits of the case.[12]

Campbell v. Clinton is but one of the most recent in a long line of cases dealing with the issue of legislator standing.[13] Ever since the Vietnam War, federal legislators have been emboldened to bring suit against the President, other Executive Branch officials and agencies, and even their own House of Congress.[14] Most of these cases have been filed in the D.C. Circuit.[15] The Supreme Court has merely touched on the

8. Article I, Section 8 of the Constitution provides that "The Congress shall have Power . . . [t]o declare War . . . ." U.S. CONST. art. I, § 8, cl. 8

9. War Powers Resolution, 50 U.S.C. §§ 1541-1548 (1973).

10. *See* Campbell, 52 F. Supp. at 34.

11. *See* Campbell v. Clinton, 203 F.3d 19 (D.C. Cir. 2000), *cert. denied*, 531 U.S. 815 (2000). In July of 2000, Congressman Campbell and his co-plaintiffs filed a petition for a writ of certiorari to the Supreme Court, which was denied on October 2, 2000.

12. *See* John C. Yoo *Point/Counterpoint: Kosovo, War Powers, and the Multilateral Future*, 148 U. PA. L. REV. 1673 (2000) (discussing merits of the use of force in Kosovo).

13. We use the term "legislator standing" to refer to suits brought by a member or members of the U.S. Congress or a House of Congress as a whole. Other commentators have used the term "congressional standing" or "legislative standing."

14. *See* Gregg v. Barrett, 771 F.2d 539, 543 (1985). Judge Mikva noted that "[a] great upsurge in this type of lawsuit began during the Vietnam War era, when members of Congress, frustrated with what they perceived as the failures of this country's Southeast Asian foreign and military policy, filed suit to declare unlawful various executive actions in pursuit of that policy." *Id.*

15. Several notable exceptions that reached other circuit courts are *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973), *Ameron, Inc. v. Unied States Army Corps of Engineers*, 787 F.2d 875 (3d Cir. 1986), *Harrington v. Schlesinger*, 528 F.2d 455 (4th Cir. 1975), *Drummond v. Bunker*, 560 F.2d 625 (5th Cir. 1977), and *Dole v. Carter*, 569 F.2d 1109 (10th Cir. 1977). Several cases that did not rise to the circuit court level are *Gravel v. Laird*, 347 F. Supp 7 (D.D.C. 1972), *Drinan v. Nixon*, 364 F. Supp 854 (D. Mass 1973), and *Shaffer v. Clinton*, 54 F. Supp. 2d 1014 (D. Col. 1999). One case decided by a three-judge court, *McClure v. Carter*, 513 F. Supp. 265 (D. Idaho 1981),

concept of legislator standing in a very small number of cases, the most recent being *Raines v. Byrd*,[16] which involved a challenge to the Line Item Veto Act. As a consequence, it has been left to the D.C. Circuit to develop a jurisprudence on legislator standing. By the 1990s, the Circuit had developed at least three distinct approaches to the question, with the last approach predominating for almost twenty years. The Supreme Court's decision in *Raines*, however, required the D.C. Circuit to reconsider its approaches. *Campbell v. Clinton* and *Chenoweth v. Clinton*,[17] both decided shortly after *Raines*, gave the appellate court the opportunity to begin this reconceptualization. But with little guidance to be gleaned from the Supreme Court's very narrow holding in *Raines*, and with a fundamental misunderstanding of both the nature of injury and the separation of powers doctrine, the D.C. Circuit has failed to develop an adequate approach to legislator standing.

The purpose of this Article is to analyze the concept of legislator standing. It will argue that legislators suing in their official capacity should never be granted standing. In order to advance this argument, Part II will discuss the general doctrine of standing as it has been developed by the Supreme Court. Part III will examine the development of legislator standing, focusing primarily on the jurisprudence of the D.C. Circuit. Part IV will consider the current state of legislator standing and provide our critique. Finally, Part V will discuss the future of legislator standing and conclude that courts should explicitly reject the doctrine of legislator standing.

II. THE DOCTRINE OF STANDING

Under Article III of the Constitution, the judicial power extends only to issues arising from "cases" or "controversies."[18] To a casual observer, this phrase may seem to have no legal significance. In reality, however, the "cases" or "controversies"

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was taken directly to the Supreme Court, which affirmed the decision of the lower court to dismiss with no opinion. *See* McClure v. Reagan, 454 U.S. 1025 (1981) (mem.).

16. 521 U.S. 811 (1997).

17. 181 F.3d 112 (D.C. Cir. 1999).

18. U.S. CONST. art. III, § 2. For an interesting dialogue on the "cases or controversy" provision, see Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297 (1979); Mark Tushnet, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698 (1980).

requirement has been interpreted by courts as an indispensable restriction of the jurisdiction of the federal judiciary. Unlike the courts of numerous other countries,[19] as well as the International Court of Justice,[20] U.S. courts cannot issue advisory opinions. Instead, they are to decide a case only if it presents a "live" dispute between real disputants. As the Supreme Court noted in *Simon v. Eastern Kentucky Welfare Rights Organization*, "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies."[21] To ensure that this "cases and controversies" requirement is met, federal courts have developed and variously used four main justiciability doctrines: standing, mootness,[22] ripeness,[23] and the political question doctrine.[24] If a case is found to be non-justiciable on the basis of any of these doctrines, courts will dismiss it and

19. The Supreme Court noted the difference between countries' standing requirements in *Raines*. Writing for the Court, Chief Justice Rehnquist states: "There would be nothing irrational about a system that granted standing in these cases; some European constitutional courts operate under one or another variant of such a regime." *Raines*, 521 U.S. at 828. The Court cited several sources to support this proposition: Louis Favoreu, *Constitutional Review in Europe, in* CONSTITUTIONALISM AND RIGHTS 38, 41 (Louis Henkin & Albert Rosenthal eds., 1990); Sarah Wright Sheive, *Central and Eastern European Constitutional Courts and the Antimajoritarian Objection to Judicial Review*, 26 LAW & POL'Y INT'L BUS. 1201, 1209 (1995); ALEC STONE, THE BIRTH OF JUDICIAL POLITICS IN FRANCE 232 (1992); DONALD P. KOMMERS, JUDICIAL POLITICS IN WEST GERMANY: A STUDY OF THE FEDERAL CONSTITUTIONAL COURT 106 (1976).

20. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 65, para. 1 ("The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.").

21. 426 U.S. 26, 37 (1976).

22. Courts will not decide cases that are moot. As the Supreme Court stated in *Powell v. McCormack*, 395 U.S. 486, 496 (1969), "a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome."

23. In suits involving a dispute between Congress and the President, the case must be "ripe"—meaning there must be a true "impasse" between the branches. *See* Goldwater v. Carter, 444 U.S. 996, 997 (1979) (Powell, J., concurring).

24. *See* Baker v. Carr, 369 U.S. 186, 217 (1962) (listing six criteria courts may use to determine if a case presents a non-justiciable political question); *Goldwater*, 444 U.S. at 998 (Powell, J., concurring) (reducing criteria to three basic questions: "(i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of Government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention?"). *See also* John Calvin Jeffries, The "Political Question" Doctrine in National Security Cases (n.d.) (unpublished manuscript, on file with author) (discussing the current status of the political question doctrine).

refuse to take up the merits.[25] As the Supreme Court noted in *Allen v. Wright*, "[t]he Art[icle] III doctrine that requires a litigant to have 'standing' to invoke the power of a federal court is perhaps the most important of these doctrines."[26] Before a court can reach the merits, therefore, it must answer—even if implicitly—the question of whether the plaintiff has standing to sue.

Recently, the Supreme Court has had occasion to explore the concept of standing. In its decisions, the Court has elaborated upon the criteria that determine if a plaintiff has standing and has examined the doctrine's underlying rationale. As the Court observed in *Lujan v. Defenders of Wildlife*, "[t]hough some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III."[27] At present, there appear to be three main constitutional criteria necessary to standing.[28] First, "the plaintiff must show that he [or she] personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant."[29] Second, the

25. Interestingly, there seems to be no "fixed rule as to the proper sequence of judicial analysis of contentions involving more than one facet of the concept of justiciability." Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 215 n.5 (1974). This is seen in court practice. In *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000), for example, the majority opinion of the panel dismissed the case for lack of standing but did not address the question of mootness, raised by the Justice Department. In *Goldwater*, the Supreme Court dismissed the case as non-justiciable, but did not discuss standing. Instead, four justices held that the cases presented a non-justiciable political question. *See Goldwater*, 444 U.S. at 1002 (Rehnquist, J., concurring). One justice explicitly rejected application of the political question doctrine, but concluded that the case was not ripe for judicial resolution. *See id.* at 997 (Powell, J., concurring).

26. 468 U.S. 737, 750 (1984).

27. 504 U.S. 555, 560 (1992).

28. Justice Scalia, writing for the Court in *Lujan v. Defenders of Wildlife*, stated:

> [O]ur cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Id. at 560-61 (citations omitted).

29. Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979).

injury must be "fairly traceable to the defendant's allegedly unlawful conduct."[30] In other words, "there must be a causal connection between the injury and the conduct complained of."[31] Third, the injury must be "likely to be redressed by a favorable decision" of the court.[32]

While the second and third criteria are self-explanatory, the Supreme Court has spent a great deal of time elaborating on the first criterion: the requirement of injury. In *Bennett v. Spear*, the Court explained that standing requires "that the plaintiff have suffered an 'injury in fact'—an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical."[33] To be "judicially cognizable," the injured interest must be one that is "legally protected."[34] There must be a legally guaranteed right not to be injured in the fashion alleged by the plaintiff. Moreover, the injury must be real and specific. The Supreme Court rejects injuries that are "generalized." In *Lujan*, the Court noted that it has:

> consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.[35]

In addition to these three fundamental constitutional requirements for standing, courts have developed prudential considerations to be used in evaluating standing.[36] These requirements are "judicially self-imposed limits on the exercise of federal jurisdiction."[37] One of these prudential considerations, established in *Association of Data Processing Service Organizations v. Camp*,[38] is the requirement that the

30. *Allen*, 468 U.S. at 751.
31. *Lujan*, 504 U.S. at 560.
32. Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976).
33. 520 U.S. 154, 167 (1997).
34. *Lujan*, 504 U.S. at 560.
35. *Id.* at 573-74.
36. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 474 (1982) (noting "the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing.").
37. Allen v. Wright, 468 U.S. 737, 751 (1984).
38. 397 U.S. 150, 153 (1970).

injury must fall within "the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[39] This consideration was further elaborated upon in *Bennett v. Spear*.[40] In *Bennett*, the Court explained that "Congress legislates against the background of our prudential standing doctrine, which applies unless it is expressly negated."[41] Thus, Congress has the authority to spell out in a statute precisely what individuals would have interests that would fall within the "zone." As the *Bennett* court noted, "the breadth of the zone of interests varies according to the provisions of law at issue . . . ."[42] Necessarily, a court would examine the provisions of any statute in question to determine precisely whose interests would be protected and thus who would have standing.

It is also important to note that the Supreme Court's understanding of standing has evolved over time. Particularly significant in this evolution has been a movement in recent years to address concerns about separation of powers.[43] In 1968, for example, the Court noted in *Flast v. Cohen* that "[t]he question whether a particular person is a proper party to maintain [a particular] action does not, by its own force, raise separation of powers problems."[44] Yet, by 1975, the Court stated in *Warth v. Seldin* that standing was "founded in concern about the proper—and properly limited—role of the courts in a democratic society."[45] Confirming the increased importance of separation of powers, the Court observed in *Allen v. Wright* that "[t]he law of Art. III standing is built on a single basic idea—the idea of separation of powers."[46]

Finally, it should be noted that when the court assesses standing, it assumes the plaintiff's claims on the merits are correct. "For purposes of ruling on a motion to dismiss for want of standing . . . courts must accept as true all material

39. *Id.*
40. 520 U.S. 154, 162-66 (1997).
41. *Id.* at 163.
42. *Id.*
43. This change was noted by the D.C. Circuit in *Chenoweth v. Clinton*. The court explained that, after 1974, "the Supreme Court began to place greater emphasis upon the separation of powers concerns underlying the Article III standing requirement." Chenoweth v. Clinton, 181 F.3d 112, 114 (D.C. Cir. 1999). We draw here upon the discussion in *Chenoweth*.
44. 392 U.S. 83, 100 (1968).
45. 422 U.S. 490, 498 (1975).
46. 468 U.S. 737, 752 (1984).

allegations of the complaint, and must construe the complaint in favor of the complaining party."[47] The court is to ask: Assuming that the plaintiff's claims on the merits are correct, was plaintiff injured? Is the injury fairly traceable to the defendant? And would a favorable court decision rectify the injury?

III. THE PAST: THE EVOLUTION OF LEGISLATOR STANDING

While there is a wealth of jurisprudence on the doctrine of standing generally, there has been little discussion by courts of the specific concept of legislator standing.[48] As noted earlier, the Supreme Court has said very little about the circumstances under which legislators can have standing. In light of general standing requirements discussed above, this Part will trace the development of legislator standing in the federal courts. It will naturally explore the role played by the Supreme Court, but will focus on the D.C. Circuit Court of Appeals as the federal court from which the vast majority of jurisprudence has emerged.

A. The Supreme Court—Phase One: The Early Cases

Broadly speaking, there have been two types of cases in which the Supreme Court has ruled on legislator standing: those in which the legislators claim an injury to some official or *institutional* interest and those in which the legislators claim an injury to a personal or *individual* interest. The first involvement

47. *Warth*, 422 U.S. at 501.

48. There has been some scholarly discussion about the concept of legislator standing. *See, e.g.*, THOMAS M. FRANCK & MICHAEL J. GLENNON, FOREIGN RELATIONS AND NATIONAL SECURITY LAW 965-1008 (2d ed. 1993); Carl McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241, 254-55 (1981); R. Lawrence Dessem, *Congressional Standing to Sue: Whose Vote is This, Anyway?*, 62 NOTRE DAME L. REV. 1 (1986); Arthur H. Abel, Note, *The Burger Court's Unified Approach to Standing and its Impact on Congressional Plaintiffs*, 60 NOTRE DAME L. REV. 1187 (1985); Theodore Y. Blumoff, *Judicial Review, Foreign Affairs and Legislative Standing*, 25 GA. L. REV. 227 (1991); Sophia C. Goodman, Note, *Equitable Discretion to Dismiss Congressional-Plaintiff Suits: A Reassessment*, 40 CASE W. RES. L. REV. 1075 (1990); David G. Mangum, Comment, *Standing Versus Justiciability: Recent Developments in Participatory Suits Brought by Congressional Plaintiffs*, 1982 B.Y.U. L. REV. 371 (1982); Jonathan Wagner, Note, *The Justiciability of Congressional-Plaintiff Suits*, 82 COLUM. L. REV. 526 (1982); David J. Weiner, Note, *The New Law of Legislative Standing*, 54 STAN. L. REV. 205 (2001); Note, *Congressional Access to the Federal Courts*, 90 HARV. L. REV. 1632 (1977).

of the Supreme Court in the question of legislator standing came in 1939 in *Coleman v. Miller*,[49] a case in which the legislators alleged an institutional injury. In 1937, the Senate of Kansas was considering ratification of an amendment to the U.S. Constitution referred to as the Child Labor Amendment. When the question of the approval of the amendment was voted upon in the Senate, the vote was split. To break the tie, the Lieutenant Governor, the presiding officer of the Senate, voted "yes." Subsequently, the Kansas House of Representatives approved the amendment. Prior to signature by the Governor, twenty four members of the legislature (all twenty senators who had voted against the amendment, one senator who had voted in its favor, and three members of the House) brought suit in the Kansas Supreme Court against the Secretary of the Senate of Kansas and other state officials to prevent them from taking action to certify the adoption of the amendment by the legislature. The State Supreme Court rejected the arguments of the plaintiffs, who then petitioned for a writ of certiorari.

The first question to be addressed by the Court was standing. In language that has confounded subsequent court discussions of legislator standing, the Court held that the plaintiff-legislators did indeed have standing. Noting that "the plaintiffs include twenty senators, whose votes against ratification have been overridden and virtually held for naught although if they are right in their contentions their votes would have been sufficient to defeat ratification,"[50] the Court held that "[t]hese senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes."[51] To support this proposition, the Court cited two cases, *Hawke v.* Smith[52] and *Leser v. Garnett*,[53] in which individuals challenged actions by their states that related to questions about the status of amendments to the U.S. Constitution. Asserting that these cases were "controlling authorities,"[54] the Court nonetheless felt compelled to "refer to some other instances in which the

49. 307 U.S. 433 (1939). The facts of the case are taken from the opinion of the Court. *See id.* at 435-37.
50. *Id.* at 438.
51. *Id.*
52. 253 U.S. 221 (1920).
53. 258 U.S. 130 (1922).
54. *Coleman*, 307 U.S. at 441.

question of what constitutes a sufficient interest to enable one to invoke our appellate jurisdiction has been involved."[55] The Court explored cases in which state and federal agencies and officials had challenged federal actions. The Court noted:

> [t]his class of cases in which we have exercised our appellate jurisdiction on the application of state officers may be said to recognize that they have an adequate interest in the controversy by reason of their duty to enforce the state statutes the validity of which has been drawn in question.[56]

Finally, after reviewing several cases in which private individuals challenged state action, the Court concluded:

> we find no departure from principle in recognizing in the instant case that at least the twenty senators whose votes, if their contention were sustained, would have been sufficient to defeat the resolution ratifying the proposed constitutional amendment, have an interest in the controversy which, treated by the state court as a basis for entertaining and deciding the federal questions, is sufficient to give the Court jurisdiction to review that decision.[57]

Unfortunately, *Coleman* raises more questions than it answers. First, does the Court's conclusion that senators in Kansas have standing to sue state officials have any relevance to suits brought by federal legislators? None of the precedents cited by the Court related specifically to legislators. Indeed, the precedents related to *individuals* suing as "voters," "taxpayers," or "citizens" and *officials* or *agencies* bringing suit. Most precedents involving individuals were challenges to actions by a State that implicated the U.S. Constitution. Moreover, the litigation involving the State of Kansas and its legislators arguably does not raise the same types of separation-of-powers concerns that could present themselves in cases involving suits brought by a U.S. Senator or Congressperson.[58] Finally, in *Coleman*, "the Kansas Supreme Court 'treated' the senators' interest in their votes 'as a basis for entertaining and deciding

55. *Id.*
56. *Id.* at 445.
57. *Id.* at 446.
58. As the Supreme Court noted, this distinction was pointed out by the appellants in *Raines*, who "argued that *Coleman* has no applicability to a similar suit brought by federal legislators, since the separation-of-powers concerns present in such a suit were not present in *Coleman*." Raines v. Byrd, 521 U.S. 811, 824 n.8 (1997).

the federal questions.'"[59] It may have been this decision by the Kansas court about its own law that led the Supreme Court of the United States to grant standing.[60] Second, even if one were to assume that *Coleman* would support the proposition that federal legislators could have standing, must the entire disenfranchised group be before the court in order for standing to be upheld? In *Coleman* all twenty senators who voted against the amendment were present before the court. Would the Supreme Court have granted standing if it had been less than the entire group? Third, has the general jurisprudence of the court on standing evolved since *Coleman*? While *Coleman* referred to parties having an "interest" in bringing suit, it did not elaborate upon the nature of the "injury" that may have been suffered. Have Supreme Court decisions on standing since *Coleman* moved toward articulating a more specific requirement of "concrete injury" that might not have been met in *Coleman*?[61]

The second type of case in which the Supreme Court has held that legislators can have standing is when an individual legislator claims some direct, individual injury. In *Bond v. Floyd*,[62] the Court granted standing to an individual who had been elected to the Georgia House of Representatives but was excluded by the House. Similarly, in *Powell v. McCormack*,[63] the Supreme Court agreed to hear a claim by U.S. Congressman Adam Clayton Powell that he had been unconstitutionally denied his seat in the House of Representatives and deprived

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59. *Id.* (quoting *Coleman*, 307 U.S. at 446) (discussing argument of appellants).

