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Congressional Participation in Article III Courts: Standing to Sue

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Summary

In disputes between Congress and the executive, questions arise about Congress's ability to turn to the federal courts for vindication of its powers and prerogatives, or for declarations that the executive is in violation of the law or the Constitution. This report seeks to provide an overview of Congress's ability to participate in litigation before Article III courts. The report is limited to a discussion of Congress's participation in litigation as either a plaintiff (e.g., the party initiating the suit alleging some sort of harm or violation of law) or as a third-party intervener (e.g., a party who is seeking to join litigation already initiated by another plaintiff). The report does not address situations where Congress or individual Members appear as a defendant, or congressional participation in court cases as *amicus curiae* ("friend of the court"), as those situations do not raise the same legal and constitutional questions as does the involvement of Congress or its Members as a party plaintiff.

Generally, to participate as party litigants, congressional plaintiffs, whether they be individual Members, committees, houses of Congress (i.e., the House or Senate), or legislative branch entities, must demonstrate that they meet the requirements of the standing doctrine, derived from Article III of the Constitution. The failure to satisfy the standing requirements is fatal to the litigation and will result in its dismissal without a decision by the court on the merits of the presented claims.

With respect to the ability of Congress and Members to demonstrate Article III standing, the Supreme Court's 1997 decision in *Raines v. Byrd* has had a chilling effect on the ability of individual Members of Congress to adjudicate claims before federal courts. Despite the Court's holding in *Raines*, in 2008 the House Judiciary Committee, acting on a resolution from the full House of Representatives, was able to convince the U.S. District Court for the District of Columbia that it had standing to sue the White House for its failure to make subpoenaed witnesses and documents available. In its decision, the court emphasized the distinction between suits brought by individual congressional plaintiffs asserting abstract and diffuse injuries and suits brought by organs of Congress alleging institutional harms. In 2013, the House Committee on Oversight and Government Reform was similarly successful, with a different judge for the District Court for the District of Columbia adopting the same reasoning as the 2008 case, holding that the Committee had standing to sue to enforce a congressional subpoena, in part because the suit was authorized by the House.

Recent case law in this area suggests that suits brought by Congress in an institutional capacity have a far greater chance of being decided on their merits than do cases where individual Members attempt to assert personal or political injuries based on executive action. Through the years, Congress has had a fair amount of success bringing suits to enforce subpoenas and intervening as a third party in ongoing litigation when it is specifically authorized to seek judicial recourse. However, outside the subpoena and intervenor contexts, it remains unclear whether a house of Congress could satisfy the requirements of standing as a plaintiff in an authorized lawsuit against the executive branch. In July 2014, the House authorized the Speaker to institute a lawsuit against the executive branch regarding its implementation of the Affordable Care Act, which may lead to the development of case law in this area of congressional standing.

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Introduction

In disputes between Congress and the executive, questions arise about Congress's ability to turn to the federal courts to vindicate its powers and prerogatives or for declarations that the executive is in violation of the law or the Constitution. This report seeks to provide an overview of Congress's ability to participate in litigation before Article III courts. The report is limited to a discussion of Congress's participation in litigation as either a plaintiff (e.g., the party initiating the suit alleging some sort of harm or violation of law) or as a third-party intervener (e.g., a party who is seeking to join litigation already initiated by another plaintiff). The report does not address situations where Congress or individual Members appear as a defendant, or congressional participation in court cases as *amicus curiae* ("friend of the court"), as those situations do not raise the same legal and constitutional questions at issue when Congress or a Member is the party plaintiff.

Congressional plaintiffs, whether they be individual Members, committees, houses of Congress (i.e., the House or Senate), or legislative branch entities, must demonstrate that they meet the requirements established by Article III of the Constitution in order to participate as party litigants. Specifically, a prospective congressional plaintiff must show that he has standing to sue. The failure to establish standing is fatal to the litigation and will result in its dismissal without the court addressing the merits of the presented claims.