60. This was another argument raised by the appellants in *Raines*. *See id.* The D.C. Circuit also raised this point in oral argument on the *Campbell* case. In its questioning of counsel for Congressman Campbell, the court said:

> Well, you have sort of an anomaly, a problem the *Coleman* case presents . . . where the Kansas Supreme Court had already made . . . a constitutional decision based in its perception that its legislators had standing under Kansas law. So, one could easily say, well, we have to treat that as standing for Kansas law, but that doesn't mean it's standing under federal [law]. In other words, the Supreme Court could distinguish *Coleman* on the grounds that we had no choice but to take that case because of what [the] Kansas Supreme Court did. But, we would never do that for a federal Congress.

Transcript of Proceedings at 13, Campbell v. Clinton, 203 F.3d 19 (D.C. Circuit 2000) (No. 99-5214).

61. Arthur H. Abel argues that the Burger Court moved to a much more specific understanding of "injury in fact." Abel, *supra* note 48, at 1192.

62. 385 U.S. 116, 131 (1966).

63. 395 U.S. 486 (1969).

of the corresponding salary. *Powell* takes on extra significance because this is the first and only time that the Court granted standing to a member of the *federal* legislature. But what makes *Powell* an easy case is the fact that he was "singled out for specially unfavorable treatment."[64] As the Supreme Court would later note, Powell's injury really involved the "loss of [a] private right"[65]—his right to his seat and salary—and not the "loss of political power."[66] Thus, *Powell* provides little guidance about the most common legislator suits, which involve a claim of an institutional injury.

B. The D.C. Circuit Addresses Legislator Standing

As noted earlier, federal legislators began to take recourse to the courts in the 1970s to challenge actions of the Executive Branch in Vietnam. Given the location of the federal government in the District of Columbia, nearly all of the legislator suits made their way into the D.C. Circuit Court of Appeals. With few relevant words from the Supreme Court, the D.C. Circuit began to develop its own jurisprudence on legislator standing. Between 1973 and 1997, the court produced three different approaches to the question.[67] The first approach was articulated in *Mitchell v. Laird*.[68] The second approach developed over the course of several cases: *Kennedy v. Sampson*,[69] *Harrington v. Bush*[70] and *Goldwater v. Carter*.[71] The final approach was also developed in several cases, beginning with *Riegle v. Federal Open Market Committee*.[72]

1. The First Approach—Mitchell v. Laird

In April of 1971, Congressman Parren J. Mitchell of Maryland and twelve other members of the House of Representatives brought suit against President Nixon, the Secretary of State, the

64. Raines v. Byrd, 521 U.S. 811, 821 (1997).
65. *Id.* at 820-21.
66. *Id.* at 821.
67. We draw upon the discussion of standing in FRANCK & GLENNON, *supra* note 48, at 965-1008, for our discussion of the early approaches taken by the D. C. Circuit.
68. 488 F.2d 611 (D.C. Cir. 1973).
69. 511 F.2d 430 (D.C. Cir. 1974).
70. 553 F.2d 190 (D.C. Cir. 1977).
71. 617 F.2d 697 (D.C. Cir. 1979), *vacated*, Goldwater v. Carter, 444 U.S. 996 (1979).
72. 656 F.2d 873 (D.C. Cir. 1981).

Secretary of Defense, and the Service Secretaries claiming that the Executive Branch officers were waging an unconstitutional war in Southeast Asia due to the lack of explicit Congressional authorization.[73] While the D.C. Circuit ultimately dismissed the case as a non-justiciable political question, the court did grant the plaintiffs standing. In an opinion delivered by District Judge Charles Wyzanski, sitting by designation, the court explained:

> If we, for the moment, assume that defendants' actions . . . are beyond the authority conferred upon them by the Constitution, a declaration to that effect would bear upon the duties of plaintiffs to consider whether to impeach defendants, and upon plaintiffs' quite distinct and different duties to make appropriations to support the hostilities, or to take other legislative actions related to such hostilities . . . . [T]hese considerations are sufficient to give plaintiffs a standing to make their complaint.[74]

The court articulated what has been called the "bears upon" test.[75] The legislators had standing not because of any specific injury, but because a decision by the court would "bear upon" their duties as members of Congress to decide if any legislative measures were necessary.

This initial approach of the D.C. Circuit to legislator standing is exceptionally permissive and quite problematic. Almost any decision by a court on virtually any issue could "bear upon" the responsibilities of the legislator. Indeed, this approach would seem to endorse advisory opinions by courts to legislators on any matter of official interest. Not surprisingly, shortly after *Mitchell* the Second Circuit rejected the "bears-upon" test for precisely this reason. In *Holtzman v. Schlesinger*,[76] the Second Circuit explained:

> The claim that the establishment of illegality here would be relevant in possible impeachment proceedings against the President would in effect be asking the judiciary for an advisory opinion which is precisely and historically what the 'case and controversy' conditions set forth in Article III,

73. *See Mitchell*, 488 F.2d at 613.
74. *Id.* at 614.
75. FRANCK & GLENNON, *supra* note 48, at 967.
76. 484 F.2d 1307 (2d Cir. 1973) (suit by Congresswoman Elizabeth Holtzman seeking declaratory and injunctive relief in response to American use of force in Cambodia).

Section 2 of the Constitution forbid.[77]

In another legislator standing case outside the D.C. Circuit, *Harrington v. Schlesinger*,[78] the Fourth Circuit also refused to accept the *Mitchell* approach.

2. *The Second Approach*—Kennedy v. Sampson; Harrington v. Bush; Goldwater v. Carter

Perhaps not surprisingly, the "bears upon" test of *Mitchell* did not survive.[79] In 1974, the D.C. Circuit began to articulate a different approach to legislator standing. Three main cases, *Kennedy v. Sampson*,[80] *Harrington v. Bush*,[81] and *Goldwater v. Carter*,[82] served as the basis for this approach. In these cases, the court aligned the test for legislator standing much closer to the general standing requirements expressed by the Supreme Court.

In *Kennedy v. Sampson*,[83] Senator Edward M. Kennedy brought suit against the Acting Administrator of the General Services Administration, Sampson, and the Chief of White House Records seeking court action requiring both to take necessary ministerial actions to certify that the Family Practice of Medicine Act had become federal law. In December of 1970, both Houses of Congress had adopted the Act by overwhelming margins and submitted it to the President. Congress, however, adjourned for the holiday and did not return until more than ten days had elapsed from the date on which the bill was given to the President for action. The President refused to sign the bill and indicated that, because

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77. *Id.* at 1315. The Court also noted that Holtzman had not suffered any personal injury traceable to defendants. The Court noted that:

> She has not been denied any right to vote . . . . She has fully participated in the Congressional debates which have transpired . . . . The fact that her vote was ineffective was due to the contrary votes of her colleagues and not the defendants herein.

Id. The Second Circuit also found that the case presented a non-justiciable political question and thus did not need to explore standing, but did so nonetheless. *See id.*

78. 528 F.2d 455, 459 (4th Cir. 1975).

79. *See* FRANCK & GLENNON, *supra* note 48, at 967 ("The *Mitchell* 'bears upon' test was short-lived.").

80. 511 F.2d 430 (D.C. Cir. 1974).

81. 553 F.2d 190 (D.C. Cir. 1977).

82. 617 F.2d 697 (D.C. Cir. 1979), *vacated and remanded*, Goldwater v. Carter, 444 U.S. 996 (1979).

83. 511 F.2d at 430. The facts of the case are taken from the opinion of the court. *Id.* at 432.

Congress was not in session, the bill failed to become law under the operation of a "pocket veto."[84] Kennedy contended that the provisions of the Constitution dealing with the pocket veto were not intended to apply to intra-session adjournments such as this, but only final adjournments.[85]

Before reaching the merits, the court spent a great deal of time on the question of standing. Unlike its approach in *Mitchell*, the court did not discuss the "bears upon" test. Instead, the court suggested two other approaches to standing. Under the first approach, the court "is to inquire whether a 'logical nexus' exists between the status asserted by a litigant and the claim sought to be adjudicated."[86] In other words, can a person in this situation bring this type of claim? The court concluded that this "logical nexus" was present. A Congressperson who voted a particular way can challenge "the validity of executive action which purports to have disapproved an Act of Congress by means of a constitutional procedure which does not permit Congress to override the

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84. The process by which a bill becomes a law is set forth in the Constitution:

> If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, *unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.*

U.S. CONST. art. I, § 7, cl. 2. (emphasis added), *quoted in Kennedy*, 511 F.2d at 436.

85. *See* Barnes v. Kline, 759 F.2d 21, 23 n.5 (D.C. Cir. 1985) ("'Intersession' adjournments separate the first and second sessions of each Congress, in contrast to 'intrasession' adjournments (those within a session) and 'final' adjournments (those at the end of a Congress).")

86. *Kennedy*, 511 F.2d at 433. *See* Flast v. Cohen, 392 U.S. 83 (1968). In *Flast*, the Supreme Court explained:

> The various rules of standing . . . have been fashioned with specific reference to the status asserted by the party whose standing is challenged and to the type of question he wishes to have adjudicated . . . . [I]n deciding the question of standing, it is not relevant that the substantive issues in the litigation might be nonjusticiable. However, . . . in ruling on standing, it is both appropriate and necessary to look to the substantive issues . . . to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated. . . . . Such inquiries . . . assure that he is a proper and appropriate party to invoke federal judicial power. Thus, our point of reference in this case is the standing of individuals who assert only the status of federal taxpayers and who challenge the constitutionality of a federal spending program. Whether such individuals have standing to maintain that form of action turns on whether they can demonstrate the necessary stake as taxpayers in the outcome of the litigation to satisfy Article III requirements.

Id. at 101-02. It seems, however, that the D.C. Circuit misinterpreted *Flast*. In *Flast*, the Supreme Court is not offering the "logical nexus" approach as an independent approach to standing, but rather is presenting it as part of the overall standing analysis.

disapproval."[87] Without much further elaboration, the court then set forth another approach to standing, noting that "[a] somewhat different analysis of standing has been employed with respect to parties who challenge administrative action."[88] Drawing upon *Association of Data Processing Service Organizations v. Camp*, the court noted two questions courts should ask to determine standing: First, "does the plaintiff allege that the challenged action has caused him 'injury in fact, economic or otherwise.'"[89] Second, "is the interest sought to be protected 'arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'"[90] The court explained that the complaint clearly "alleges an injury to [Kennedy] in his capacity as a United States Senator . . . 'by denying him the effectiveness of his vote as a member of the United States Senate.'"[91] Moreover, the claim fell within the "zone of interest" protected by the Constitution.[92] The court noted that "[a]ppellee's asserted interest plainly falls among those contemplated by the constitutional provision upon which he relies [Article I, Section 7]."[93] As the court explained:

> The gist of appellee's complaint is that such an intrusion [upon his legislative power] has occurred as a result of the President's misinterpretation of this clause and that a consequence of this intrusion is the nullification of appellee's vote in favor of the bill in question; hence, the complaint alleges injury to an interest of appellee as a member of the legislative branch of the government, an interest among those protected by Article I, Section 7.[94]

But after having made these general statements, the court had to address a crucial question left open in *Coleman v. Miller*: Can *one* or *several* legislators have standing? Does the entire disenfranchised group need to be before the court? In *Kennedy*, the appellants claimed "that only the interests of the *Congress*

87. *Kennedy*, 511 F.2d at 433.
88. *Id.*
89. *Id.* at 434 (quoting Association of Data Processing Service Orgs. v. Camp, 397 U.S. 150, 152 (1970)).
90. *Id.* (quoting *Association of Data Processing Service Orgs.*, 397 U.S. at 153).
91. *Id.*
92. *Id.* (quoting Complaint at 15, Kennedy v. Sampson, 364 F. Supp. 1075 (D.D.C. 1972) (No. 1583-72)).
93. *Id.*
94. *Id.*

or one of its Houses *as a body* are protected by this [constitutional] provision."[95] The court rejected this argument. While noting that "[t]he *Coleman* opinion neither confirms nor rejects appellants' interpretation,"[96] the court concluded that "the better reasoned view of both *Coleman* and the present case is that an individual legislator has standing to protect the effectiveness of his vote with or without the concurrence of other members of the majority."[97] Even though the injury to an individual legislator may be "indirect" or "'derivative,'"[98] "[t]he prerequisite to standing is that a party be 'among the injured'. . . not that he be the *most* grievously or *most* directly injured."[99] From the court's perspective, Kennedy was "among the injured."[100] Moreover, the court explained, it appeared:

> axiomatic that, to the extent that Congress' role in the government is thus diminished, so too must be the individual roles of each of its members. Put another way, the influence of any one legislator upon the political process is in great measure dependent upon the stature of the governmental branch of which he is a member.[101]

Accordingly, the court concluded that, though the asserted interest was derivative:

> it is nonetheless substantial. When asserted in the context of a particular dispute about specific legislation, such an interest may be sufficient to confer standing . . . . In the present case, appellee has alleged that conduct by officials of the executive branch amounted to an illegal nullification not only of Congress' exercise of its power, but also of appellee's exercise of his power. In the language of the *Coleman* opinion, appellee's object in this lawsuit is to vindicate the effectiveness of his vote. No more essential interest could be asserted by a legislator. We are satisfied, therefore, that the purposes of the standing doctrine are fully served in this litigation.[102]

With these words, the court was making a critical claim about the nature of an institutional injury, a claim that would

95. *Id.* (emphasis added).
96. *Id.* at 435.
97. *Id.*
98. *Id.* (quoting Appellants' Reply Brief at 2-3).
99. *Id.* (quoting Sierra Club v. Morton, 405 U.S. 727, 735 (1972)).
100. *Id.* at 436.
101. *Id.*
102. *Id.*

haunt the Circuit's jurisprudence. The court said that while the "full injury" is to the entire body, an individual Congressperson's effectiveness, as a member of that body, has been diminished, and thus he or she should be able to bring suit to vindicate that effectiveness. The grave problem with this conclusion is that it misapprehends the role of a member of Congress. Unlike the President or other members of the Executive Branch, individual Congresspersons have no governmental power. The only governmental power of the Legislative Branch exists when Congress or a particular House acts as a whole. Because individual members lack governmental power, they cannot suffer "injury" cognizable for standing.[103]

In short, the *Kennedy* court took a very different approach than the *Mitchell* court. Not purporting to rely on the "bears upon" test, the court looked to the same types of requirements found in a general standing analysis. The court seemed determined to demonstrate that there had been an "injury in fact." The court also attempted to fill part of the void left by *Coleman*, holding that individual members of Congress could have standing, even if their injury was "derivative" from injury to Congress or a particular House as a whole. Interestingly enough, the *Kennedy* court did not *explicitly* reject the "bears upon" language of *Mitchell*. That rejection would have to wait until the D.C. Circuit decided *Harrington v. Bush* in 1977.

Harrington v. Bush involved a suit brought by Congressman Michael Harrington against the Director of Central Intelligence, George Bush.[104] Harrington sought a declaratory judgment that the Central Intelligence Agency was engaging in illegal activities and a court order "prohibiting the Agency from using the funding and reporting provisions of the Central Intelligence Agency Act of 1949 . . . in connection with the allegedly illegal activities."[105] Harrington attempted to base his standing on both the *Mitchell* and *Kennedy* decisions. He contended that a ruling by the court on the CIA's activities would "bear upon" his duties as a legislator both with respect to contemplating impeachment[106]and with regard to considering other legislative

103. *See infra* Part IV.
104. 553 F.2d 190 (D.C. Cir. 1977).
105. *Id.* at 193.
106. *Id.* at 198. The court explained: "Appellant states that a declaration of

action.[107] He also argued that he suffered injury to his effectiveness as a legislator because the funding and reporting arrangement established by the Central Intelligence Act was being used to conduct illegal activities.[108]

In an exceptionally well-written decision by Judge Wilkey, the court rejected both of Harrington's claims and further refined the approach to standing announced in *Kennedy*. The court was quite explicit about its view of the proper approach to legislator standing, explaining that "[t]he *most basic point* to consider is that *there are no special standards for determining Congressional standing questions*."[109] It went on to say that "[a]lthough the interests and injuries which legislators assert are surely different from those put forth by other litigants, the technique for analyzing the interests is the same."[110] The basic approach to all standing issues, the court explained, has been explicated by the Supreme Court.[111] According to Judge Wilkey, "the most consistent theme expressed by the Supreme Court on the question of standing is that a party must allege 'a distinct and palpable injury to himself.'"[112] The court explained that "[t]his injury must be 'a particular concrete injury' which amounts to 'a claim of specific present objective harm or a threat of specific future harm.'"[113] Given this conclusion that "injury-in-fact" is a *sine qua non* of standing, the court explicitly rejected the *Mitchell* approach. The court concluded:

> [T]he "bears upon" language, and the notion it imports, are inconsistent with the constitutional requirement of injury in fact and strike at the foundations of the standing doctrine as

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illegality in this case would 'bear upon' his duties and rights 'to consider, initiate, support or vote for the impeachment of the defendants and other civil officers of the United States . . . .'" *Id.* (citations omitted).

107. *Id.* at 199.

108. *Id.* at 200.

109. *Id.* at 204.

110. *Id.*

111. *Id.* at 204-05. As the court explained:

> The source for these standards and techniques is to be found in the opinions of the Supreme Court. Although the Supreme Court has not directly faced the question of standing to allow individual members of the legislative branch to seek judicial relief from action taken by members of the executive branch, the Court's numerous rulings on standing in other contexts are fully applicable to this particularized situation.

Id. (footnote omitted).

112. *Id.* at 208 (quoting Warth v. Seldin, 422 U.S. 490, 501 (1975)) (footnote omitted).

113. *Id.* (citing United States v. Richardson, 418 U.S. 166, 177 (1974); Laird v. Tatum, 408 U.S. 1, 14 (1972)) (footnotes omitted).

> developed by the Supreme Court. Just as it is well established that "a mere 'interest in a problem' . . . is not sufficient by itself . . ." for standing, neither is the mere relevance of a challenged activity to an asserted interest sufficient to invoke the power of the federal judiciary.[114]

Thus, any claim to standing by Harrington based solely on the notion that a ruling by the court would have an impact on his decision making as a member of Congress must be dismissed.

Having thus disposed of the "bears upon" approach, the court clarified what constitutes an "injury-in-fact" to legislators to determine if Harrington met this standard. To do this, the court began with the principle from *Kennedy*. According to the court, "[t]he *Kennedy* paradigm . . . relies on nullification of a specific vote as the requisite injury in fact."[115] "[T]he injury," the court explained, "to the previously cast vote was the effective disenfranchisement of the legislator with respect to the bill in question. As a result of the asserted illegality, the Senator's vote was rendered a direct and immediate nullity, as if he had not cast the vote at all."[116] Judge Wilkey also noted that the *Kennedy* court had "adopted an objective standard for determining when judicially cognizable injury has taken place."[117] This standard "is to be found in reference to 'official influence'; the nature of this influence is determined by the Constitution, statutes, and rules and practices of the two houses of Congress and not by an individual legislator's conception."[118] Congressman Harrington, however, had only claimed "subjective injury to his overall effectiveness"[119] and thus did not meet the *Kennedy* test.

The court then proceeded to "test [Harrington's claims] against the broader framework of the standing doctrine."[120] The court again found Harrington's claim invalid. His past[121] and

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114. *Id.* at 209 (quoting Sierra Club v. Morton, 405 U.S. 727, 739 (1972)) (footnotes omitted).
115. *Id.* at 211.
116. *Id.*
117. *Id.* at 212.
118. *Id.*
119. *Id.*
120. *Id.*
121. The court noted:

> With respect to the impairment of votes already cast . . . there is no injury in fact . . . . [A]ll the traditional alternatives related to the "power of the purse" remain intact. Appellant's votes have not been nullified . . . .

future votes[122] on appropriations had not been impaired in such a manner as to constitute an "injury-in-fact." Nor was his overall effectiveness as a legislator diminished. The court explained that "[t]o constitute injury in fact, the alleged harm must be 'specific . . . and objective'; appellant's claims regarding effectiveness are neither."[123] Harrington was, "from an objective vantage, as effective a legislator as any of his colleagues, fully able to exercise all rights granted to him by the Constitution, statutes, and House rules and practices."[124] Thus, the court concluded:

> The allegedly illegal activities of the CIA have not diminished this effectiveness. The legislative prerogatives of Congress and the appellant have not been frustrated by the Agency activities. Since appellant has failed to show injury to his effectiveness as a Congressman, he has no right to invoke the power of the federal judiciary.[125]

Harrington, therefore, supports the proposition that legislators need to be treated for standing purposes as any other litigant. It is not enough that a decision by the court would have a bearing on the official duties of the legislator; there must be a specific, concrete injury-in-fact. Such injury could be a disenfranchisement resulting from a nullification of a specific vote on a specific measure before Congress. But denial of information to a legislator or the simple violation of federal law by the Executive does not rise to the level of such

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> [A]ppellant may feel that he has been severely injured when casting his votes or that he would have cast his vote differently. Such feelings of injury are subjective in nature; from an objective standpoint, his "official influence" has not been diminished by the allegedly illegal activities.

Id. at 213 (footnote omitted).

122. The court explained:

> As to appellant's claims that his future votes on appropriations measures are impaired . . . there has been no judicially cognizable injury stated . . . . [H]e has not drawn the necessary connection between these activities and his interests in the appropriations process to assure us of the "concrete adverseness" which is the concern of the standing doctrine. In *Kennedy* this concreteness was assured because of the direct nullification of the Senator's vote; here the illegality has not been traced into a "discrete factual context in which . . . concrete injury [has] occurred or is threatened," and any injury remains speculative and remote.

Id. at 212 (footnotes omitted) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 222 (1974)).

123. *Id.* at 213 (footnotes omitted) (quoting Laird v. Tatum, 408 U.S. 1, 14 (1972)).

124. *Id.*

125. *Id.*

disenfranchisement.

The D.C. Circuit continued this line of reasoning in *Goldwater v. Carter*.[126] Senator Goldwater sued President Carter over the President's termination of the Mutual Defense Treaty with the Republic of China (Taiwan), alleging that Carter's action was unconstitutional because he failed to submit the Treaty to the Senate for a vote on termination. For standing purposes, Goldwater asserted a specific, concrete injury: he was denied an opportunity to vote on termination of the Treaty. The D.C. Circuit agreed. In a *per curium* opinion, the court differentiated two types of injury claims made by legislators seeking standing. The court noted it:

> has carefully drawn a distinction between (1) a diminution in congressional influence resulting from an Executive action that nullifies a specific congressional vote or opportunity to vote, in an objectively verifiable manner which, we have found, constitutes injury in fact; and (2) a diminution in a legislator's effectiveness, subjectively judged by him or her, resulting from Executive action withholding information or failing to obey a statute enacted through the legislator's vote, where the plaintiff-legislator still has power to act through the legislative process to remedy the alleged abuses in which situations we do not find injury in fact.[127]

The court explained that "[t]o be cognizable for standing purposes, the alleged diminution in congressional influence must amount to a disenfranchisement, a complete nullification or withdrawal of a voting opportunity; and the plaintiff must point to an objective standard in the Constitution, statutes or congressional house rules, by which disenfranchisement can be shown."[128] Goldwater, the court continued, identified "an objective standard in the Constitution as giving them a right to vote on treaty termination."[129] The plaintiffs were able to demonstrate a "disenfranchisement in the context of a specific measure, *i.e.*, the proposed termination of the Mutual Defense Treaty."[130]

What is perhaps most significant about this case is that the

126. 617 F.2d 697 (D.C. Cir. 1979), *vacated and remanded*, Goldwater v. Carter, 444 U.S. 996 (1979).
127. *Id.* at 702 (footnotes omitted).
128. *Id.* (footnotes omitted).
129. *Id.*
130. *Id.*

court defines more precisely what is meant by "disenfranchisement." In *Goldwater*, the court explained that "[w]hether the President's action amounts to a complete disenfranchisement depends on whether appellees have left to them any legislative means to vote in the way they claim is their right."[131] "In other words," asked the court, "do they have effective power to block the termination of this treaty despite the President's action?"[132] The court concluded Goldwater and his colleagues had no other legislative remedies, effectuating a "complete disenfranchisement."[133] This language suggests that to be disenfranchised, there must be nothing else a legislator can do through the legislative process to stop the action by the Executive Branch official.

Given the D.C. Circuit's decisions in *Kennedy v. Sampson*, *Harrington v. Bush*, and *Goldwater v. Carter*, a clear approach to legislator standing had been developed. For a legislator to have standing there had to be a concrete injury in fact, resulting in "complete disenfranchisement." This disenfranchisement took place when a specific vote was nullified or an opportunity to vote was denied and there were no other legislative remedies available. Mere violation of the law by the President or other Executive Branch official did not constitute an injury cognizable for standing purposes. Further, it did not matter whether only one or several legislators brought suit. Under the *Kennedy-Harrington-Goldwater* approach, there was no requirement that the entire House of Congress be a party or that the suit be pursuant to explicit authorization.[134]

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131. *Id.*

132. *Id.*

133. *Id.*

134. Two Judges in *Goldwater* argued that Goldwater and his colleagues lacked standing. Judge Wright, in a concurrence joined by Judge Tamm, contended that because a majority of Congress had not explicitly challenged the President's action, an individual member of Congress cannot properly have suffered an injury at the hands of the President. Judge Wright explained:

> [W]here a legislator alleges Executive impairment of the effectiveness of his vote, his injury can only be derivative. He cannot suffer injury in fact unless Congress has suffered injury in fact . . . . Unless Congress has taken all final action in its power to exercise its constitutional prerogative, any injury an individual legislator suffers may find its source not in the President, but in his colleagues in Congress. Where Congress itself, and not the Executive, renders an individual legislator's vote ineffective, the courts have no role.

Id. at 712 (Wright, C.J., concurring) (footnotes and citations omitted). This logic implies that for a legislator to have standing in cases such as this, Congress or a

3. *The Third Approach*—Riegle v. Federal Open Market Committee *and the Doctrine of "Equitable Discretion"*

For good or ill, the approach from *Kennedy-Harrington-Goldwater* did not last much beyond *Goldwater*. Following the decision by the D.C. Circuit on the merits in *Goldwater* upholding President Cater's right to terminate unilaterally the Mutual Defense Treaty, Senator Goldwater and his co-plaintiffs petitioned the Supreme Court for certiorari. While the Court decided to grant certiorari, it nonetheless dismissed the suit as non-justiciable for a variety of reasons: four justices found the case presented a political question,[135] and one justice concluded that the case was not ripe for judicial determination.[136] Interestingly enough, the Court did not address the question of standing.[137] With the Supreme Court completely "ignoring" legislator standing, the circuit decided to reevaluate this approach. *Riegle v. Federal Open Market Committee*[138] gave the court its first opportunity to begin this reevaluation.

In 1979, Senator Donald Riegle sued the Federal Open Market Committee, claiming that the arrangement for appointing its members was unconstitutional because appointees were not submitted to the Senate for consideration. In a problematic opinion, though the D.C. Circuit held Riegle had standing, the court employed "a doctrine of circumscribed

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House thereof would need either to be a party to the suit or to have gone on record by appropriate majority vote opposing the Executive Branch action. Judge Wright also acknowledged that standing would obtain "where a majority of Congress approves a lawsuit by expressly authorizing a member or a committee to represent it in the courts." *Id.* at 712 n.6.

135. With no opinion for the Court, Justice Rehnquist wrote a concurrence, in which Chief Justice Burger, Justice Stewart, and Justice Stevens joined, arguing that the dispute presented a political question. Goldwater v. Carter, 444 U.S. 996, 1002-06 (1979) (Rehnquist, J., concurring).

136. Justice Powell disagreed that the political question doctrine operated in this case and found that the case was non-justiciable due to lack of ripeness. *Id.* at 997-1002 (Powell, J., concurring).

137. The only reference to standing comes in a dissent by Justice Blackmun joined by Justice White. They believed the Court was moving too quickly to dismiss the case: "[i]t is also indefensible, without further study, to pass on the issue of justiciability or on the issues of standing or ripeness." *Id.* at 1006 (Blackmun, J., dissenting in part).

138. 656 F.2d 873, 880 (D.C. Cir. 1981) ("The Court ignored the standing concept altogether and . . . relied upon the doctrines of ripeness and political question, respectively.") (citation omitted). *See also* FRANCK & GLENNON, *supra* note 48, at 990 ("The Supreme Court's failure even to discuss standing in *Goldwater* prompted the D.C. Circuit to re-assess its analysis of congressional standing rules.").

equitable discretion"[139] and dismissed the case. In a quick stroke, the court changed its approach to standing and created a "new" doctrine.

With Judge Robb writing for the three-judge panel, the court began its assessment of standing by critiquing the *Kennedy-Harrington-Goldwater* approach. The court claimed that previous cases had articulated "two contradictory principles."[140] On the one hand, past circuit decisions noted that "no distinctions are to be made between congressional and private plaintiffs in the standing analysis."[141] Yet, on the other hand, previous decisions indicated that the court would "not confer standing on a congressional plaintiff unless he is suffering an injury that his colleagues cannot redress."[142] In recognition of this contradiction, the court cited a recent law review article written by the former Chief Judge of the D.C. Circuit, Carl McGowan:

> There can be no peaceful coexistence between, on the one hand, the notion that legislators are treated like any other plaintiff for standing purposes, and, on the other, the idea that courts should rigorously scrutinize whether the congressional plaintiff's true quarrel is with his colleagues, rather than the executive. There is no general requirement that a private litigant employ self-help before seeking judicial relief. Nor should there be, because an ordinary plaintiff, having suffered injury in fact within the contemplation of the law he invokes, is entitled to his day in court.[143]

Here, thus, was the apparent contradiction: if the court is to approach legislator standing the same way in which it deals with standing for non-congressional plaintiffs, how can it deny standing to a congressional plaintiff if he or she has not sought available legislative remedies? Non-congressional plaintiffs are not required to seek "other remedies" as a condition of standing.

With no further elaboration on McGowan's comments, the court noted that it would "proceed by applying to this case the

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139. *Riegle*, 656 F.2d. at 881.
140. *Id.* at 877.
141. *Id.*
142. *Id.*
143. McGowan, *supra* note 48, at 254-55 (footnotes omitted), *cited in Riegle*, 656 F.2d. at 877-78.

traditional standing tests for non-congressional plaintiffs gleaned from opinions of the Supreme Court."[144] "Thereafter," the court continued, it would "examine what additional considerations, if any, must enter our analysis by virtue of the plaintiff's status as a Member of the United States Senate."[145] The court proceeded to determine what the general standing test entailed. Drawing primarily on *Association of Data Processing Service Organizations v. Camp*,[146] *Warth v. Seldin*,[147] and *Simon v. Eastern Kentucky Welfare Rights Organization*,[148] the court found three absolute standing requirements: "(i) injury-in-fact (ii) to an interest protected by the relevant law (iii) where the injury is caused by defendants' actions or capable of judicial redress."[149]

Having set forth these three criteria, the court applied them to Senator Riegle. Interestingly, the court, which had spent much time in previous cases discussing the nature of "injury-in-fact," said very little about the precise contours of that criterion. The court merely noted that assuming the Senator's arguments on the merits were correct, "Riegle's inability to exercise his right under the Appointments Clause of the Constitution is an injury sufficiently personal to constitute an injury-in-fact."[150] The court quoted the Supreme Court's decision in *Warth v. Seldin*, "that the plaintiff must allege such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf."[151] The court explained there was no causal link to the defendants in this case. But, under Supreme Court doctrine at the time of the case, "the causation requirement can also be met by showing that 'prospective [judicial] relief will remove the harm,'"[152] and the second criterion was met. Finally, the court noted that "the interest [the right of advise and consent in appointment of

144. *Riegle*, 656 F.2d at 878.
145. *Id.* (footnote omitted).
146. 397 U.S. 150 (1970).
147. 422 U.S. 490 (1975).
148. 426 U.S. 26 (1976).
149. *Riegle*, 656 F.2d at 878.
150. *Id.*
151. *Id.* at 878-79 (quoting Warth v. Seldin, 422 U.S. 490, 498-99 (1975) (citations omitted).
152. *Id.* at 879 (quoting *Warth*, 422 U.S. at 505).

executive branch officers] which Riegle claims was injured by defendants' action"[153] fell within the "zone of interests" protected by the Constitution.[154] Thus, the three criteria being met, the court concluded that the Senator had standing. Unlike *Kennedy* or *Goldwater*, there was no elaboration on how the Senator was injured, no reference to a disenfranchisement or vote nullification. The court seemed to be loosening the requirement of a concrete, specific injury.

The granting of standing did not end the court's discussion of justiciability. Even though the court had found it improper to include "prudential concerns" in the standing test,[155] the court nonetheless addressed those concerns as part of the overall assessment of justiciability. Drawing again upon Judge McGowan's article,[156] the circuit articulated a "new" doctrine of "equitable discretion."[157] With a foundation in "separation-of-powers concerns,"[158] this doctrine holds that the court should refrain from adjudicating a dispute when there are other means available to the legislator to seek redress from his or her colleagues *and* there is the potential that a private citizen plaintiff could bring a similar suit.[159] In other words, after a court determined that the legislator-plaintiff had standing, the court would ask: (1) Are there other legislative remedies available? and (2) Would a private plaintiff be able to bring suit

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153. *Id.*

154. *Id.*

155. *Id.* at 880. The court quoted the following passages from Judge McGowan's article on this point:

> The use of the standing doctrine to address the separation-of-powers concerns arising when federal legislators sue the executive branch in federal court is fraught with difficulties . . . . [T]he recent Supreme Court decision in *Goldwater*, which made no use of the term, suggests that its day may have passed insofar as these lawsuits are concerned.

McGowan, *supra* note 48, at 256, *quoted in Riegle*, 656 F.2d at 880.

156. The D.C. Circuit would later observe: "*Riegle* relied heavily on a recent article by former Chief Judge Carl McGowan, which . . . concluded 'that the best way to translate those [separation-of-powers] concerns into principled decisionmaking is through the discretion of the federal court to grant or to withhold injunctive or declaratory relief.'" Vander Jagt v. O'Neill, 699 F.2d 1166, 1168 (D.C. Cir. 1983) (footnote omitted) (quoting McGowan, *supra* note 48, at 262).

157. Senator Riegle sought injunctive relief, a suit in equity. Accordingly, the court used the phrase "equitable discretion." When declaratory judgment is sought, the phrase "remedial discretion" is used. *See Vander Jagt*, 699 at 1175 n.25.

158. *Riegle*, 656 F.2d at 881 ("The most satisfactory means of translating our separation-of-powers concerns into principled decisionmaking is through a doctrine of circumscribed equitable discretion.").

159. *See id.* at 882.

on the underlying legal issue? If the answer to *both questions* is in the affirmative, then the court will dismiss. Not only must there be other legislative remedies available, there must also be the potential that a private citizen could sue. This second requirement, that there be a private plaintiff who could bring suit, would assure that there could be some resolution of the legal issue at hand by a court, even if the legislator was unable to get his or her own redress through political means.[160]

As the court explained, the *Riegle* "standard would counsel the courts to refrain from hearing cases which represent the most obvious intrusion by the judiciary into the legislative arena: challenges concerning congressional action or inaction regarding legislation."[161] If a legislator's "dispute appears to be primarily with his fellow legislators," the court explained, "separation-of-powers concerns are most acute."[162] In such instances, "[j]udges are presented not with a chance to mediate between two political branches but rather with the possibility of thwarting Congress' will by allowing a plaintiff to circumvent the processes of democratic decisionmaking."[163] The *Riegle* standard, however "would assure that non-frivolous claims of unconstitutional action which *could only be brought by members of Congress* will be reviewed on the merits."[164]

In sum, equitable discretion allows courts to dismiss a case that presents separation-of-powers concerns without making those concerns part of the standing test. In theory, this makes the standing test for legislators essentially the same as for non-congressional plaintiffs. It also allows the court to dismiss certain suits without taking recourse to the ripeness doctrine or the political question doctrine.[165] No doubt the *Riegle* court believed that this approach to legislator suits would be cleaner and more consistent with the Supreme Court's conception of

160. Interestingly enough, McGowan's article made no reference to a requirement that a private plaintiff be able to sue.

161. *Riegle*, 656 F.2d at 881.

162. *Id.*

163. *Id.*

164. *Id.* (emphasis added).

165. The *Riegle* court, following Judge McGowan, was also critical of the use of the political question doctrine and the ripeness doctrine. *Id.* at 880 "[T]he doctrines of ripeness and political question are no 'more elegant in their conception [n]or more satisfying in their execution' than the standing concept as a means of articulating our prudential concerns in congressional plaintiff cases." *Id.* (second alteration in original) (quoting McGowan, *supra* note 48, at 256).

standing.