The Supreme Court's 1997 decision in *Raines v. Byrd* has had a chilling effect on the ability of individual Members of Congress to demonstrate Article III standing and thereby have their claims adjudicated in federal court. However, Members or committees who are authorized to sue and act on behalf of a whole house have been able to establish standing under certain circumstances, even after the *Raines* decision. Courts have emphasized the distinction between suits brought by individual congressional plaintiffs asserting abstract and diffuse injuries and suits brought by organs of Congress alleging concrete institutional harms.

Recent case law in this area suggests that suits brought by Congress in an institutional capacity have a greater chance of satisfying standing requirements than do cases where individual Members attempt to assert political or institutional injuries based on executive action.

Article III Standing

Generally, the doctrine of standing is a threshold procedural question that does not turn on the merits of a plaintiff's complaint, but rather on whether the particular plaintiff has a legal right to a judicial determination on the issues before the court.[1] The law with respect to standing is a mix of both constitutional requirements and prudential considerations.[2] Article III of the Constitution specifically limits the exercise of federal judicial power to "cases" and "controversies."[3]

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[1] *See* Flast v. Cohen, 392 U.S. 83, 99 (1968).

[2] *See* Dep't of Commerce v. House of Representatives, 525 U.S. 316, 328-29 (1999). By law, Congress can grant a right to sue to a plaintiff who would otherwise lack standing. According to the Court, however, such a law can eliminate only prudential, but not constitutional, standing requirements. *See* Raines v. Byrd, 521 U.S. 811, 820 n.3 (1997). For example, in the Line Item Veto Act, which was the statute at issue in *Raines*, Congress had granted standing to sue to "any Member of Congress or any individual adversely affected by" the act. *See* Line Item Veto Act of 1996, P.L. 104-130, §692(a)(1), 110 Stat. 1200 (1996). Likewise, Congress also statutorily granted standing to challenge the use of statistical sampling methods in the census. *See Dep't of Commerce*, 525 U.S. at 328-29.

[3] U.S. CONST. art. III, §2 (stating that "The judicial Power shall extend to all *Cases*, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made … under their Authority ... – to *Controversies* to

Accordingly, the courts have "consistently declined to exercise any powers other than those which are strictly judicial in nature."[4] Thus, it has been said that "the law of Article III standing is built on a single basic idea—the idea of separation of powers."[5]

Constitutional Requirements

To satisfy the constitutional standing requirements in Article III, the Supreme Court imposes three requirements. First, the plaintiff must allege a personal injury-in-fact, which is actual or imminent, concrete, and particularized. Second, the injury must be "fairly traceable to the defendant's allegedly unlawful conduct."[6] Third, the injury must be "likely to be redressed by the requested relief."[7]

Prudential Requirements

In addition to the constitutional questions posed by the doctrine of standing, federal courts also follow a well-developed set of prudential principles that are relevant to a standing inquiry.[8] Similar to the constitutional requirements, these limits are "founded in concern about the proper—and properly limited—role of the courts in a democratic society,"[9] but are judicially created. Unlike their constitutional counterparts, prudential standing requirements "can be modified or abrogated by Congress."[10] These prudential principles require that (1) the plaintiff assert his own legal rights and interests, rather than those of a third party; (2) the plaintiff's complaint fall within the "zone of interests" protected or regulated by the statute or constitutional guarantee in question; and (3) the plaintiff not assert "abstract questions of wide public significance which amount to generalized grievances pervasively shared and most appropriately addressed in the representative branches."[11]

Individual Members of Congress as Plaintiffs

As applied to congressional plaintiffs, the doctrine of standing has generally been invoked only in cases involving challenges to executive branch actions or acts of Congress. Prior to the Supreme Court's 1997 decision in *Raines v. Byrd*,[12] the case law with respect to the standing of Members of Congress had been largely, though not exclusively, developed by decisions of the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit).[13]

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which the United States shall be a Party;– to *Controversies* between two or more States; ... .")(emphasis added).

[4] *Raines*, 521 U.S. at 819 (*quoting* Muskrat v. United States, 219 U.S. 346, 355 (1911)).

[5] *Id.* at 820 (*quoting* Allen v. Wright, 468 U.S. 737, 752 (1984)).