Unfortunately, there are several difficulties with the *Riegle* decision. First, the court seems to have misunderstood the *Kennedy-Harrington-Goldwater* approach.[166] The court found a fundamental contradiction between the principle that courts should treat legislators like private plaintiffs for standing purposes and the principle that for a legislator to have standing there had to be no legislative remedies available for redress. Though there appears to be a contradiction, it could be argued that in *Goldwater* the court was not adding an extra requirement to the standing test, but was merely *defining* what "disenfranchisement" would mean. If the President took action that thwarted Congressional will but there continued to be legislative mechanisms to stop or reverse the action, there had been no true disenfranchisement and, therefore, no "injury-in-fact." In this light, the *Kennedy-Harrington-Goldwater* approach merely identified what kinds of actions could be considered injuries-in-fact to legislators. Second, it is unclear precisely what would constitute an injury to a legislator under *Riegle*. As noted earlier, the court's discussion of Senator Riegle's alleged injury is extremely brief. The court merely stated that "Riegle's inability to exercise his right under the Appointments Clause of the Constitution is an injury sufficiently personal to constitute an injury-in-fact."[167] Perhaps this is a clear denial of an opportunity to vote, but it would seem as though a more extensive definition of injury would have been in order, especially given that the court was attempting to develop a new approach to standing.[168] Third, the court seemed to assume that the fact that the Supreme Court did not discuss standing in *Goldwater* was to be taken as its disapproval of the previous approach to legislator standing developed by the circuit. To infer such disapproval from the Court when it was itself having difficulty reaching a consensus on why *Goldwater* was not justiciable may be unwarranted. Fourth, the court did

166. A similar conclusion was reached in Abel, *supra* note 48, at 1205.

167. *Riegle*, 656 F.2d at 878. Of course, at the more fundamental level, the *Riegle* court can be criticized for continuing the *Kennedy* principle that an individual member can be regarded as an injured party for purposes of standing.

168. Abel argued that, "[b]y finding injury to a congressman's right to approve FOMC members, and ignoring congressional intent to limit that right, *Riegle* expanded the scope of injury in fact for congressmen." Abel, *supra* note 48, at 1206.

not really explore the legal basis for the doctrine of equitable discretion. It simply asserted that the use of that doctrine was the best way to apply concerns about the separation of powers to legislator suits. To an observer, it might appear that the doctrine had no more specific basis than that it was articulated in Judge McGowan's law review article.

4. *Post*-Riegle *Developments*

Whatever difficulties the D.C. Circuit's decision in *Riegle* may have presented, it established the circuit's basic approach to legislator standing for the next decade and a half.[169] Subsequent decisions would attempt to clarify and develop the *Riegle* approach. But, they would also reveal a growing dissatisfaction on the part of some of the members of the circuit with this approach. In particular, Judges Scalia and Bork, in very strongly worded concurrences and dissents, would question the wisdom of addressing legislator standing in this way.

In the cases that followed *Riegle*,[170] there were several

169. Interestingly enough, the two cases immediately following the *Riegle* decision did not discuss *Riegle's* approach at all. In *Metzenbaum v. Federal Energy Regulatory Commission*, 675 F.2d 303 (D.C. Cir. 1982), the court dismissed one complaint based on the political question doctrine, another based on ripeness, and ruled on the merits on a third. In *American Federation of Government Employees v. Pierce*, 697 F.2d 303 (D.C. Cir. 1982), the court used *Kennedy* as a basis for denying standing.

170. *See, e.g.*, American Fed'n of Gov't Employees v. Pierce, 697 F.2d 303 (D.C. Cir. 1982) (granting standing to member of Congress based on *Kennedy*); Vander Jagt v. O'Neill, 699 F.2d 1166 (D.C. Cir 1982) (granting standing, but dismissing based on remedial discretion); Crockett v. Reagan, 720 F.2d 1355 (D.C. Cir. 1983) (affirming dismissal of Congressman's claim based on equitable discretion); Moore v. House of Representatives, 733 F.2d 946 (D.C. Cir. 1984) (granting standing, but dismissing based on remedial discretion); United Presbyterian Church v. Reagan, 738 F.2d 1375 (D.C. Cir. 1984) (dismissing for lack of standing); Barnes v. Kline, 759 F.2d 21 (D.C. Cir. 1984) (granting Congressman standing, not dismissing due to lack of legislative remedies, and reaching the merits); Southern Christian Leadership Conference v. Kelley, 747 F.2d 777 (D.C. Cir. 1984) (denying standing to Senator); Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir 1985) (dismissing Congressional plaintiffs' claims based on mootness and the political question doctrine); Gregg v. Barrett, 771 F.2d 539 (D.C. Cir. 1985) (dismissing Congressman's claim based on equitable discretion); Synar v. United States, 626 F. Supp 1374 (D.D.C. 1986) (three-judge court) (granting standing to members of Congress, not dismissing based on equitable discretion because Act in question authorized suit); Melcher v. Federal Open Mkt. Comm., 836 F.2d 561 (D.C. Cir. 1987) (dismissing based on equitable discretion); Humphrey v. Baker, 848 F.2d 211 (D.C. Cir 1988) (dismissing based on equitable discretion); Dornan v. United States Secretary of Defense, 851 F.2d 450 (D.C. Cir. 1988) (dismissing based on equitable discretion or lack of standing); Michel v. Anderson, 14 F.3d 623 (D.C.

noteworthy developments. First, there was a more explicit discussion of the nature of injury to a Congressperson. Initially, the court appeared to relax the disenfranchisement injury standard that had been developed in the *Kennedy-Harrington-Goldwater.* In *Vander Jagt v. O'Neill,*[171] the court suggested that the strict "nullification" criterion for legislator injury had been rejected in *Riegle.* The court claimed the *Riegle* court had "discarded . . . a legal distinction . . . between allegations that a legislator's vote has been 'nullified' and allegations that the legislator's influence has merely been diminished."[172] Implicitly, the court suggested in *Vander Jagt* that broader claims of diminution of a legislator's influence constituted sufficient injury for standing purposes. Subsequent cases, however, seemed to be unwilling to affirm this more permissive approach. Writing for the court in *Moore v. United States House of Representatives,*[173] Judge Wilkey seemed to return to the concept of injury in the pre-*Riegle* decisions. Based on the Supreme Court's standing doctrine, "the plaintiff's alleged injury must be specific and cognizable in order to give rise to standing."[174] He noted that "in *Harrington v. Bush,* this court insisted that congressional complainants clearly allege a concrete injury in fact to a specific legal interest in order to invoke the jurisdiction of the court."[175] The court granted standing to the congressional plaintiffs in *Moore,* noting the claimed "deprivation of a particular opportunity to vote in a manner prescribed by the Constitution" was a "specific and concrete" injury in fact.[176] This more restrictive understanding of injury was reflected in the circuit's decisions in *United Presbyterian Church v. Reagan,*[177] *Barnes v. Kline,*[178] and *Southern*

Cir. 1994) (not fully exploring legislator standing and equitable discretion because of the presence of private plaintiffs); Boehner v. Anderson, 30 F.3d 156 (D.C. Cir. 1994) (granting standing); Skaggs v. Carle, 110 F.3d 831 (D.C. Cir. 1997) (concluding plaintiffs lack standing because injury is "hypothetical").

171. 699 F.2d 1166 (D.C. Cir. 1982).

172. *Id.* at 1168.

173. 733 F.2d 946 (D.C. Cir. 1984).

174. *Id.* at 951.

175. *Id.*

176. *Id.* at 952.

177. 738 F.2d 1375 (D.C. Cir. 1984). The court found Congressman Dellums's injury "indistinguishable" from the claim in *Harrington v. Bush. Id.* at 1382. Dellums claimed an executive order "violate[ed] express limitations imposed by Congress," and accordingly, "his powers as a legislator [had] been diminished, constituting sufficient injury to give him standing." *Id* at 1381. The court concluded: "[H]is complaint is 'a generalized grievance about the conduct of

Christian Leadership Conference v. Kelley.[179] It would thus seem that while the court may have contemplated moving beyond the *Kennedy-Harrington-Goldwater* standard of injury, it was less willing to do so as the 1980s progressed.

A second aspect of the post-*Riegle* cases was a willingness of the circuit to elaborate upon the jurisprudential basis for the doctrine of equitable discretion. As noted earlier, the *Riegle* court itself did not provide much discussion of the legal basis for the doctrine. In *Vander Jagt*, the court made clear that the doctrine of equitable or remedial discretion was an effort to remove prudential concerns from Article III standing analysis.[180] The court explained, "[w]e invoke our remedial discretion in this setting because this case raises separation-of-powers concerns similar to *Riegle*'s, and the remedial discretion approach—which this circuit has used before—provides a more candid and coherent way of addressing those concerns."[181] In footnotes, the court then affirmed its authority to use this doctrine. Referring to the Supreme Court's decision in *Weinberger v. Romero-Barcelo*,[182] the court in *Vander Jagt* contended that it could not "be seriously disputed . . . that we have broad discretion in deciding whether to issue equitable or declaratory relief."[183] The court further claimed that "[t]here have been many cases where courts have refused to grant declaratory or injunctive relief for prudential reasons not even remotely related to neutral principles of law."[184] Similarly, in *Moore v. United States*

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government, not a claim founded on injury to the legislator by distortion of the process by which a bill becomes law.'" *Id.* at 1382 (quoting *Moore*, 733 F.2d at 952).

178. 759 F.2d 21 (D.C. Cir. 1984). As in *Kennedy*, Congressman Barnes and his co-plaintiffs claimed that their votes were nullified by an improper pocket veto.

179. 747 F.2d 777 (D.C. Cir. 1984).

180. Vander Jagt v. O'Neill, 699 F.2d 1166, 1177 (D.C. Cir. 1982) ("Once again, we treat our prudential reservations as to whether to provide relief, not as part of our inquiry into our Article III powers.").

181. *Id.* at 1175 n.24.

182. 456 U.S. 305, 311-12 (1982).

183. 699 F.2d at 1175.

184. *Id.* at 1176 n.25. Citing a much earlier decision in the circuit, *Lampkin v. Connor*, 360 F.2d 505 (D.C. Cir. 1966), the court explained:

> The unanimous court in *Lampkin* declined to adopt the lower court's denial of standing, or the alternative suggestion that the case was nonjusticiable under the political question doctrine. Instead, the court exercised its discretion to withhold declaratory relief, and explained that especially because the recently-passed Voting Rights Act offered significant hope for remedying the plaintiffs' complaints, judicial action at that time would be unwise.

House of Representatives, the circuit explained that "[t]he principle that a meritorious plaintiff is not automatically entitled to declaratory relief regardless of the availability of other forms of relief is not a new one in the federal courts."[185] The court went on to cite a 1942 Supreme Court case, *Brillhart v. Excess Insurance Co.*,[186] in support of this proposition.

But even as the court attempted to provide precedent for the doctrine of equitable discretion, it also began to "revise" the doctrine of equitable discretion by removing the requirement that a private plaintiff be able to bring a similar suit. As noted earlier, the *Riegle* court held that a court should dismiss a case based on equitable discretion where other legislative remedies were available *and* a private plaintiff could bring suit on the underlying legal question. A few years after *Riegle*, however, the court began to move away from this latter requirement. In 1985, in *Gregg v. Barrett*, the court noted that *"Riegle . . . suggested* that the potential lack of standing of private plaintiffs is a relevant inquiry in determining whether the exercise of remedial discretion is appropriate."[187] The court contended that "this court has never squarely held that, where private plaintiffs are held to lack standing, an action by a congressional plaintiff may not be dismissed on prudential grounds."[188] Two years later, the court explicitly rejected the private plaintiff requirement. In *Melcher v. Federal Open Market Committee*, the court proclaimed that "the *Riegle* court's discussion of possible suits by private plaintiffs is dicta."[189] To the *Melcher* court, there was a "fundamental difficulty with *Riegle*'s non-binding observations about the role of private plaintiffs."[190] This difficulty was that "the separation-of-powers concerns

Vander Jagt, 699 F.2d. at 1176 n.25 (citing *Lampkin*, 360 F.2d at 505).

185. 733 F.2d 946, 955 (D.C. Cir. 1984).

186. 316 U.S. 491 (1942). The D.C. Circuit in *Moore* explained:

> In *Brillhart* . . . the Court held that federalism concerns properly counseled restraint in affording declaratory relief to the parties before the court. Likewise, in *Wilderness Society v. Morton*, . . . [t]he *en banc* court noted that the issuance of a declaratory judgment is discretionary and that where a case involves "difficult questions concerning the relationship between the legislative and executive branches," that discretion may be properly exercised by declining to grant declaratory relief.

Moore, 733 F.2d at 955 (footnotes omitted) (citing *Brillhart*, 316 U.S. at 491; Wilderness Soc'y v. Morton, 479 F.2d 842 (D.C. Cir. 1973) (en banc)).

187. 771 F.2d 539, 544 (1985) (emphasis added).

188. *Id.*

189. 836 F.2d 561, 563 (D.C. Cir. 1987).

190. *Id.* at 564.

informing the doctrine of equitable discretion are, upon reflection, entirely unaffected by the ability of a private plaintiff to bring suit."[191] But because the *Riegle* court had referred to private plaintiff suits, the *Melcher* court wanted to make its views on the matter absolutely clear. "Lest there be any lingering doubt," the court explained, "we expressly disapprove *Riegle's* intimation in dicta that the standing of private plaintiffs to bring a particular action affects the propriety of our entertaining the same challenge when brought by a legislator."[192] To dispel all misconceptions to the contrary, the court added that, "[t]he statement . . . disapproving *Riegle's* intimation in dicta has been separately circulated to and approved by the entire court, and thus constitutes the law of the circuit."[193] While characterizing the *Riegle* language as dicta actually seems to misread that case,[194] the circuit's position after *Melcher* was clear: the court had equitable discretion to dismiss a case in circumstances when the court concluded that there were other legislative remedies, irrespective of whether a similar suit could be brought by a non-congressional plaintiff.

Despite these refinements to *Riegle*, the D.C. Circuit seemed to grow restive with this approach to legislator standing. While even the majority in some panel decisions began to express skepticism, the most critical language came in concurrences and dissents, primarily from Judges Scalia and Bork.[195] Initially, it was Judge Scalia who took the most extreme position. In *Moore v. United States House of Representatives*, Scalia rejected the notion that legislators in their official capacity should ever have standing, with the exception of circumstances, such as *Powell v. McCormack*,[196] in which the legislators have a "private right."[197]

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191. *Id.*

192. *Id.* at 565.

193. *Id.* at 565 n.3.

194. It seems difficult to maintain that the reference in *Riegle* to private plaintiff's ability to bring suit was dicta. The court specifically said: "*our standard* would counsel dismissal . . . only in cases in which (i) the plaintiff lacks standing under the traditional tests, or (ii) the plaintiff has standing but could get legislative redress *and* a similar action could be brought by a private plaintiff." Riegle v. Federal Open Mkt. Comm., 656 F.2d 873, 882 (D.C. Cir. 1981) (emphasis added). It seems clear that the *holding* of the court in *Riegle* was that in order for a case to be dismissed based on equitable discretion the court must show *both* that there were other legislative remedies *and* that a private plaintiff could sue. *See also* FRANCK & GLENNON, *supra* note 48, at 992.

195. *See* FRANCK & GLENNON, *supra* note 48, at 993.

196. 395 U.S. 486 (1969).

Scalia explained:

> The only test of congressional standing that is both consistent with our constitutional traditions and susceptible of principled application . . . must take as its point of departure the principle that we sit here neither to supervise the internal workings of the executive and legislative branches nor to umpire disputes between those branches regarding their respective powers. Unless and until those internal workings, or the resolution of those inter-branch disputes through the system of checks and balances . . . brings forth a result that harms private rights, it is no part of our constitutional province, which is "solely, to decide on the rights of individuals," . . . As the cases that have been brought before us since *Mitchell v. Laird* . . . demonstrate, that principle is reduced to meaninglessness, and the system of checks and balances replaced by a system of judicial refereeship, if the officers of the political branches are deemed to have a personal, "private" interest in the powers that have been conferred upon them (whether specifically or vaguely) by Constitution or statute. Unless those powers have been denied in such fashion as to produce a *governmental result* that harms some entity or individual who brings the matter before us, we have no constitutional power to interfere.[198]

Unlike the majority in *Riegle* and the post-*Riegle* line of cases, Scalia argued that separation of powers concerns are indeed properly discussed under the doctrine of standing.[199] One way to conceive of this, Scalia suggested, is to return to the general standing requirement that the injury fall within the "zone of interest" protected by some authority. A proper conception of the separation of powers "suggests that the personal desires of legislative and executive officers to exercise their authority are not within the 'zone of interests' protected by the provisions of the Constitution and laws conferring such authority."[200] In other words, a legislator has no standing in his or her official capacity to sue for "institutional injury" because such injury is not a protected injury. To Scalia, "[o]nly the interests of *particular individuals* who would be aided by the exercise of that authority—and have been harmed by its unlawful

197. 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia, J., concurring).

198. *Id.* (Scalia, J., concurring) (citations omitted).

199. *Id.* at 958 (Scalia, J., concurring) (arguing that the "doctrine of standing" was "'*founded in concern*' for the separation of powers . . . .") (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)).

200. *Id.* at 960 (Scalia, J., concurring).

deprivation—come within that zone, since the authority was conferred for the benefit not of the governors but of the governed."[201]

Given that Scalia would deny standing to legislators based on separation of powers concerns, it is not surprising that he had grave reservations about the doctrine of equitable or remedial discretion. While Scalia recognized "that separation-of-powers considerations can lead to the denial of discretionary relief if other relief is available,"[202] he did not believe this should be the case when dealing with legislator suits. He explained that:

> where, as here, that ordinary condition to the denial of discretionary relief does not exist—so that the practical effect of denying relief and denying standing is precisely the same—our legal tradition from *Marbury v. Madison* forward suggests that any role for judicial discretion in protecting separation of powers must be an extremely limited one, reserved for unique or at least distinctive factual contexts.[203]

"It cannot be applied," he continued, "so generally to entire classes of litigation, and on the basis of such factors, as to warrant the overt admission that discretion is an alternative to the doctrine of standing."[204] Furthermore, Scalia argued, he knew:

> of no precedent for the assertion, which has been made in this *Riegle* line of cases, of a discretion to grant or withhold the only available relief on the basis of a factor that is not accidental or extrinsic but pertains to the identity of the parties and the very nature of the claim.[205]

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201. *Id.* (emphasis added) (footnote omitted). Interestingly, the "zone of interest" requirement came to be considered by the Supreme Court to be a prudential limitation, not a constitutionally mandated requirement of standing. *See supra* notes 37-42 and accompanying text. In fact, the Court would note that Congress could actually waive this requirement by allowing for a suit. *See* Raines v. Byrd, 521 U.S. 811, 820 n.3 (1997) ("We acknowledge, though, that Congress' decision to grant a particular plaintiff the right to challenge an Act's constitutionality . . . eliminates any prudential standing limitations and significantly lessens the risk of unwanted conflict with the Legislative Branch when that plaintiff brings suit."). Today, Scalia might make this point if he argued for the need for the injury to be to "a legally protected interest."

202. *Moore*, 733 F.2d at 962 (Scalia, J., concurring).

203. *Id.*

204. *Id.*

205. *Id.* at 962-63 (Scalia, J., concurring) (footnote omitted). In the footnote, Scalia disputed the applicability of the authorities cited by the majority:

> With one exception, all of the cases cited in the majority opinion to

"When the impropriety of granting relief derives from such a jurisdictional characteristic," he concluded, "the courts have not hidden behind a massive 'remedial discretion,' but have admitted their lack of power to rule in favor of the plaintiff because of lack of standing."[206] For Scalia, courts should only exercise discretion to dismiss a case if there are special circumstances in that case. But discretion should not be used to dismiss the general category of legislator suits when standing, properly understood, could serve the same function.

While Scalia's opposition to the *Riegle* approach may have been the most colorful,[207] it was by no means the only voice of disapproval among the members of the circuit. Scalia's colleague Judge Robert Bork also came to reject the majority's approach to legislator standing. Initially, Bork was not as complete in his opposition. In *Vander Jagt v. O'Neill*, Bork rejected the *Riegle* approach but did not go as far as Scalia in arguing that legislators *never* have standing to sue in their official capacity. First, Bork rejected the notion that separation of powers concerns should not be part of the Article III standing test. While acknowledging that earlier Supreme Court cases had indicated that separation of powers issues were not to be considered under the rubric of standing,[208] Bork believed that in *Valley Forge Christian College v. Americans United for*

> establish that it is not novel to deny declaratory relief "regardless of the availability of other forms of relief," [733 F.2d.] at 955, involve situations in which alternate relief was not available in the current proceeding *but was available later or elsewhere* . . . . The one exception *is Winpisinger v. Watson*, 628 F.2d 133 (D.C. Cir.), *cert. denied*, 446 U.S. 929 (1980), and there it is significant that the discretionary denial of relief was an alternate ground, the first basis being . . . a jurisdictional one, *viz.*, lack of standing. That first ground, of course, meant that the court had no jurisdiction to speculate upon the second, so it is the weakest of dictum.

Id. at 962-63, n.9 (Scalia, J., concurring) (some citations omitted).

206. *Id.* at 963 (Scalia, J., concurring).

207. In one of Scalia's more colorful passages in *Moore*, he criticized the D.C. Circuit's approach to legislator standing:

> [F]or the moment I must note how strange it is that a doctrine (the doctrine of standing) *"founded in concern"* for the separation of powers, Warth v. Seldin, [422 U.S. 490, 498 (1975)] (emphasis added), should now have yielded . . . a result so repugnant to the separation of powers that we have had to exercise our supposed equitable powers to forestall it . . . . Any scientific theory which required this kind of adjustment would be pronounced useless and discarded. What does it take, one wonders, to arouse judicial suspicions that a legal theory is wrong?

Id. at 958-59 (Scalia, J., concurring) (some citations omitted) (alteration in original).

208. Vander Jagt v. O'Neill, 699 F.2d 1166, 1179 (D.C. Cir. 1982) (Bork, J., concurring) ("It is true that the Supreme Court once indicated that separation of powers is no part of the Article III component of standing . . . .").

Separation of Church and State,[209] which was decided in 1982, the year after *Riegle*, the Supreme Court moved beyond its early cases to "read[] separation of powers concepts back into that part of the standing requirement which rests upon a constitutional, rather than a prudential, foundation."[210] Bork argued, "[t]he premise on which *Riegle* rested, therefore, is no longer valid."[211] For Bork, the *Kennedy-Harrington-Goldwater* approach had incorporated these separation-of-powers concerns into the standing test. Given the Supreme Court's decision in *Valley Forge*,[212] Bork regarded the pre-*Riegle* "formula as the law of this circuit, and would apply it without now inquiring as to whether a less permissive rule might be preferable."[213] Thus, while Bork opened the door to an even more stringent test for legislator standing,[214] in *Vander Jagt* he was content to support the vote nullification standard of *Kennedy-Harrington-Goldwater*. Similarly, in *Crockett v. Reagan* Bork proclaimed that he "continue[d] to believe that an alleged diminution in congressional influence must amount to a disenfranchisement—a nullification or diminution of a congressman's vote—before a congressional plaintiff may claim the requisite injury-in-fact necessary to confer standing to sue."[215]

By the time the court decided *Barnes v. Kline*[216] in 1984, Bork had come to adopt Scalia's approach.[217] Beginning with the proclamation that the court "ought to renounce outright the whole notion of congressional standing,"[218] Bork set forth his

209. 454 U.S. 464 (1982).

210. *Vander Jagt*, 699 F.2d at 1179 (Bork, J., concurring) (citing *Valley Forge*, 454 U.S. at 464).

211. *Id.* at 1181 (Bork, J., concurring).

212. Bork believed that even before *Valley Forge*, separation of powers concerns were part of Supreme Court jurisprudence on standing and argued that *Valley Forge* made that absolutely clear. *See id.* ("[E]ven at the time it was decided, *Riegle's* reasoning proceeded from a false premise about the Supreme Court's view of standing and . . . the invalidity of that premise was once more demonstrated by the Supreme Court's *Valley Forge* decision.").

213. *Id.* at 1180 (Bork, J., concurring).

214. Indeed, he explicitly described *Kennedy* as "a decision I think this court should reexamine under more appropriate circumstances . . . ." *Id.*

215. 720 F.2d 1355, 1357 (D.C. Cir. 1983) (Bork, J., concurring).

216. 759 F.2d 21 (D.C. Cir. 1984).

217. *See* FRANCK & GLENNON, *supra* note 48, at 993 ("Bork gravitated toward Scalia's view in *Barnes v. Kline* . . . .").

218. *Barnes*, 759 F.2d at 41 (Bork, J., dissenting).

theory of legislator standing in a lengthy dissent. For Bork, the doctrine of legislator standing represented a fundamental betrayal of the democratic theory on which standing was based. Historically, "[t]he respective constitutional powers of Congress and the President could have been given judicial definition only when a private party, alleging a concrete injury, actual or threatened, brought those powers necessarily into question."[219] Under the circuit's more recent approach, it may have seemed "more 'convenient' to let congressmen sue directly and at once."[220] But, Bork argued, "in actuality, that convenience is purchased at the cost of subverting the constitutional roles of our political institutions."[221]

Bork detailed several reasons for his opposition to legislator standing. In particular, he raised five major objections. First, he argued that, if courts uphold the notion that legislators can serve as plaintiffs, logic dictates that a whole host of governmental plaintiffs would be possible because "Congress is not alone in having governmental powers created or contemplated by the Constitution. This vindication-of-constitutional-powers rationale thus confers standing upon the President and the judiciary to sue other branches just as much as it does upon Congress."[222] It would also mean that members of the Executive Branch could sue each other and the President[223]and even that states would be able to sue the federal government in a whole host of circumstances not currently recognized.[224] Second, Bork contended that legislator

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219. *Id.* at 42 (Bork, J., dissenting).

220. *Id.*

221. *Id.* (footnote omitted).

222. *Id.* at 44 (Bork, J., dissenting).

223. *Id.* at 47 (Bork, J., dissenting). Bork explained:

> The head of an agency who believes that another agency has improperly encroached [upon the authority of that agency] . . . no longer need bring the dispute before the President, for the courts stand ready to resolve it. Beyond that, a cabinet officer aggrieved by an Executive Order or any other exercise of presidential power . . . can proceed to challenge the offending directive in federal court, where declaratory judgment and injunctive relief are available to set the President right.

Id. (footnote omitted).

224. *Id.* Bork explained:

> Should Congress enact a law that arguably is beyond its powers and that has an impact upon citizens of the several states, it would seem, under this court's reasoning, that members of a state legislature . . . would have standing to sue the national executive to enjoin enforcement of that law. Certainly the State itself would have standing. States, after all, have

standing ran contrary to his understanding of recent Supreme Court decisions that dealt with standing generally. To Bork, a variety of decisions by the Court made it clear that standing required "injury in fact"[225] and that "generalized grievances" are not cognizable for standing.[226] Third, Bork contended that legislator standing would be out of line with the desires of the Framers of the Constitution. While acknowledging that the D.C. Circuit is bound by Supreme Court precedents in any case,[227] Bork reviewed the discussions surrounding the adoption of the Constitution and concluded "that those who drafted, proposed, and ratified the Constitution did not intend that the judiciary should entertain suits directly between the political branches of the national government."[228] "The judiciary they envisioned," he explained, "was to play no such dominant role in affairs of state."[229] As a consequence, "[t]heir intention precludes the doctrine of standing devised by this court to thrust the judiciary into that leading position."[230] Fourth, Bork argued that the doctrine of equitable discretion was an inappropriate mechanism to address separation of powers concerns. In language reminiscent of Scalia's concurrence in *Moore*, Bork rejected the notion of equitable discretion completely. He explained that it "permits the court to say that a congressional plaintiff has standing, and hence that the court has jurisdiction, and yet refuse to hear the case

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constitutional functions and powers as surely as Congress does.

Id.

225. *Id.* at 48 n.6 (Bork, J., dissenting).

226. *Id.* at 48 (Bork, J., dissenting). Bork explains:

> The merits of the dispute offered us turn upon the interpretation of Article I, Section 7, Clause 2 of the Constitution. That is a task for which courts are suited, and I would have no hesitation in reaching and deciding the substantive question if this were a suit by a private party who had a direct stake in the outcome . . . . This is an action by representatives of people who themselves have . . . only a "generalized grievance" about an allegedly unconstitutional operation of government. It is well settled that citizens, whose interest is here asserted derivatively, would have no standing to maintain this action. That being so, it is impossible that these representatives should have standing that their constituents lack.

Id. at 48-50 (Bork, J., dissenting) (footnotes and citations omitted).

227. *Id.* at 56 (Bork, J., dissenting) ("Though we are obligated to comply with Supreme Court precedent, the ultimate source of constitutional legitimacy is compliance with the intentions of those who framed and ratified our Constitution.").

228. *Id.* at 59 (Bork, J., dissenting).

229. *Id.*

230. *Id.*

because the court is troubled by the separation-of-powers implications of deciding on the merits."[231] But, Bork submitted, "[w]e have no such equitable discretion . . . for '[w]e have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.'"[232] "By claiming that discretion," Bork continued, "the court has created for itself a kind of certiorari jurisdiction—which it took an act of Congress to create for the Supreme Court."[233] "There would be no need to violate the settled principle of federal jurisprudence that a court with jurisdiction may not decline it," he concluded, "if the Article III limits on this court's jurisdiction were adhered to."[234] Fifth, Bork contended that the Supreme Court decisions the majority cited as precedent did not support the notion of legislator standing and that, accordingly, the circuit was not bound by its own line of cases.[235]

Analyzing the specific facts surrounding the *Barnes* case best illustrates the extent of Bork's views concerning legislative standing. In comparison to all previous cases on legislator standing taken up by the D.C. Circuit, *Barnes* was probably the strongest. In cases such as *Kennedy*, *Harrington*, and *Riegle*, suit was brought by only a single legislator. In other cases, such as *Goldwater*, *Crockett*, and *Moore*, several members of Congress were suing. But in *Barnes*, the plaintiffs included the Senate *as a body*, the Speaker of the House, and the House Bipartisan Leadership Group *"in their official capacities."*[236] As a consequence, Bork's dismissal of legislator standing in *Barnes* is complete. Even in a circumstance where an entire House of

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231. *Id.*

232. *Id.* (alteration in original) (quoting Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821)).

233. *Id.*

234. *Id.*

235. *Id.* at 43 (Bork, J., dissenting).

236. *Id.* at 23 n.3 (emphasis added). The court explained in a footnote:

> The Senate intervened in the District Court pursuant to FED. R. CIV. P. 24(a)(1) and 2 U.S.C. §§ 288b(c), 288e(a), 288l(a) (1982). The resolution directing Senate Legal Counsel to undertake intervention was jointly sponsored by Senators Howard Baker and Robert Byrd, Majority and Minority Leaders, respectively, of the Senate. The Speaker of the House of Representatives and the House Bipartisan Leadership Group, which includes the Majority and Minority Leaders and Whips, intervened in their official capacities pursuant to FED. R. CIV. P. 24(a)(2), or in the alternative under FED. R. CIV. P. 24(b)(2). All applications of intervention were granted without opposition in the District Court.

Id. (citations omitted).

Congress brings suit, as the Senate clearly did in this case, Bork would argue that the court should still not grant standing. Indeed, even though the government actually conceded that the Senate had standing, Bork was no less forceful in his rejection of standing. To him, the constitutional impediments to standing were the same whether the suit was brought by one member or an entire House.[237]

It is perhaps in light of these concerns that even the majority opinions of the panels of the circuit began to express reservations about the *Riegle* approach. In 1984, in *United Presbyterian Church v. Reagan*, Scalia, writing for a unanimous panel, noted that "it seem[ed] to us inconvenient for our district judges to have to distinguish between those legislator claims that lack standing, and those that should be denied a favorable exercise of remedial discretion for reasons generally indistinguishable from those that underlie the doctrine of standing."[238] A few years later in *Melcher v.. Federal Open Market Committee*, Judge Starr agreed with the concurrence by noting that the majority was "in agreement with our colleague's [Judge Edward's] expression of concern over whether the court-fashioned doctrine of equitable discretion 'is a viable doctrine upon which to determine the fate of constitutional litigation.'"[239] Starr explained: "As a panel, however, we are bound faithfully to follow the law of the circuit. Judge Edwards makes the point succinctly: '[*Riegle*] must be followed until rejected by this court *en banc* or the

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237. Bork explained:

> The Executive Branch conceded at oral argument that the Senate has standing to sue in this suit . . . . That concession does not, of course, remove the issue from this dispute, for it is axiomatic that parties cannot confer subject matter jurisdiction by waiver . . . . By conceding the standing issue appellees endanger a constitutional principle far more momentous than the scope of the pocket veto power, especially since the latter issue can arise and be decided later in a private suit.

Id. at 42 n.1 (Bork, J., dissenting) (citation omitted).

238. 738 F.2d 1375, 1382 (D.C. Cir. 1984). Scalia continued to explain:

> It is, moreover, an unproductive inconvenience, in light of the fact that we have only once permitted the exercise of remedial (or equitable) discretion to entertain rather than dismiss a suit brought by a congressional plaintiff—and that in a case where it made no difference to the result.

Id. (citation omitted).

239. 836 F.2d 561, 565 n.4 (D.C. Cir. 1987) (quoting *Melcher*, 836 F.2d at 565 (Edward, J., concurring)).

Supreme Court.'"[240] Starr reiterated these views the following year for a unanimous panel in *Humphrey v. Baker*, noting in particular "that this circuit's recently minted doctrine of equitable discretion has not even been addressed, much less endorsed, by the Supreme Court."[241] Once again, Starr acknowledged the concerns raised by Edwards in *Melcher* and declared that "[t]hose concerns, *which all members of this panel share*, continue to trouble us."[242]

Such was the state of affairs in the D.C. Circuit when the Supreme Court granted certiorari in *Raines v. Byrd*. The circuit had developed a two-pronged approach to cases involving legislator-plaintiffs. The court would attempt to apply something resembling the general standing criteria. If the legislator would gain standing under this test, the court would then use the doctrine of equitable or remedial discretion to determine whether separation-of-powers concerns would advise against reaching the merits. Over the years grave reservations about this approach had been raised both in various concurrences and dissents and in the majority opinions of the court. *Raines* would thus provide an opportunity for the court to reassess its approach to legislator standing.

C. The Supreme Court—Phase Two: Raines v. Byrd[243]

In 1996, Congress adopted the Line Item Veto Act, and President Clinton signed it into law. This Act gave the President the authority to cancel provisions in certain legislation dealing with the expenditure of funds or the establishment of tax benefits after the Congress had adopted the legislation and the President had signed it.[244] If the

240. *Id.* (quoting *Melcher*, 836 F.2d at 565 (Edward, J., concurring)).

241. 848 F.2d 211, 214 (D.C. Cir. 1988).

242. *Id.* (emphasis added).

243. 521 U.S. 811 (1997). There have been a few case comments and articles written on *Raines*. *See, e.g.*, Neal Devins & Michael A. Fitts, *The Triumph of Timing:* Raines v. Byrd *and the Modern Supreme Court's Attempt to Control Constitutional Confrontations*, 86 GEO. L. J. 351 (1997); Note and Comment, James I. Alexander, *No Place to Stand: The Supreme Court's Refusal to Address the Merits of Congressional Members' Line-Item Veto Challenge in* Raines v. Byrd, 6 J. L. & POL'Y 653 (1998); Adam L. Blank, Casenote, 49 MERCER L. REV. 609 (1998); Tracy Rottner Yu, Casenote, 67 U. CIN. L. REV. 639 (1999); Note, *Standing in the Way of Separation of Powers: The Consequences of* Raines v. Byrd, 112 HARV. L. REV. 1741 (1999).

244. As the Court noted in *Raines*, "the President is given the authority to 'cancel' certain spending and tax benefit measures after he has signed them into law." Raines v. Byrd 521 U.S. 811, 814 (1997). The Court quoted the appropriate

President did cancel certain portions of the legislation, he would submit to Congress a "special message" indicating the cancellation.[245] If Congress so chose, they could adopt a "disapproval bill," which would then be presented to the President as any other bill.[246] The Act further provided that "[a]ny Member of Congress or any individual adversely affected by [this Act] may bring an action, in the United States District Court for the District of Columbia, for declaratory judgment and injunctive relief on the ground that any provision of this part violates the Constitution."[247]

After the Act came into effect in 1997, five then-current members of Congress and one former member brought suit against the Director of the Office of Management and Budget and the Secretary of Treasury as "the officials alleged, respectively, to be responsible for executing the President's 'cancellations' of spending items and limited tax benefits under the Act."[248] The District Court found that the plaintiffs had standing and proceeded to rule that the Line Item Veto Act was unconstitutional.[249] The defendants appealed. Because the Act contained a provision allowing for direct, expedited appeal to the Supreme Court, the Supreme Court immediately moved to hear the case.[250] By a six to two margin,[251] the Justices found the

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provisions of the Line Item Veto Act:

> "The President may, with respect to any bill or joint resolution that has been signed into law pursuant to Article I, Section 7, of the Constitution of the United States, cancel in whole—(1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; or (3) any limited tax benefit; if the President—
>
> (A) determines that such cancellation will—(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest; and
>
> (B) notifies the Congress of such cancellation by transmitting a special message . . . within five calendar days (excluding Sundays) after the enactment of the law [to which the cancellation applies]."

Id. at 814-15 (quoting Line Item Veto Act, 2 U.S.C. § 691(a) (Supp. 1997)).

245. *See id.* at 815 (citing 2 U.S.C. § 692(a)).

246. *See id.* (citing 2 U.S.C. §§ 691d, 691b(a), 691e(6)(C)).

247. *Id.* at 815-16 (quoting 2 U.S.C. § 692(a)(1)).

248. Byrd v. Raines, 965 F. Supp 25, 27 (D.D.C. 1997).

249. *Id.*

250. The Court explained:

> The Act provides for a direct, expedited appeal to this Court. [2 U.S.C.] § 692(b) (direct appeal to Supreme Court); [2 U.S.C.] § 692(c) ("It shall be the duty of . . . the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any [suit challenging the Act's constitutionality] brought under [§ 3(a) of the Act]"). On April 18, eight days after the District Court issued its order, appellants filed a jurisdictional statement asking us to note

plaintiffs did not have standing to sue and never reached the merits.[252]

The *Raines* case was truly a case of first impression for the Supreme Court.[253] While the Court had addressed the question of legislator standing in both *Powell v. McCormack*[254] and *Coleman v. Miller*,[255] this was the first time the Supreme Court actually addressed *federal* legislator standing in a case involving allegations of *institutional* injury. It would have been an ideal time for the Court to establish its approach to legislator standing. But rather than develop a detailed doctrine of legislator standing, as the D.C. Circuit had been attempting to do, the Court decided the case on exceptionally narrow grounds and left many questions unanswered.