[6] *Dep't of Commerce*, 525 U.S. at 329 (internal quotations omitted).

[7] *Id*. *See also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

[8] Bennett v. Spear, 520 U.S. 154, 162 (1997).

[9] *Id.*

[10] *Id.*

[11] Valley Forge Christian Coll. v. Ams. United for the Separation of Church and State, 454 U.S. 464, 474 (1982) (internal quotations omitted).

[12] 521 U.S. 811 (1997).

[13] For cases heard outside the D.C. Circuit, *see, e.g.*, Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973); Ameron, Inc. v. U.S Army Corps of Eng'rs, 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); Dole v. Carter, 569 F.2d 1109 (10th Cir. 1977). In addition, there have been several cases that did not rise to the circuit court level. *See, e.g.*, Gravel v. Laird, 347 F. Supp 7

Individual Member Standing Prior to *Raines v. Byrd*

Before *Raines v. Byrd* was decided in 1997, the D.C. Circuit relied on two Supreme Court decisions in developing the law of legislative standing. The first case, *Coleman v. Miller*,[14] involved the ratification of a constitutional amendment, concerning child labor practices by the Kansas state legislature in 1937.

Coleman was initiated by 24 members of the Kansas legislature, who asserted that the Lieutenant Governor acted beyond the scope of his authority by casting the tie-breaking vote to ratify a proposed amendment to the U.S. Constitution. The Member plaintiffs asked the court to order the Secretary of the State Senate to erase the state's ratification of the amendment.[15] The Kansas Supreme Court rejected the request, holding that the Lieutenant Governor was authorized to cast the tie-breaking vote to ratify the amendment.[16] On appeal to the U.S. Supreme Court, the Kansas attorney general argued that the legislators lacked standing to challenge the ratification.

In addressing the standing argument, the Court held that the legislators had a "plain, direct and adequate interest in maintaining the effectiveness of their votes[,]" and thus, had standing under Article III.[17] In addition, the Court reasoned that these legislators claimed a right and privilege under the Constitution to have their votes against ratification be given full effect, and that the state court denied them that right and privilege.[18] Therefore, the Court declared that the legislators, if their contentions proved true, had a sufficient interest in the controversy.[19] Despite holding that the legislators had standing, the Court affirmed the holding of the Kansas Supreme Court. According to the Court, because Article V of the Constitution grants Congress undivided power to control the amendment process, questions regarding ratification of constitutional amendments are "political questions" and, therefore, non-justiciable.[20]

The second major case relied upon by the D.C. Circuit was *Powell v. McCormack*.[21] *Powell* involved a challenge by Representative Adam Clayton Powell, Jr., who alleged that he was unconstitutionally excluded from the House of Representatives and, therefore, deprived of his federal salary. The Court held that Representative Powell had standing because he was able to demonstrate a private, personal injury not merely an institutionally related one. As the Supreme Court would later note in *Raines v. Byrd*, Powell's injury really involved the "loss of [a] private right"—his right to his congressional seat and salary—and not an institutional injury, like the "loss of political power."[22]

Given the Supreme Court's limited precedent, D.C. Circuit decisions have been the principal source of jurisprudence regarding the standing of individual Members of Congress to bring civil

(D.D.C. 1972); Drinan v. Nixon, 364 F. Supp 854 (D. Mass. 1973). Finally, there was one case decided by a three-judge court, McClure v. Carter, 513 F. Supp. 265 (D. Idaho 1981), that was appealed directly to the Supreme Court, who affirmed the decision of the lower court to dismiss with no opinion. *See* McClure v. Reagan, 454 U.S. 1025 (1981) (mem.).

[14] 307 U.S. 433 (1939).

[15] *See id.* at 436.

[16] *See id.* at 437.

[17] *Id.* at 437-38.

[18] *Id.* at 438.

[19] *Coleman*, 307 U.S. at 446.

[20] *See id.* at 450.

[21] 395 U.S. 486 (1969).