Not surprisingly, the Court began its discussion of standing with a strong reaffirmation of the general standing doctrine that had developed over time.[256] Citing *Allen v. Wright*, the Court noted that "[t]o meet the standing requirements of Article III, '[a] plaintiff must allege *personal injury* fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'"[257] The Court

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probable jurisdiction, and on April 21, appellees filed a memorandum in response agreeing that we should note probable jurisdiction. On April 23, we did so. We established an expedited briefing schedule and heard oral argument on May 27.

Raines, 521 U.S. at 817-18 (some citations omitted).

251. The Chief Justice gave the opinion of the Court for himself and Justices O'Connor, Scalia, Kennedy, Thomas, and Ginsburg. *Raines*, 521 U.S. at 813-30. Justices Stevens and Breyer wrote dissenting opinions arguing that plaintiffs did have standing. *Id.* at 835-38 (Stevens, J., dissenting); *Id.* at 838-43 (Breyer, J., dissenting).

252. Subsequently, the Court did reach the merits of the constitutionality of the Line Item Veto Act. In *Clinton v. City of New York*, 524 U.S. 417 (1998), the Court granted standing to plaintiffs who alleged a direct injury as the result of actual cancellations by the President. This case was the consolidation of two cases, brought by the City of New York, two hospital associations, one hospital, and two unions representing health care employees, and a farmers' cooperative. *See id.* at 425. The Court held that the plaintiffs had standing. *See id.* at 426-436. It then reached the merits and held the Line Item Veto Act to be unconstitutional. *See id.* at 437-39.

253. *Raines*, 521 U.S. at 820 ("We have never had occasion to rule on the question of legislative standing presented here.").

254. *See supra* notes 63-66 and accompanying text.

255. *See supra* notes 49-61 and accompanying text.

256. The Court noted that the "case" or "controversy" requirement of Article III "is a 'bedrock requirement.'" *Raines*, 521 U.S. at 818 (quoting Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 471 (1982)).

257. *Id.* (citing Allen v. Wright, 468 U.S. 737, 751 (1984)).

emphasized that "[f]or our purposes, the italicized words in this quotation from *Allen* are the key ones."[258] "We have consistently stressed," the Court continued, "that a plaintiff's complaint must establish that he has a 'personal stake' in the alleged dispute, and that the alleged injury suffered is particularized as to him."[259] The Court noted that it had "also stressed that the alleged injury must be legally and judicially cognizable."[260] "This requires," the Court explained, "that the plaintiff have suffered 'an invasion of a legally protected interest which is . . . concrete and particularized,' . . . and that the dispute is 'traditionally thought to be capable of resolution through the judicial process.'"[261] These standing requirements, the Court stressed, were fundamental. "We have always insisted," the Court emphasized, "on strict compliance with this jurisdictional standing requirement."[262] Moreover, the Court explained, its "standing inquiry has been especially rigorous when reaching the merits of the dispute would force [it] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional."[263]

With these general principles of standing established, the Court proceeded to explore *Powell* and *Coleman* to determine if they offered any guidance in the current suit. *Powell*, the Court concluded, was not relevant because the injury claimed by Congressman Powell was a *personal* injury rather than an *institutional* injury. Unlike Powell, the Court explained, "appellees have not been singled out for specially unfavorable treatment," and they "do not claim that they have been deprived of something to which they *personally* are entitled—such as their seats as [m]embers of Congress after their constituents had elected *them*."[264] In *Raines*, "appellees' claim of standing is based on a loss of political power, not loss of any private right, which would make the injury more concrete."[265]

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258. *Id.* at 819.
259. *Id.*
260. *Id.*
261. *Id.* (quoting Lujan v. Defenders of Wildlife, 504 U.S. 551, 560-61(1992); Flast v. Cohen, 392 U.S. 83, 97 (1968)).
262. *Id.*
263. *Id.* at 819-20.
264. *Id.* at 821.
265. *Id.* ("Unlike the injury claimed by Congressman Adam Clayton Powell, the injury claimed by the [m]embers of Congress here is not claimed in any private capacity but solely because they are [m]embers of Congress.")

In *Coleman*, however, the effected legislators did claim an institutional injury. As a consequence, the Court found it necessary to examine more fully the principle established in *Coleman* and apply its logic to *Raines*. After discussing the facts and the ruling of *Coleman*, the Court concluded: "It is obvious, then, that our holding in *Coleman* stands (at most) for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified."[266] In a footnote, the Court gave a very important explanation of the parenthetical "at most":

> Since we hold that *Coleman* may be distinguished from the instant case on this ground, we need not decide whether *Coleman* may also be distinguished in other ways. For instance, appellants have argued that *Coleman* has no applicability to a similar suit brought in federal court, since that decision depended on the fact that the Kansas Supreme Court "treated" the senators' interest in their votes "as a basis for entertaining and deciding the federal questions."... They have also argued that *Coleman* has no applicability to a similar suit brought by federal legislators, since the separation-of-powers concerns present in such a suit were not present in *Coleman*, and since any federalism concerns were eliminated by the Kansas Supreme Court's decision to take jurisdiction over the case.[267]

In essence, the Court refused to hold whether federal legislators would ever have standing; perhaps *Coleman's* holding applies only to state legislators. But, if *Coleman's* standards were ever held to apply to federal legislators, the principle would be that those legislators would have standing only if their votes had been "completely nullified" because their votes were sufficient to adopt a measure that was not adopted or to prevent the adoption of a measure that was adopted.

With this interpretation of *Coleman*, the Court concluded that the legislator-plaintiffs in *Raines* would not have standing. As the Court explained:

> They have not alleged that they voted for a specific bill, that

266. *Id.* at 822 (footnote omitted).
267. *Id.* at 824 (quoting Coleman v. Miller, 307 U.S. 433, 446 (1939)).

> there were sufficient votes to pass the bill, and that the bill was nonetheless deemed defeated. In the vote on the Line Item Veto Act, their votes were given full effect. They simply lost that vote. Nor can they allege that the Act will nullify their votes in the future in the same way that the votes of the *Coleman* legislators had been nullified. In the future, a majority of Senators and Congressman can pass or reject appropriations bills . . . . In addition, a majority of Senators and Congressman can vote to repeal the Act, or to exempt a given appropriations bill (or a given provision in an appropriations bill) from the Act . . . . *Coleman* thus provides little meaningful precedent for appellees' argument.[268]

Simply put, the Court found that the plaintiffs' votes had not been nullified. Plaintiffs' "nay" votes on the Line Item Veto Act had not been discounted, those votes were merely insufficient to defeat the measure. Moreover, even though the legislators contended that their votes on future bills had lost their effectiveness due to the Line Item Veto Act,[269] such diminution of legislative influence simply was not tantamount to a nullification. The Court explained, "[t]here is a vast difference between the level of vote nullification at issue in *Coleman* and the abstract dilution of institutional legislative power that is alleged here."[270] "To uphold standing here," the Court continued, "would require a drastic extension of *Coleman*. We are unwilling to take that step."[271]

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268. *Id.* at 823 (footnotes omitted).

269. The Court explained this argument:

> Nevertheless, appellees rely heavily on our statement in *Coleman* that the Kansas senators had "a plain, direct, and adequate interest in maintaining the effectiveness of their votes." Appellees claim that this statement applies to them because their votes on future appropriations bills (assuming a majority of Congress does not decide to exempt those bills from the Act) will be less "effective" than before, and that the "meaning" and "integrity" of their vote has changed. The argument goes as follows. Before the Act, [m]embers of Congress could be sure that when they voted for, and Congress passed, an appropriations bill that included funds for Project X, one of two things would happen: (i) the bill would become law and all of the projects listed in the bill would go into effect, or (ii) the bill would not become law and none of the projects listed in the bill would go into effect. Either way, a vote for the appropriations bill meant a vote for a package of projects that were inextricably linked. After the Act, however, a vote for an appropriations bill that includes Project X means something different. Now, in addition to the two possibilities listed above, there is a third option: the bill will become law and then the President will "cancel" Project X.

Id. at 825 (footnote and citations omitted).

270. *Id.* at 826.

271. *Id.*

Next, the Court examined historical practices that supported the conclusion that legislator-plaintiffs in analogous situations did not have standing.[272] Following this discussion, the Court concluded: "In sum, appellees have alleged no injury to themselves as individuals (contra, *Powell*), the institutional injury they allege is wholly abstract and widely dispersed (contra, *Coleman*), and their attempt to litigate this dispute at this time and in this form is contrary to historical experience."[273] The Court, however, went on to add two important caveats. First, the Court observed: "We attach some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose their suit."[274] The Court supported this statement with citations to two cases, *Bender v. Williamsport Area School Dist.*,[275] and *United States v. Ballin*.[276] These citations suggest that the Court may have placed some importance on the lack of an explicit congressional authorization. From *Bender*, the Court quoted the statement that "'[g]enerally speaking, members of collegial bodies do not have standing to perfect an appeal the body itself has declined to take.'"[277] From *Ballin*, the Court quoted the following: "'The two houses of Congress are legislative bodies representing larger constituencies. Power is not vested in any one individual, but in the aggregate of the members who compose the body, and its action is not the action of any separate member or number of members, but the action of the body as a whole.'"[278] Second, the Court explained: "our conclusion neither deprives [m]embers of Congress of an adequate remedy (since they may repeal the Act or exempt appropriations bills from its reach), nor forecloses the Act from constitutional challenge (by someone who suffers judicially cognizable injury

272. *Id.* at 826 ("Not only do appellees lack support from precedent, but historical practice appears to cut against them as well . . . . [I]n analogous confrontations between one or both Houses of Congress and the Executive Branch, no suit was brought on the basis of claimed injury to official authority or power.").

273. *Id.* at 829.

274. *Id.* (footnote omitted).

275. 475 U.S. 534 (1986).

276. 144 U.S. 1 (1892).

277. *Raines*, 521 U.S. at 830, n.10 (quoting Bender v. Williamsport Area School Dist., 475 U.S. 534, 544 (1986)).

278. *Id.* (quoting United States v. Balling, 144 U.S. 1, 7 (1892)).

as a result of the Act)."[279] With these comments, the Court emphasized the narrowness of its decision by noting that "[w]hether the case would be different if any of these circumstances were different we need not now decide."[280] Rather, the Court could simply "hold that these individual [m]embers of Congress do not have a sufficient 'personal stake' in this dispute and have not alleged a sufficiently concrete injury to have established Article III standing."[281]

What is most clear about the Court's ruling in *Raines* is its narrowness. As noted earlier, the Court came short of determining whether legislators could ever have standing. Despite the various approaches to legislator standing by the D.C. Circuit in which that court would, at least under certain conditions, grant standing to legislators,[282] the Supreme Court ultimately refused to either affirm or reject the concept of legislator standing. Because the legislators in *Raines* did not rise to the standard of *Coleman* (the only relevant case in the Court's mind), the Court did not need to determine if federal legislators who did meet the *Coleman* test would have standing. As in *Coleman* itself, the Court continued to leave a series of questions unanswered. First, does the *Coleman* principle apply only to *state* legislators? The Court suggested in footnote 8 that, because of the unique circumstances in *Coleman*, in which the Kansas Supreme Court had granted standing and separation-of-powers concerns may not have existed, it may be that *Coleman* would never ultimately be controlling for federal legislators. Perhaps, if the Supreme Court had been required to decide this issue, it would have found that separation-of-powers concerns would ultimately prevent legislators from ever having standing. Second, even if the *Coleman* principle were to apply to federal legislators, how many legislators must bring suit in order for standing to obtain? In *Coleman*, as noted

279. *Id.* at 829.

280. *Id.* at 829-30.

281. *Id.* at 830 (footnote omitted). In the footnote, the Court noted that "[i]n addition, it is far from clear that this injury is 'fairly traceable' to appellants, as our precedents require, since the alleged cause of appellees's injury is not appellants' exercise of legislative power but the actions of their own colleagues in Congress in passing the Act." *Id.* at 830 n.11.

282. The Court did note in a footnote that "[o]ver strong dissent, the Court of Appeals for the District of Columbia Circuit has held that [m]embers of Congress may have standing when (as here) they assert injury to their institutional power as legislators." *Id.* at 821 n.4.

above, the entire group of disenfranchised senators brought suit. In *Raines*, the Court says that the principle of *Coleman* is that "legislators *whose votes would have been sufficient* to defeat (or enact) a specific legislative act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that *their votes* have been completely nullified."[283] This seems to suggest that were *Coleman* to apply to federal legislators it might not be sufficient that one or several of the aggrieved legislators be plaintiffs, but rather that the number of plaintiffs be such that their aggregated votes would have affected the outcome of the action. Third, must the action be authorized by Congress or a particular House of Congress in order for the legislators in question to have standing? As noted earlier, the Court said that it "attach[ed] some importance to the fact"[284] that Congress had not authorized the suit in *Raines*, but had instead actually opposed such suit.[285] Perhaps the decision in *Raines* would have been different had the Senate, the House, or both authorized the suit. In citing *Bender* and *Ballin*, the Court suggested that Congress is to be understood as a *body* (or even two *bodies)* for standing purposes. Perhaps, if there is to be legislator standing, it should only come if either the House, the Senate, or the whole of Congress is a plaintiff. Finally, what if there were no other remedies available to members of Congress or private plaintiffs? The Court noted that with respect to the Line Item Veto Act there were other legislative remedies available to members of Congress and a private plaintiff would be able to bring suit if he or she were injured. What if there had been no other remedies available to members of Congress and no potential for a noncongressional plaintiff to bring suit? Would that have made a difference in the decision? As demonstrated earlier, these factors, at various points in time, affected the D.C. Circuit's jurisprudence on legislator standing. Perhaps they would have affected the Supreme Court's decision as well. But, because the Supreme Court in *Raines* did not need to address any of these questions in order to resolve the case, the answers remained uncertain.

283. *Id.* at 822 (emphasis added).
284. *Id.* at 829.
285. *Id.*

D. The D.C. Circuit Responds to Raines

Within two years of the *Raines* decision, the D.C. Circuit was confronted with two other suits involving legislators: *Chenoweth v. Clinton*[286] and *Campbell v. Clinton*.[287] These cases provided an opportunity for the Circuit to reassess its approach to legislator standing.

1. Chenoweth v. Clinton

In January of 1997, President Clinton announced that his administration would be establishing a new program, the American Heritage Rivers Initiative (AHRI).[288] This was to be an effort to preserve historic rivers and communities. In June of that year, Congresswoman Chenoweth and two other members of Congress introduced a bill in the House that sought to prevent the President from establishing this program. But the bill was never voted upon, and the President promulgated Executive Order 13,061 establishing the Initiative. Shortly thereafter, Representative Chenoweth and three other members of Congress brought suit against the President seeking both declaratory and injunctive relief. The plaintiffs claimed that they were injured because "the President's issuance of the AHRI by executive order, without statutory authority therefor, 'deprived [the plaintiffs] of their constitutionally guaranteed responsibility of open debate and vote on issues and legislation' involving interstate commerce, federal lands, the expenditure of federal monies, and implementation of the NEPA."[289] The District Court dismissed the suit for lack of standing, and the legislators appealed. Not surprisingly, the D.C. Circuit also denied standing to Chenoweth and her colleagues. Relying upon *Raines*, the court ruled that the claimed injury did not rise to the level of nullification and thus was not sufficient for standing purposes.[290]

In the course of its opinion, the court had to struggle with the meaning of *Raines* and its implications for the Circuit's approach to legislator standing. Chenoweth's arguments relied

286. 181 F.3d 112 (D.C. Cir. 1999).
287. 203 F.3d at 19. (D.C. Cir. 2000).
288. The facts are taken from *Chenoweth*, 181 F. 3d at 112-13.
289. *Id.* at 113 (citation omitted).
290. *Id.*

on the Circuit's rulings in *Kennedy v. Sampson* and *Moore v. United States House of Representatives* and claimed that the basic principle in those cases survived the Supreme Court's decision in *Raines*.[291] While the court was unwilling to pronounce *Kennedy* and *Moore* completely moribund in the wake of *Raines*, the court nonetheless concluded that the particular interpretation given to those cases by Chenoweth and her co-appellants was no longer valid.[292] As the court saw it, the Circuit's understanding of what would be a judicially cognizable injury under *Kennedy* and *Moore* was rather broad.[293] As a consequence, "the injury [the plaintiffs] allegedly suffered when the President issued Executive Order 13,061—a dilution of their authority as legislators—is precisely the harm we held in *Moore* and *Kennedy* to be cognizable under Article III."[294] But, the court continued, "[i]t is also, however, identical to the injury the Court in *Raines* deprecated as 'widely dispersed' and 'abstract.'"[295] The court explained:

> If, as the Court held in *Raines*, a statute that allegedly "divests [congressmen] of their constitutional role" in the legislative process does not give them standing to sue, then neither does an Executive Order that allegedly deprives congressmen of their "right[] to participate and vote on legislation in a manner defined by the Constitution."[296]

"Consequently," the court concluded, "the portions of our legislative standing cases upon which the current plaintiffs rely are untenable in the light of *Raines*."[297]

The Court then proceeded to speculate upon the status of *Moore* and *Kennedy* in the post-*Raines* world. With respect to *Moore*, the court contended that "[w]hatever *Moore* gives the Representatives under the rubric of standing, it takes away as a matter of equitable discretion."[298] This was because, the court explained, there remained other legislative remedies available

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291. *Id.*
292. *Id.* at 115.
293. *Id.*
294. *Id.*
295. *Id.* (quoting Raines v. Byrd, 521 U.S. 811 (1997)).
296. *Id.* (alterations in original) (quoting *Raines*, 521 U.S. at 816; Moore v. United States House of Representatives, 733 F. 2d 946, 951 (1984)).
297. *Id.*
298. *Id.* at 116.

to the plaintiffs to seek to end the AHRI.[299] Because the court believed it "would reach the same conclusion" by "[a]pplying *Raines*," the court rather boldly stated that "*Raines*, therefore, may not overrule *Moore* so much as require us to merge our separation of powers and standing analyses."[300] In other words, the court suggested, perhaps *Raines* may mean that the second prong of the *Riegle* approach, the inquiry about other legislative remedies, is simply reincorporated into the standing inquiry much as it had been in *Goldwater*. Regarding *Kennedy*, the court noted that it, too, "may survive as a peculiar application of the narrow rule announced in *Coleman v. Miller*."[301] The court claimed:

> Although *Coleman* could be interpreted more broadly, the *Raines* Court read the case to stand only for the proposition that "legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect) on the ground that their votes have been completely nullified."[302]

Thus, "[e]ven under this narrow interpretation, one could argue that the plaintiff in *Kennedy* had standing" because his vote was nullified.[303] But, the court concluded, "*Raines* leaves no room for the broad theory of legislative standing that we adopted in *Moore* and *Kennedy*."[304]

Taking the *Raines* decision as it is, it does seem as though the D.C. Circuit's ruling in *Chenoweth* was correct. There had been no "vote nullification" of the kind suggested by the Supreme Court in *Raines*. Moreover, it is probably correct that the Supreme Court's decision in *Raines* suggests that separation-of-powers concerns should be incorporated back into the standing assessment proper. But, other aspects of the court's discussion of *Kennedy* and *Moore* seem a bit more problematic. The court referred to "the broad theory of legislative standing that we adopted in *Moore* and *Kennedy*."[305] Yet, as noted earlier, the *Kennedy-Harrington-Goldwater* line of cases does not seem as

299. *Id.*
300. *Id.*
301. *Id.*
302. *Id.* (quoting Raines v. Byrd, 521 U.S. 811, 823 (1997)).
303. *Id.*
304. *Id.* at 117, n.*
305. *Id.*

broad as the court in *Chenoweth* seemed to suggest.[306] The injury claimed by the plaintiffs in *Chenoweth*, "the deprivation of their right as [m]embers of the Congress to vote on (or, more precisely, against) the AHRI,"[307] seems much broader than the vote nullification that took place in *Kennedy*. In *Kennedy*, the President did not undertake some measure on which Congress had constitutional authority to act. Rather, the President refused to acknowledge that a *specific* bill became law in spite of its adoption by Congress and its going unsigned for the ten-day period established by the Constitution. *Moore* may be more analogous to *Chenoweth*. In *Moore*, the plaintiffs were claiming an injury because they had experienced "the deprivation of debate and a vote in the origination of revenue-raising legislation."[308] That would seem similar to Chenoweth's claim that she and her colleagues were denied an opportunity to "'debate and vote on issues and legislation involving interstate commerce, federal lands, the expenditure of federal monies, and implementation of the [National Environmental Protection Act]."[309] But even in *Moore*, the bill in question had already originated in a manner that the plaintiffs believed to be unconstitutional. In *Chenoweth*, while the executive order had been issued, the Congress was not precluded from legislating in any of those areas.