[22] *Raines*, 521 U.S. at 820-21.

suits in federal court. The D.C. Circuit has developed several different approaches to the standing question since the 1970s. The first approach arose in *Mitchell v. Laird*,[23] a suit brought by 12 Members of the House of Representatives against President Richard Nixon and the Secretaries of State, Defense, and the military branches, alleging that they were conducting an unconstitutional military operation in Southeast Asia since Congress had never expressly declared war.[24] In granting the Members standing, the D.C. Circuit adopted a broad theory of legislator standing, best described as the "bears upon" test.[25]

The court concluded that the Members had sufficient interest to have standing because a judicial declaration that the defendants were operating beyond the scope of their constitutional duties "would bear upon the duties of the [Members] to consider whether to impeach defendants and upon [the Members] quite distinct and different duties to make appropriations ... or to take other actions to support the hostilities.... "[26] Although the court ultimately dismissed the case on political question grounds without deciding the merits, the rationale for legislator standing remained the law of the circuit and arguably provided fodder for additional lawsuits by Members against other government officials.[27]

Beginning in 1974, the D.C. Circuit issued a series of opinions that rejected the "bears upon" test and changed the standard for legislator standing. The first of these cases, *Kennedy v. Sampson*,[28] involved a suit by Senator Edward M. Kennedy against the General Services Administration (GSA), seeking a GSA certification stating that the Family Practice Medicine Act had become federal law. Although the bill had passed both houses of Congress and was presented to the President, Congress recessed before the 10 days that the President had to sign or veto the bill had elapsed. President Nixon refused to sign the bill into law and argued that because Congress was not in session, the bill failed to become law by virtue of a "pocket veto."[29] Senator Kennedy asserted that the language in the Constitution authorizing a "pocket veto" only applied to end-of-session adjournments, and not intra-session recesses of the Congress.[30]

Prior to reaching the merits,[31] the court addressed Senator Kennedy's Article III standing. The court put forth two approaches to adjudicating such claims, neither of which was the "bears upon" test. The court's first approach asked "whether a 'logical nexus' exists between the status asserted by a litigant and the claim sought to be adjudicated."[32] The court found that such a "logical

[23] 488 F.2d 611 (D.C. Cir. 1973).

[24] *Id.* at 613.

[25] *See* Anthony Clark Arend & Catherine B. Lotrionte, *Congress Goes to Court: The Past, Present, and Future of Legislator Standing*, 25 HARV. J.L. & PUB. POL'Y 209, 223 (2002).

[26] *Mitchell*, 488 F.2d at 614.

[27] It should be noted that after *Mitchell*, both the Second and Fourth Circuits declined to follow the "bears upon" test in similar cases involving legislator standing. *See Holtzman*, 484 F.2d 207 (suit brought by Representative Holtzman against the Secretary of Defense seeking an injunction against the use of force in Cambodia); *Harrington*, 528 F.2d 455 (suit brought by Members of Congress, taxpayers, and citizens challenging expenditure of monies in support of military operations in Southeast Asia).

[28] 511 F.2d 430 (D.C. Cir. 1974).

[29] *Id.* at 436.

[30] *Id.* at 433.

[31] On the merits, the court concluded that the intrasession congressional recess did not prevent the President from returning the bill to Congress after his veto. As the constitutionally required 10-day period had elapsed without Presidential action, the bill was not considered to have been vetoed, but rather became law consistent with Article 1, §7. *See id.* at 442.

[32] *Id* at 433.

nexus" existed, concluding that Members of Congress can challenge "the validity of executive action which purports to have disapproved of an Act of Congress by means of a constitutional procedure which does not permit Congress to override the disapproval."[33] The court's second approach asked whether the plaintiff alleged that the action caused him "'injury in fact,' economic or otherwise" and whether "the interest sought to be protected [is] 'arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'"[34] The court concluded that Senator Kennedy's injury denied him the effectiveness of his vote as a U.S. Senator. Furthermore, this interest was within the "zone of interest" protected by Article I, Section 7 of the Constitution.[35] Finally, the court addressed a question unsettled after the Supreme Court's decision in *Coleman*: can only one or several legislators have standing, or must the entire legislature be before the court? The Nixon Administration had argued that "only the interests of the Congress or one of its Houses as a body are protected by this provision." The court rejected the Administration's reading of *Coleman*, holding 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."[36]

The D.C. Circuit further refined its approach to legislative standing cases in *Harrington v. Bush*[37] and *Goldwater v. Carter*.[38] *Harrington* involved a suit by Congressman Michael Harrington seeking a declaratory judgment that the Central Intelligence Agency was engaging in illegal activities. In deciding that Congressman Harrington did not have standing, the court clearly stated that "[t]he most basic point to consider is that there are no special standards for determining Congressional standing questions."[39] Although congressional plaintiffs may have unique issues and concerns, the legal approach for examining those issues is the same, requiring the party to allege "a distinct and palpable injury to himself."[40] In determining whether Congressman Harrington met this standard, the court adopted the *Kennedy* approach, which "relies on nullification of a specific vote as the requisite injury in fact."[41] Using this standard, the court found that Harrington had no injury because neither his future votes on matters related to funding the CIA were impaired, nor was his effectiveness as a legislator objectively diminished.[42]

The D.C. Circuit continued this line of reasoning in *Goldwater v. Carter*,[43] focusing on how to interpret disenfranchisement of a Member's right to vote. Senator Barry Goldwater brought suit against President Carter over the unilateral termination of the Mutual Defense Treaty with the Republic of China (Taiwan). According to Senator Goldwater, the President's action was unconstitutional because he did not submit the treaty to the Senate for a vote on its termination. Thus, the Senator argued he suffered an "injury in fact" because he was completely denied the right to vote on the treaty's termination. The court agreed, noting that "to be cognizable for

[33] *Id.*

[34] *Kennedy*, 511 F.2d at 434 (quoting Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970)).

[35] *Id.*

[36] *Id.* at 435.

[37] 553 F.2d 190 (D.C. Cir. 1977).

[38] 617 F.2d 697 (D.C. Cir. 1979), *vacated and remanded*, Goldwater v. Carter, 444 U.S. 996 (1979).

[39] *Harrington*, 553 F.2d at 204.

[40] *Id.* at 208 (internal quotation marks omitted).

[41] *Id.* at 211.

[42] *Id.* at 213 (stating that "[t]o constitute injury in fact, the alleged harm must be 'specific … and objective'; appellant's claims regarding effectiveness are neither.") (quoting Laird v. Tatum, 408 U.S. 1, 14 (1972)).

[43] 617 F.2d 697 (D.C. Cir. 1979), *vacated and remanded*, 444 U.S. 996.

standing purposes the alleged diminution in congressional influence must amount to a disenfranchisement, a complete nullification or withdrawal of a voting opportunity."[44] Furthermore, "the plaintiff must point to an objective standard in the Constitution, statutes, or congressional house rules, by which disenfranchisement can be shown."[45] In concluding that Senator Goldwater had been so disenfranchised, the court set forth the standard for determining when a nullification occurs. According to the court, "[w]hether the President's action amounts to a complete disenfranchisement depends on whether [the Members] have left to them any legislative means to vote in the way they claim is their right."[46]

After the court's decision in *Goldwater*, it appeared that the law of legislator standing was settled. Legislators seeking to bring suit in federal court had to demonstrate a concrete injury in fact resulting in the complete disenfranchisement of their right to vote. In addition, a Member had to show that no other legislative remedies were available. The mere fact that the executive had violated the law arguably was no longer sufficient, nor was mere diminution in effectiveness as a Member of Congress. Further, the court established that it did not matter whether one or several legislators brought suit, as the entire Congress or even a single house was not required to be a party.