In sum, the *Chenoweth* court acknowledged that *Raines* had important implications for the Circuit's approach to legislator standing. It affirmed the vote nullification presented in *Raines*, but did not go much beyond that in articulating a developed post-*Raines* approach. As a consequence, *Campbell v. Clinton*

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306. Judge Tatel made this same point in his concurrence. He explained:
> In the course of deciding that *Raines* essentially overrules the theory of legislative standing recognized in *Kennedy* and *Moore*, my colleagues read those decisions too broadly, stating that the legislator injury we found cognizable in those cases "is precisely the harm" that appellants allege here. But unlike appellants, the legislators in *Kennedy* and *Moore* challenged alleged constitutional defects in the way specific pieces of legislation were passed or defeated. Contrary to appellants' claim that they have been "denied the 'right[ ] to participate and vote on legislation in a manner defined by the Constitution,'" they can point to no defect in any "discrete aspect of the process by which a bill becomes law (the actual vote on the legislation) [or] those post-enactment events denying the bill's status as law."

Id. at 117-18 (Tatel, J., concurring) (citations omitted).

307. *Id.* at 113.

308. Moore v. United States House of Representatives, 733 F. 2d 946, 952 (1984).

309. *Chenoweth*, 181 F. 3d at 113.

provided the D.C. Circuit another opportunity to develop a new approach to legislator standing.

2. Campbell v. Clinton

By the time *Campbell v. Clinton*[310] reached the D.C. Circuit, the Kosovo campaign was over. Yet, despite claims by the government that the court should dismiss the suit as moot, the majority of the panel opted not to discuss mootness and focused instead on standing.[311] The opinion of the court, written by Judge Silberman, sought to clarify the Circuit's understanding of standing. The court began by reviewing the Supreme Court's decision in *Raines* and the Circuit's decision in *Chenoweth*. In this brief review, the court paid particular attention to the fact that both *Raines* and *Chenoweth* denied standing and made explicit reference to the availability of other legislative remedies.[312] But, the court noted, "[t]here remains,

310. 203 F.3d 19 (D.C. Cir. 2000). Little has been written on the Campbell case. *See* Recent Case, *Constitutional Law—Congressional Standing—D.C. Circuit Holds That Members of Congress May Not Challenge the President's Use of Troops in Kosovo.* Campbell v. Clinton, 203 F.3d 19 (D.C. Cir. 2000), 113 HARV. L. REV. 2134 (2000); Michael Hahn, Note, *The Conflict in Kosovo: A Constitutional War?*, 89 GEO. L.J. 2351 (2001). A comment on the District Court ruling is Major Geoffrey S. Corn, Case Comment, Campbell v. Clinton, *The "Implied Consent" Theory of Presidential War Power is Again Validated*, 161 MIL. L. REV. 202 (1999). For a commentary written by several of the attorneys who represented Campbell, *see* H. Lee Halterman et al., Commentary, *The Fog of War [Powers]*, 37 STAN. J. INT'L L. 197 (2001).

311. Almost comically, there were actually *four* opinions written by a *three*-judge panel. Judge Silberman penned the opinion of the court, joined by Judge Tatel. *Campbell*, 203 F.3d at 19. Judge Randolph wrote a separate concurrence, disagreeing with the majority's analysis of standing, but concluding that the suit should be dismissed, in part because plaintiffs lacked standing on other grounds and in part because one of the claims was moot. *Id.* at 30 (Randolph, J., concurring). Judge Silberman also wrote a separate concurrence in which he argued that, even if the plaintiffs had standing, the case should be dismissed as a non-justiciable political question. *Id.* at 24 (Silberman, J., concurring). Finally, Judge Tatel wrote his own concurrence in which he argued that if the plaintiffs did have standing the case should not be dismissed under the political question doctrine. *Id.* at 37. (Tatel, J., concurring).

312. *Id.* at 20. With respect to *Raines*, Judge Silberman noted:

> Observing it had never held that congressmen have standing to assert an institutional injury as against the executive, the Court held that petitioners in the case lacked "legislative standing" to challenge the Act. The Court observed that petitioners already possessed an adequate political remedy, since they could vote to have the Line Item Veto Act repealed, or to provide individual spending bills with a statutory exemption.

Id. It is interesting to note that in the very quick summary of the decision in *Raines*, Judge Silberman choose to refer to the Court's statement about other legislative remedies. As noted above, while the Court did make that reference, there were a number of other points made by the Court as well. Silberman seemed to be

however, a soft spot in the legal barrier against congressional legal challenges to executive action, and it is a soft spot that appellants sought to penetrate."[313] This "soft spot" was the *Coleman* doctrine as interpreted in *Raines*. While acknowledging the Supreme Court's comment in *Raines* that it might have been possible to distinguish *Raines* from *Coleman* on the grounds of separation of powers, the Circuit Court noted that the Supreme Court "thought it unnecessary to cabin *Coleman* on those grounds."[314] "Instead," the court explained, "the [Supreme] Court emphasized that the congressmen were not asserting that their votes had been 'completely nullified.'"[315]

Up to this point in the opinion, the D.C. Circuit had merely been summarizing what had gone before. Now, the court went beyond mere description and began to interpret the *Raines* interpretation of *Coleman* by attempting to define what a "vote nullification" would be. While acknowledging that "[i]t is, to be sure, not readily apparent what the Supreme Court meant by that word ['nullified']," the court went on to note:

> [T]he key to understanding the [*Raines*] Court's treatment of *Coleman* and its use of the word nullification is its implicit recognition that a ratification vote on a constitutional amendment is an unusual situation. It is not at all clear whether once the amendment was "deemed ratified," the Kansas Senate could have done anything to reverse that position. We think that must be what the Supreme Court implied when it said the *Raines* plaintiffs could not allege that the "[Line Item Veto Act] would nullify their votes *in the future*," and that, after all, a majority of senators and congressmen could always repeal the Line Item Veto Act. The *Coleman* senators, by contrast, may well have been powerless to rescind a ratification of a constitutional amendment that they claimed had been defeated. In other words, they had no legislative remedy. Under that reading—which we think explains the very narrow possible *Coleman* exception to *Raines*—appellants [in *Campbell*] fail because they continued, after the votes, to enjoy ample legislative

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focusing on that remark by the Court because it would later become a critical part of the D.C. Circuit's interpretation of what was meant by a "vote nullification." *See infra* notes 315-16 and accompanying text.

313. *Campbell*, 203 F.3d at 20.

314. *Id.* at 22.

315. *Id.*

power to have stopped prosecution of the "war."[316]

In this critical passage, the D.C. Circuit seemed to be defining "nullification" in a manner reminiscent of the *Kennedy-Harrington-Goldwater* approach. For a legislator to have standing, the court in *Campbell* explained, there must be a nullification of a vote. A nullification means there are no other legislative remedies available to rectify the action by the defendant. This means that whatever had been done by the defendant cannot be undone by legislative action. In *Coleman*, once the constitutional amendment was certified as ratified, there was nothing the Kansas legislature could do through the normal legislative process. In *Goldwater*, once the President had terminated a treaty, neither the Senate, nor the House of Representatives, nor both together, could re-conclude a treaty with Taiwan. But this was not the case in *Campbell*, the court argued. There were ample means available to Congress to stop the President's actions in Yugoslavia:

> Congress certainly could have passed a law forbidding the use of U.S. forces in the Yugoslav campaign; indeed, there was a measure—albeit only a concurrent resolution—introduced to require the President to withdraw U.S. troops. . . . [T]his measure was defeated by a 139 to 290 vote. Of course, Congress always retains appropriations authority and could have cut off funds for the American role in the conflict. Again there was an effort to do so but it failed; appropriations were authorized. And there always remains the possibility of impeachment should a President act in disregard of Congress' authority on these matters.[317]

As a consequence, the court concluded that Campbell and his colleagues had not met the vote nullification standard articulated in *Raines*.

From Judge Silberman's language, it seems that the D.C. Circuit defined a very restrictive approach to legislator standing. The court seemed to proceed from the assumption that *Raines* intended to leave open a very small window for legislator standing. Like *Kennedy-Harrington-Goldwater*, a legislator could only have standing if a vote nullification took place. A vote nullification took place if there were *absolutely no*

316. *Id.* at 22-23 (third and fourth alterations in original) (citations and footnote omitted).

317. *Id.* at 23.

legislative remedies available. It was not enough that *most* legislative remedies be unavailable or that *reasonable* legislative remedies be unavailable. As long as there were *something* that the legislative branch could do—even if it went to the extreme of impeachment true nullification of a vote had not occurred. Moreover, the court's discussion seemed to indicate that, short of such a vote nullification, no other injury would rise to the level of an injury cognizable for standing purposes.

The restrictiveness of this opinion was born out in Judge Randolph's concurrence. While Randolph agreed that the plaintiffs did not have standing, he believed that the court had gone too far in limiting legislator standing. From his perspective, the opinion of the court, "misconceives the holding of *Raines v. Byrd* and conflicts with the law of this circuit."[318] First, Randolph noted that "[t]he majority opinion in our case seems to assume that the only thing left of legislative standing is whatever *Raines* preserves."[319] While noting that he would "not quarrel with the assumption," Judge Randolph limited this by adding, "at least for cases in which a legislator is claiming that his vote has been illegally nullified."[320] In a footnote, he suggested that there might be other types of injuries that would be cognizable for standing purposes.[321] Second, even accepting that a vote nullification is one type of injury that courts would recognize for standing purposes, Randolph believed that the majority had erroneously interpreted *Raines*'s discussion of nullification. A vote nullification, accordingly to Randolph, was not limited to circumstances where no other legislative remedies existed. He explained:

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318. *Id.* at 28 (Randolph, J., concurring).

319. *Id.* at 33 (Randolph, J., concurring).

320. *Id.*

321. Judge Randolph noted:

> The Court has "recognized that state legislators have standing to contest a decision holding a state statute unconstitutional if state law authorizes legislators to represent the State's interests," [Arizonans for Official English v. Arizona, 520 U.S. 43, 65 (1997)] (citing Karcher v. May, 484 U.S. 72, 82, (1987)). Compare INS v. Chadha, 462 U.S. 919, 930 n.5, 939-40, (1983), in which the "Court held Congress to be a proper party to defend [a] measure's validity where both Houses, by resolution, had authorized intervention in the lawsuit," and the executive branch refused to defend the one-House veto provision. [Arizonans,] 520 U.S. at 65 n.20.

Id. at 33 n.4 (Randolph, J., concurring).

> The majority has, I believe, confused the right to vote in the future with the nullification of a vote in the past, a distinction *Raines* clearly made. To say that your vote was not nullified because you can vote for other legislation in the future is like saying you did not lose yesterday's battle because you can fight again tomorrow. The Supreme Court did not engage in such illogic. When the Court in *Raines* mentioned the possibility of future legislation, it was addressing the argument that "the [Line Item Veto] Act will nullify the [Congressmen's] votes in the future. . . ." This part of the Court's opinion, which the majority adopts here, is quite beside the point to our case. No one is claiming that their votes on future legislation will be impaired or nullified or rendered ineffective.[322]

Moreover, Randolph contended, there would *always* be other legislative remedies available. "[A]s long as Congress and the Constitution exist," he explained, "Members will always be able to vote for legislation."[323] Because of this, "the majority's decision is tantamount to a decision abolishing legislative standing."[324] "[I]f we are going to get rid of legislative standing altogether," he admonishes the majority, "we ought to do so openly and not under the cover of an interpretation, or rather misinterpretation, of a phrase in *Raines*."[325] Indeed, from his perspective, "[i]f the Supreme Court had meant to do away with legislative standing, it would have said so and it would have given reasons for taking that step."[326]

In addition to Judge Randolph's critique of the majority's conception of *Raines*, he also accused the court of adopting a position at variance with its decision in *Chenoweth*. Randolph claimed that in *Chenoweth* the D.C. Circuit had "interpreted *Raines* consistently with my analysis in this case and concluded that a previous legislative standing decision of this court—*Kennedy v. Sampson*—upholding legislative standing to challenge the legality of a pocket veto was still good law."[327] After explaining the facts of *Kennedy*, Randolph concluded:

> If *Chenoweth* is correct, the majority opinion in this case must

322. *Id.* at 42-43 (citations omitted) (Randolph, J., concurring) (quoting Raines v. Byrd, 521 U.S. 811, 824 (1997)).

323. *Id.* at 43 (Randolph, J., concurring).

324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.* at 43-44 (Randolph, J., concurring) (citation omitted).

> be wrong. If *Chenoweth* is correct, it is no answer to say—as the majority says in this case—that standing is lacking because, despite the pocket veto, Congress could pass the same law again, or it could retaliate by cutting off appropriations for the White House or it could impeach the President.[328]

There seem to be two problems with Randolph's understanding of prior decisions by the Circuit. First, he appears to have missed an important case from the pre-*Riegel* period: *Goldwater v. Carter*. Randolph's understanding of the distinction between *Kennedy* itself and the majority in *Campbell* seems to be correct. In *Kennedy*, despite the nullification of a vote that may have taken place by the allegedly impermissible pocket veto, there continued to be legislative remedies available to redress the matter. Accordingly, there had not been a nullification in the sense that the court defined it in *Campbell*. But, it should be noted, while *Kennedy* made no reference to the availability of legislative remedies, *Goldwater* did. The court in *Goldwater* made it clear that "[w]hether the President's action amounts to a complete disenfranchisement depends on whether appellees have left to them *any legislative means* to vote in the way they claim is their right."[329] To the *Goldwater* court that was "the crucial issue."[330] Hence, the court could grant standing to Senator Goldwater and his co-plaintiffs because there was "no conceivable senatorial action that could likely prevent termination of the Treaty."[331] In light of this language from *Goldwater*, it does not appear that the *Campbell* decision is too much different from the *Kennedy-Harrington-Goldwater* approach taken as a whole. A second problem with Judge Randolph's analysis is that *Chenoweth* never said that *Kennedy* "*was* still good law." Instead, the court noted that "*Moore* and *Kennedy may* remain good law" and that *Kennedy* "*may* survive as a peculiar application of the narrow rule announced in *Coleman v. Miller*."[332] It could be argued that the majority of the court was merely trying to apply this "peculiar application" in

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328. *Id.* at 44 (Randolph, J., concurring).
329. Goldwater v. Carter, 617 F. 2d 697, 703 (D.C. Cir. 1979) (emphasis added).
330. *Id.*
331. *Id.*
332. Chenoweth v. Clinton, 181 F. 3d 112, 116 (D.C. Cir. 1999) (emphasis added).

Campbell, not a pre-*Goldwater* version of *Kennedy*.[333]

In *Campbell*, the D.C. Circuit was attempting to articulate a principle that was consistent with *Raines* and that the court could operationalize. As the concurrence noted, the court's approach in *Campbell* is exceptionally restrictive. Under the court's definition of a vote nullification, very few circumstances would seem to exist where standing would be possible. There are almost always *some* potential legislative remedies. Given the many types of injuries that had been claimed in previous cases over the years, perhaps only *Coleman* and *Goldwater* would permit standing under the D.C. Circuit's interpretation of *Raines*. But while the court decision in *Campbell* is indeed consistent with the Supreme Court's narrow ruling in *Raines*, it fails to resolve some of the deeper questions purposely left open in *Raines:* Does *Coleman* ever apply to federal legislators? If so, can individual legislators bring suit? Must the entire disenfranchised group bring suit? Or, must the entire House of Congress bring suit? In order to attempt to address these questions, Part IV will critique the current state of legislator standing.

IV. THE CURRENT STATE OF LEGISLATOR STANDING: A CRITIQUE

Given the recent efforts by both the Supreme Court and the D.C. Circuit over the past several years to deal (or not) with legislator standing, what is the current state of the doctrine?

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333. The court was critical of Judge Randolph's interpretation:

> Judge Randolph also contends that our opinion is in conflict with *Chenoweth v. Clinton* . . . . *Chenoweth* did not hold, as Judge Randolph would have it, that *Kennedy v. Sampson* survived *Raines*. Instead, we stressed the increased emphasis placed by such post-*Kennedy* cases as *Raines* on separation of powers concerns. Although appellants' injury in *Chenoweth* was "precisely the harm we held in . . . Kennedy to be cognizable under Article III," it was also "identical to the injury the Court in *Raines* deprecated as 'widely dispersed' and 'abstract,' " and therefore we affirmed the district court's dismissal for lack of standing. *Id.* We only suggested tentatively that "Kennedy may remain good law . . . as a peculiar application of the narrow rule announced in" *Coleman*. Indeed, Judge Tatel understandably read our opinion to "essentially overrule[ ] the theory of legislative standing recognized in *Kennedy* . . . ." *See id.* at 117 (Tatel, J., concurring). In any event, *Chenoweth*'s discussion of *Kennedy*'s fate after *Raines* was dicta, and we need not decide for purposes of this case if *Kennedy*, which involved the special question of a pocket veto, survived *Raines*.

Campbell, 203 F.3d at 24 n.6 (some citations omitted).

We believe that several conclusions can be made about the state of the law. First, the Supreme Court has made it completely clear that for all standing assessments, including those relating to legislators, there are three "bedrock" requirements: (1) there must be a specific, concrete injury to a legally protected interest; (2) the injury must be fairly traceable to the defendant; and (3) there must be a likelihood that the injury can be remedied by a favorable court ruling. Second, the Supreme Court has also made it clear that separation-of-powers concerns are a proper part of the standing inquiry. Moreover, as the Court noted in *Raines*, its "standing inquiry has been especially rigorous when reaching the merits of the dispute would force [it] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional."[334] Third, the Supreme Court has recognized that federal legislators could have standing for *personal*, as opposed to *institutional* injuries.[335] Fourth, the Supreme Court has not developed a *doctrine* of legislator standing for institutional injuries to federal legislators. *Raines* refused to endorse the notion that federal legislators could have standing in some circumstances; but, conversely, *Raines* did not explicitly reject the notion of legislator standing. Fifth, the Supreme Court has said that if it were possible that federal legislators could have standing, one type of injury that would be acceptable for standing purposes would be a nullification of a vote. Sixth, the Supreme Court did not resolve the question of how many members would need to be among the plaintiffs. Seventh, the D.C. Circuit has seemed to acknowledge that a nullification of a vote is the *only* basis for legislator standing. Eighth, the D.C. Circuit has claimed that a vote nullification takes place when there are no other legislative remedies available to the members of Congress to rectify the situation.