The settled nature of the law, however, did not last long. In 1979, Senator Donald Riegle brought suit against the Federal Open Market Committee, arguing that it was unconstitutionally constituted because its appointees were not submitted to the Senate for its "advice and consent." In *Riegle v. Federal Open Market Committee*,[47] the D.C. Circuit concluded that, once a Member of Congress can establish standing under the rules applied in non-congressional plaintiff cases, the separation of powers issues raised by the Member's suit should be addressed by applying the "doctrine of circumscribed equitable discretion."[48] As explained by the court, this doctrine is a prudential principle that requires suits brought by Members of Congress, who have demonstrated standing, to be dismissed if the Member "could obtain substantial relief from his fellow legislators through the enactment, repeal, or amendment of a statute.... "[49] This "legislative remedy" aspect of the doctrine seems to reflect a judicial reluctance to provide a forum to a Member who has failed to exhaust possible legislative avenues of relief, or who has done so unsuccessfully.[50] Additionally, in these instances the court suggested that "it is probable" that a private plaintiff could establish standing without implicating the same separation of powers concerns.[51] However, "[w]hen a congressional plaintiff brings a suit involving circumstances in which legislative redress is not available or a private plaintiff would likely not qualify for standing, the court would be counseled under our standard to hear the case."[52] Ultimately, the *Riegle* court created a distinct division between the standing and separation of powers analyses, placing existence of a legislative remedy under the latter inquiry.

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[44] *Id.* at 702 (citations omitted).

[45] *Id.*

[46] *Id.*

[47] 656 F.2d 873 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 1082 (1981).

[48] *See id.* at 881.

[49] *Id*.

[50] *Id.* at 881; *see also* Moore v. House of Representatives, 733 F.2d 946, 956 (D.C. Cir. 1984) (stating that "Congressional actions pose a real danger of misuse of the courts by members of Congress whose actual dispute is with their fellow legislators."), *cert. denied*, 469 U.S. 1106 (1985).

[51] *Riegle*, 656 F.2d at 881.

[52] *Id*. at 882.

After *Riegle*, it appears that Members had some success in establishing standing, but such suits were frequently dismissed on the basis of the equitable discretion doctrine.[53] The problems presented by congressional plaintiff suits were explained by the D.C. Circuit in an important post-*Riegle* ruling, *Moore v. U.S. House of Representatives*:

> Suits against coordinate branches of government by congressional plaintiffs pose separation-of-powers concerns which may affect a complainant's standing to invoke the jurisdiction of the federal courts. To the extent that the Constitution envisions limited federal court jurisdiction out of respect for the coordinate branches of government, we have been reluctant to grant standing to members of Congress alleging generalized, amorphous injuries due to either the actions of their colleagues in Congress or the conduct of the Executive.... [W]here separation-of-powers concerns are present, the plaintiff's alleged injury must be specific and cognizable in order to give rise to standing.... Deprivation of a constitutionally mandated process of enacting law may inflict a more specific injury on a member of Congress than would be presented by a generalized complaint that a legislator's effectiveness is diminished by allegedly illegal activities taking place outside the legislative forum.[54]

Raines v. Byrd

In 1997, the Supreme Court decided *Raines v. Byrd*,[55] which presented a constitutional challenge to the Line Item Veto Act of 1996.[56] The Court, in an opinion by Chief Justice Rehnquist, held that the plaintiffs, Members of Congress who had voted against the act, lacked standing because their complaint did not establish that they had suffered a personal, particularized, and concrete injury.[57] Although the holding was based on the Court's finding that the plaintiffs did not satisfy the personal injury requirement of standing, the Court also questioned whether the plaintiffs could meet the second standing requirement, that the plaintiffs' injury be "fairly traceable" to unlawful conduct by the defendants. The plaintiffs' injury was allegedly caused not by the executive branch defendants' exercise of legislative power, but instead by "the actions of their own colleagues in Congress in passing the act."[58] The majority opinion distinguished between a personal injury to a

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[53] *See, e.g.*, *Moore*, 733 F.2d at 956. *Compare* Am. Fed'n of Gov't Emps. v. Pierce, 697 F.2d 303 (D.C. Cir. 1982) (granting standing to Member of Congress based on *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974)); Vander Jagt v. O'Neill, 699 F.2d 1166 (D.C. Cir. 1982) (granting standing, but dismissing based on remedial discretion); *Moore*, 733 F.2d 946 (granting standing, but dismissing based on remedial discretion); Barnes v. Kline, 759 F.2d 21 (D.C. Cir. 1984) (granting Representative standing, not dismissing due to lack of legislative remedies, and reaching the merits); 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); Boehner v. Anderson, 30 F.3d 156 (D.C. Cir. 1994) (granting standing) *with* Crockett v. Reagan, 720 F.2d 1355 (D.C. Cir. 1983) (affirming dismissal of Representative's claim based on equitable discretion); United Presbyterian Church v. Reagan, 738 F.2d 1375 (D.C. Cir. 1984) (dismissing for lack of standing); S. Christian Leadership Conference v. Kelley, 747 F.2d 777 (D.C. Cir. 1984) (denying standing to Senator); Gregg v. Barrett, 771 F.2d 539 (D.C. Cir. 1985) (dismissing Representative's claim based on equitable discretion); Melcher v. Fed. 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); Doman v. Sec'y of Def., 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. Cir. 1994) (not fully exploring legislator standing and equitable discretion because of the presence of private plaintiffs); Skaggs v. Carle, 110 F.3d 831 (D.C. Cir. 1997) (concluding plaintiffs lack standing because injury is "hypothetical").

[54] 733 F.2d at 951.

[55] 521 U.S. 811 (1997).

[56] Line Item Veto Act of 1996, P.L. 104-130, §692(a)(1), 110 Stat. 1200 (1996).

[57] *Raines*, 521 U.S. at 818-20.

[58] *Id.* at 830, n. 11.

private right, such as the loss of salary presented in *Powell v. McCormack*,[59] and an institutional or official injury.[60]

The Court held that a congressional plaintiff may have standing in a suit against the executive branch if the plaintiff(s) alleges either (1) a personal injury (e.g., the loss of a Member's seat) or (2) an institutional injury[61] that is not "abstract and widely dispersed" and amounts to vote nullification.[62] In *Raines*, the Court concluded that the plaintiffs asserted an institutional injury, but their votes were not nullified because of the continued existence of other legislative remedies. As the Court explained,

> They have not alleged that they voted for a specific bill, that 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.[63]

As a result, under *Raines* it appears that a congressional plaintiff is more likely to establish standing where he alleges a particular personal injury, as opposed to an injury related to a generalized grievance about the conduct of government or an injury amounting to a claim of diminished effectiveness as a legislator.[64] The Court in *Raines* seemed prepared to recognize the standing of a Member who alleged a personal injury to a private right. However, it concluded that the *Raines* plaintiffs' asserted injury, affecting their voting power, was an institutional or official injury that did not confer standing.[65]

It appears that the limits on Member standing established in *Raines* will likely preclude a Member from obtaining standing in a suit challenging an act of Congress[66] because legislative remedies, such as the repeal or amendment of the act in question,[67] would be available, which would

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[59] 395 U.S. 486 (1969); *see also supra*, notes 21 and 22 and accompanying text.

[60] Justice Souter's concurring opinion seemed to attach less importance than the majority to the distinction between personal and institutional injury, but he nevertheless agreed with the majority that the plaintiffs lacked standing. *See Raines*, 521 U.S. at 831 (J. Souter, *concurring*). Justice Breyer, however, dissented, arguing that there is no absolute constitutional distinction between cases involving a "personal" harm and those involving an "official" harm, and would have granted standing. *See id.* at 841-43 (J. Breyer, *dissenting*). Unlike the majority, which viewed injury to a legislator's voting power as an institutional injury, Justice Stevens, in his dissenting opinion, asserted that a legislator has a personal interest in the ability to vote, and stated that deprivation of the right to vote would be a sufficient injury to establish standing. *See id.* at 837, n. 2 (J. Stevens, *dissenting*).

[61] *See* Chenoweth v. Clinton, 997 F. Supp. 36, 38-39 (D.D.C. 1998) (holding that personal injury claims are more likely to result in a grant of standing, but mere institutional injury is sufficient under *Raines*), *aff'd*, 181 F.3d 112 (D.C. Cir. 1999); *see also* Planned Parenthood v. Ehlmann, 137 F.3d 573, 577-78 (8th Cir. 1998) (addressing the standing of state legislators).