Given these conclusions, there are serious problems with the current state of jurisprudence. While the Supreme Court has left many questions unanswered, it cannot truly be faulted for the narrowness of the *Raines* decision. Confronted with the paucity of previous decisions of relevance and the particular

334. 521 U.S. at 819-20.

335. This is what the Court clearly held in *Powell v. McCormack* and affirmed in *Raines*.

fact pattern of *Raines*, the Court did what judges are encouraged to do: decide the case on the narrowest possible grounds. Since a *doctrine* of legislator standing was unnecessary to achieve this result, the Court refrained from articulating its approach to this issue.

The D.C. Circuit, on the other hand, has developed a jurisprudence of legislator standing that is not consistent with general standing doctrine and separation-of-powers concerns. Ever since the *Kennedy* decision, the court has made a fundamental misinterpretation of the nature of an institutional injury. In *Kennedy*, it will be recalled, the government argued that individual members of Congress or a few members of Congress should never have standing.[336] Instead, the government contended, only an entire House of Congress as a body should have standing. The logic of this argument is that an institutional injury can only occur to the *institution* as a whole. Accordingly, only the entity that is injured, the Senate, the House, or Congress, should be regarded as an injured party for standing purposes. Under this approach, if members of Congress believe that an Executive Branch official has wronged Congress in an institutional manner, they would be obliged to convince their fellow members to file suit as a body or, at the very least, adopt a resolution by a majority vote authorizing suit on behalf of the body.

This approach to injury seems to be much more consistent with the logic of standing in general. Indeed, courts have reached similar conclusions with respect to analogous bodies. As noted earlier, in dicta in *Raines*, the Court referred to two cases dealing with standing of "collegial bodies." In *Bender v. Williamsport Area School District*,[337] the District School Board decided not to appeal a decision of a United States District Court regarding the constitutionality of a particular student activity. One of the Board Members, however, decided to file an appeal himself. Without discussing standing, the Third Circuit reached the merits of the case. The Supreme Court, however, overturned the decision of the Court of Appeals, holding that the individual Board Member did not have standing to file the appeal. Noting that, "[g]enerally speaking,

336. *See supra* notes 95-96 and accompanying text.
337. 475 U.S. 534 (1986).

members of collegial bodies do not have standing to perfect an appeal the body itself has declined to take,"[338] the Court explained that the individual's "status as a School Board member does not permit him to 'step into the shoes of the Board' and invoke its right to appeal."[339] Interestingly enough, the Court in *Bender* cited a decision of the D.C. Circuit in a similar case, which held:

> [an individual] has no appealable interest as a member of the Board of Education. While he was in that capacity a named defendant, the Board of Education was undeniably the principal figure and could have been sued alone as a collective entity. Appellant Smuck had a fair opportunity to participate in its defense, and in the decision not to appeal. Having done so, he has no separate interest as an individual in the litigation. The order directs the Board to take certain actions. But since its decisions are made by vote as a collective whole, there is no apparent way in which Smuck as an individual could violate the decree and thereby become subject to enforcement proceedings.[340]

Clearly, a similar argument could be advanced regarding legislators. Because decisions by Congress are made by vote as a collective whole, one or several members should not be able to "step into the shoes of the" Congress and invoke its claim to injury. Another case mentioned in *Raines* that is consistent with the notion that only the body is injured is *United States. v.*

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338. *Id.* at 544.

339. *Id.* (citation omitted). In a footnote, the Court did suggest that there *might* be one circumstance in which the member would have standing. Citing *Coleman*, the Court noted that "[i]t might be an entirely different case if, for example, state law authorized School Board action solely by unanimous consent, in which event Mr. Youngman might claim that he was legally entitled to protect 'the effectiveness of [his][vote].'" *Id.* at 545 n.7 (quoting Coleman v. Miller, 307 U.S. 433, 438 (1939)). But the Court continued:

> [I]n that event Mr. Youngman would have to allege that his vote was diluted or rendered nugatory under state law and even then he would have a mandamus or like remedy against the Secretary of the School Board (mandamus action 'to compel a proper record of legislative action'); he would not be entitled to take legal action in the Board's authority in his own name.

Id. (citations omitted) (quoting *Coleman*, 307 U.S. at 436-37). This circumstance would seem more analogous to *Powell*. The injury suffered if the Board acted despite a requirement of unanimity would seem to be more of a personal injury; the Board member would have been, in effect, "singled out for specially unfavorable treatment." Raines v. Byrd, 521 U.S. 811, 821 (1997) (characterizing the injury suffered by Congressman Powell). *See supra* notes 64-66 and accompanying text.

340. *Id.* at 545 (citing Smuck v. Hobson, 408 F.2d 175, 177-78 (D.C. Cir. 1969) (en banc)).

Ballin.[341] In *Ballin*, the Court noted that:

> [t]he two houses of Congress are legislative bodies representing larger constituencies. Power is not vested in any one individual, but in the aggregate of the members who compose the body, and its action is not the action of any separate member or number of members, but the action of the body as a whole.[342]

Absent the consent of the body, an individual member would thus be powerless to sue. Finally, an analogy can be drawn from corporate law. If a corporate board of directors, the body with fiduciary responsibility for the corporation, declined to pursue a law suit, individual members of the board who disagreed with the decision of the board would in most jurisdictions not have standing to bring suit.[343] As the *Restatement of Agency* notes in a comment, an individual member of a corporate board "has no power of his own to act on the corporation's behalf, but only as one of the board of directors acting as a board."[344] The same logic would seem to apply to individual members of Congress. In sum, the first fatal flaw in the D.C. Circuit's approach to legislator standing is a mistaken conception of institutional injury.

If this were the only problem with the Circuit's approach, it could be fixed by limiting legislator suits to circumstances in which the *body* claiming injury was a party to the suit, as in *Barnes*, or the body has authorized a suit by a majority vote.[345]

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341. 144 U.S. 1 (1892).

342. *Id.* at 3.

343. A corporate board could authorize an agent to sue on behalf of the corporation. *See* MODEL BUS. CORP. ACT § 3.02 (1991) (noting a corporation has the power "to sue and be sued"); *id.* at § 8.01(b) (providing "[a]ll corporate powers shall be exercised by or under the authority of . . . [the] board of directors"). But, it is generally recognized that an individual board member *qua* board member would not have the power to sue without authorization. While there are some states in which individual directors are authorized to bring derivative suits, these are the exception. *See* HARRY G. HENN & JOHN R. ALEXANDER, LAWS OF CORPORATIONS 581-82 (1983) (noting this is the practice in "few jurisdictions"). *See also* PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS §. 7.02(c) (accepting a similar approach). We are deeply indebted to Professor Stephen M. Bainbridge for his assistance with the corporate analogy. Our citations and language in this note draw heavily upon e-mail communication with Professor Bainbridge. E-Mail from Stephen M. Bainbridge, Professor, UCLA School of Law, to Anthony Clark Arend (Aug. 22, 2000) (on file with author). We would also like to thank Professor Richard Diamond for his useful advice on this issue.

344. RESTATEMENT (SECOND) OF AGENCY § 14C cmt. b (1958).

345. It is important to note a distinction between the immutable constitutional

Unfortunately, there is a second and even more significant difficulty with the D.C. Circuit's jurisprudence. While we would agree that certain Executive Branch actions may indeed cause an injury to a House of Congress or Congress as a whole, we do not believe such actions ever constitute an "injury to a *legally protected interest*." The notion that an institutional injury is, in fact, a legally protected injury has never been seriously questioned by the majority opinions of the D.C. Circuit.[346] In past cases, the court has pointed to various Constitutional provisions—the procedures by which a bill becomes a law, for example—to demonstrate that the Constitution granted members of Congress certain legal rights. But, the mere existence of Constitutional provisions in a particular area does not necessarily mean that a putative violation of those provisions would be an injury cognizable for standing purposes. The reason for this has been explicitly stated by Scalia and Bork and can even be inferred from the general tenor of the Court's opinion in *Raines*—the doctrine of separation of powers.

Since at least *Valley Forge*, the Supreme Court has made it clear that balance of powers considerations are properly part of

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requirements of standing and prudential considerations of standing. In *Raines*, the Line Item Veto Act authorized individual members to sue if they believe the Act unconstitutional. The Court noted "that Congress' decision to grant a particular plaintiff the right to challenge an act's constitutionality . . . eliminates any *prudential* standing limitations and significantly lessens the risk of unwanted conflict with the Legislative Branch when that plaintiff brings suit." Raines v. Byrd, 521 U.S. 811, 820 n.3 (1997) (emphasis added). But, the Court noted, "[i]t is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue a plaintiff who would not otherwise have standing." *Id.* It is also important to note that the *Raines* Court did not regard this provision of the Act as constituting a specific authorization by Congress of this particular suit. As noted earlier, the Court explicitly stated that the plaintiffs in *Raines* had "not been authorized to represent their respective Houses of Congress in this action." *Id.* at 829. Thus, the only way the injured party would be before the court would be if the House, the Senate, or Congress entered the suit as a *body* or if that House explicitly authorized that particular suit. A provision in an act in question would not suffice.

346. As demonstrated earlier, Judges Scalia and Bork *did* question this assumption. In *Barnes*, Bork made clear that his "disagreement with the majority, put in the technical terms of traditional standing criteria, is over whether impairment of governmental powers is a judicially cognizable injury, that is, an 'injury in fact' for purposes of article III." Barnes v. Kline, 759 F.2d 21, 52 n.9 (D.C. Cir. 1985). Similarly, Scalia concluded in *Moore*: "In my view no officers of the United States, of whatever Branch, exercise their governmental powers as personal prerogatives in which they have a judicially cognizable private interest." Moore v. United States House of Representatives, 733 F.2d 946, 959 (1984) (Scalia, J., concurring). *See also*, Goodman, *supra* note 48, at 1103 (discussing Bork's views).

an Article III standing assessment.[347] At the heart of the separation of powers doctrine is the notion that courts are not to be involved in issues that fall properly within the purview of the political branches of government. Naturally, this means that disputes that result from the course of the normal political interactions both within and among the branches would not be injuries cognizable for standing purposes. This is because the Constitution not only anticipates such differences but actually welcomes them as a means of preventing any one Branch from gaining too much power.[348] If, for example, a Democratic President refused to nominate a Republican to be a Supreme Court Justice, the Senate or the Congress would not be injured. Similarly, if a member of the House of Representatives failed to have his or her version of a bill adopted by the House, that member would suffer no injury. But what if the President or another Executive Branch official does something that seems to exceed his or her *legal* duties as outlined in the Constitution? Or what if members of a House collectively take an action that seems to improperly limit the legal rights of other members? Would separation of powers concerns prevent courts from involving themselves in those circumstances? The D.C. Circuit's answer in *Campbell* was that separation of powers concerns would prevent judicial interference when there was a legislative means available to address the problem. But if there had been a vote nullification and other legislative remedies did not exist, separation of powers concerns would not be a bar to standing. We believe separation of powers concerns should be a bar even in this circumstance.

While the Constitution may have established a legal framework for relationships among and within the Branches, it does not follow that the Constitution effectively endorses suits by members of Congress about the meaning of those

347. This was an important point noted by Judge Bork in his concurrence in *Vander Jagt*. *See supra* notes 207-12 and accompanying text.

348. Madison's discussion in THE FEDERALIST is well known. In FEDERALIST NO. 51, he writes of the need to establish necessary checks among the branches:

> But the great security against gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. This provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition.

THE FEDERALIST NO. 51, at 321-22 (James Madison) (Clinton Rossiter ed., 1961).

provisions. This is what Scalia meant when he said that courts "sit here neither to supervise the internal workings of the executive and legislative branches nor to umpire disputes between those branches regarding their respective powers."[349] The purpose of the federal courts is to deal with cases that affect private rights.[350] The Framers did not intend a dispute between Congress and the President over, for instance, the meaning of the declaration of war clause to be subject to judicial determination unless the individual rights of persons were at stake. Congress has power as a governmental body. The President has power as a governmental body. They can pursue that power through those channels open to them. Individuals have no such power and as a consequence must rely on the courts. As Judge Wright noted in his concurrence in *Goldwater*, "courts could logically afford legislators even less consideration on standing than they afford other citizens, since the legislator's position gives him special access to the political process through which general constitutional grievances should find redress."[351] Moreover, a main concern of the Framers was to limit the power of the legislature, not enhance it. It is clear that the Framers believed the Legislative Branch would, by its very nature, be the most powerful of the three branches.[352] As a consequence, it was necessary to erect mechanisms to limit its power.[353] With such a critical concern, it seems unlikely that the Framers would have wanted the Legislative Branch to be able to use the power of the Judiciary

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349. Moore v. United States House of Representatives, 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia, J., concurring).

350. *Id.*

351. Goldwater v. Carter, 617 Fd. 2d 697 (D.C. Cir. 1979) (Wright, C.J., concurring).

352. Madison's view was that the Legislative Branch was the real threat to democracy. He contented that "[t]he legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex." THE FEDERALIST NO. 48, at 309 (James Madison) (Clinton Rossiter ed., 1961).

353. In the minds of the Framers, the power of the Legislative Branch would be checked by giving powers to the other Branches and dividing the Legislative Branch itself. In FEDERALIST NO. 51, Madison explains:

> In republican government, the legislative authority, necessarily, predominates. The remedy for this inconvenience is, to divide the legislature into different branches; and to render them . . . as little connected with each other, as the nature of their common functions, and their common dependency on the society, will admit.

THE FEDERALIST NO. 51, *supra* note 348, at 322..

to take on the Executive.[354] Similarly, it would seem inconsistent with the nature of the Legislative Branch that the Framers would endorse judicial intervention in matters internal to that Branch that do not present individual injury.

In *Raines*, the Supreme Court did not *rule* that separation of powers concerns would prevent federal legislators from suing, but such a conclusion would be quite consistent with the opinion of the Court. It is noteworthy that the Court spent a great deal of time exploring the history of disputes between the Branches. The Court explained that "[i]t is evident from several episodes in our history that in analogous confrontations between one or both Houses of Congress and the Executive Branch, no suit was brought on the basis of claimed injury to official authority or power."[355] The Court then examined a number of instances where the President or a member of Congress had been "injured" by an allegedly unconstitutional act but neither Branch had sued. The Court concluded this discussion with a quotation from Justice Powell's concurrence in *United States v. Richardson*:

> The irreplaceable value of the power articulated by Mr. Chief Justice Marshall . . . lies in the protection it has afforded the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action. It is this role, not some amorphous general supervision of the operations of government, that has maintained public esteem for the federal courts and has permitted the peaceful coexistence of the countermajoritarian implications of judicial review and the democratic principles upon which our Federal Government in the final analysis rests.[356]

In short, courts, as the only non-elected Branch of government,[357] would be overstepping their role if they were to

354. Indeed, Madison even speaks of the possibility of needing to enhance the power of the Executive vis-a-vis Congress. He explains that "[it] may even be necessary to guard against dangerous encroachments by still further precautions. As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified." *Id.* at 322-23. While we do not want to suggest that the power of the President should necessarily be enhanced, we do believe that the notion of adding power to Congress by permitting the use of the courts to seek redress for institutional injuries would be beyond the pale for the Framers.

355. Raines v. Byrd, 521 U.S. 811, 826 (1997).

356. United States v. Richardson, 418 U.S. 166, 192 (Powell, J., concurring).

357. Judge Scalia notes this in *Moore*. *See supra* note 349 and accompanying text.

engage in a review of the intra- and inter-Branch disputes unless somehow such disputes affected rights of private individuals. As a consequence, even if the House or the Senate were to authorize the suit or be a party to the suit, these fundamental separation of powers concerns would remain and would counsel against granting standing.

V. THE FUTURE OF LEGISLATOR STANDING— A CONCLUSION

While it is impossible to predict the future of legislator standing, several reasonable conclusions emerge. To begin with, it does seem likely that legislators will continue to sue. Despite the general unwillingness of any court to reach the merits in these cases, there will undoubtedly continue to be members of Congress who will take recourse to the courts. If for no other reason, legislators will be inclined to use the courts as a political venue to challenge the President or other Executive Branch officials. In *Campbell*, for example, even though the courts never addressed the lawfulness of President Clinton's actions in Yugoslavia, the case provided the Representatives an opportunity to criticize the President and affirm their understanding of the War Powers Resolution and the Constitutional provisions on war powers. While the courts did not endorse their position, the legislator's views, and their opposition to the President, became a matter of court record. Those legislators could now point to that record in communications with their colleagues and constituents to demonstrate not just their rhetorical opposition to the President but their willingness to "do something about it" as well.

But while these suits are likely to continue, the critical question is what will courts do in the future. With respect to the Supreme Court, it seems highly improbable that the Court will be inclined to develop a true doctrine of legislator standing. The *Raines* case presented that opportunity to the Court, but the Court decided to demur. It seems unlikely that any future case would force the Court to address the question. This seems to be true for several reasons. First, it is probable that very few appropriate cases will ever get to the Supreme Court. Given the standing test articulated by the D.C. Circuit in *Campbell*, there would seem to be very few situations in which the kind of vote nullification articulated in that case would

occur. As noted earlier, there will virtually always be some legislative remedies available to the members of Congress. Second, even if a case reached the Supreme Court, it is likely that there would be other established doctrines that the Court could use to dismiss the case. *Goldwater* is an example of this. There, the Court could have engaged in a discussion of standing, as the D.C. Circuit did. Instead, the Court avoided the standing question entirely and dismissed the suit on other grounds. It is easy to imagine a future case in which the Court would opt not to explore standing and find the case a non-justiciable political question. Perhaps the only occasion for the Supreme Court to squarely address legislator standing would come if another Circuit developed a jurisprudence on the problem. But, as has been demonstrated, very few legislator suits have made their way into other Circuits.

Given the unlikelihood of Supreme Court action, it falls to the D.C. Circuit to continue to address standing questions for legislator suits. In the short term, it seems likely that the Circuit will continue to take the *Campbell* approach, which is not inconsistent with the actual holding in *Raines.* Moreover, as noted above, because it greatly limits the circumstances in which legislators could sue, it is unlikely that any cases will ever reach the merits. But, as we have attempted to demonstrate, even the restrictive *Campbell* approach does not go far enough. We would recommend that the D.C. Circuit take the next step. In light of the concerns raised earlier, we believe the Circuit should reject legislator standing outright. The D.C. Circuit should take the next opportunity to establish clearly that legislators, whether one, a few, or as an entire Congress, should never be able to sue for an institutional injury. Such an approach would be consistent with both a proper understanding of injury and the separation-of-powers doctrine. It would also help rid the courts of political disputes that are truly the province of the political branches.