[62] *See Raines*, 521 U.S. at 826. Therefore, *Raines* did not address the question of whether *Coleman* would warrant granting standing in a suit by federal legislators even though such an action raises separation of powers concerns not present in *Coleman*. *See id.* at 824, n. 8.

[63] *Id.* at 824.

[64] *See id.* at 822-24; *see also Moore*, 733 F.2d at 951-52.

[65] *See Raines*, 521 U.S. at 820-21.

[66] *See* 13B CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE §3531.11.2, at 133 (3d ed. 2008) [hereinafter WRIGHT & MILLER].

[67] *See Raines*, 521 U.S. at 824.

prevent a court from finding vote nullification. In addition, though the Court did not expressly overrule *Coleman*, *Kennedy*, or *Riegle*, *Raines* also appears to restrict, but not eliminate, a Member's ability to establish standing to challenge an executive action. Arguably, a Member plaintiff who can show that an executive action nullified his vote could establish standing to sue based on an institutional injury.[68]

Individual Member Standing After *Raines v. Byrd*

D.C. Circuit decisions involving individual Members of Congress following *Raines* have attempted to clarify both the meaning of "vote nullification" and the status of the D.C. Circuit's pre-*Raines* rulings. With respect to the status of its pre-*Raines* rulings, a majority of the D.C. Circuit in *Chenoweth v. Clinton* concluded that the Supreme Court's decision in *Raines* limited, but did not overrule, its precedents.[69] *Chenoweth* involved a dispute between then-President Clinton and several Members of Congress over the implementation of a historic preservation program that was established via executive order and without statutory authorization. The Members brought suit, arguing that "the President's issuance of the [ ] executive order, without statutory authority therefore, 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 National Environmental Protection Act]."[70]

The D.C. Circuit denied the Members standing, holding that the alleged injury did not rise to the level of vote nullification required by the Court's decision in *Raines*.[71] The case, however, presented a conflict between the Court's holding in *Raines* and the D.C. Circuit's precedents established by *Kennedy, Goldwater, Moore,* and subsequent cases. Rather than expressly overruling its previous cases, the D.C. Circuit pulled back on its expansive standing determination in *Kennedy* and *Moore*.[72] The court also suggested that the two-prong analysis utilized in *Moore*, assessing standing and separation of powers concerns separately, be reincorporated into a more general, unified standing analysis, as seen in *Goldwater*.[73]

In 2000, the D.C. Circuit decided *Campbell v. Clinton*[74] and more directly addressed the meaning of the term "vote nullification." *Campbell* was a suit filed by 31 Members of Congress seeking a declaration that President Clinton violated the War Powers Clause of the Constitution and the War Powers Resolution by directing U.S. forces' participation in North Atlantic Treaty Organization (NATO) airstrikes against the Federal Republic of Yugoslavia without congressional authorization.[75] In support of their position, the Members attempted to fit the case into the *Coleman* exception to *Raines*, arguing that their votes defeating a War Powers Resolution and congressional declaration of war were "nullified" by the continued involvement of U.S. troops.[76] The court rejected this argument and stated that *Raines* did not suggest "that the President

[68] *See, e.g.*, *Coleman*, 307 U.S. 433; *see also Kennedy*, 511 F.2d 430; *Riegle*, 656 F.2d at 879, n. 6.

[69] Chenoweth v. Clinton, 181 F.3d 112 (D.C. Cir. 1999).

[70] *Id.* at 113 (internal quotation marks omitted).

[71] *See id.*

[72] *See id.* at 113, 116.

[73] *Id.*

[74] 203 F.3d 19 (D.C. Cir. 2000), *cert. denied*, 531 U.S. 815 (2000).

[75] *Id.* at 19-20.

[76] *Id.* at 22.

'nullifies' a congressional vote and thus legislators have standing whenever the government does something Congress voted against, still less than congressmen would have standing anytime a President allegedly acts in excess of statutory authority."[77] The court concluded that "[i]t would seem the [*Raines*] Court used nullify to mean treating a vote that did not pass as if it had, or vice versa."[78] It interpreted *Raines* vote nullification to require that no other legislative remedies be available to rectify the executive action. Using this interpretation, according to the court, *Coleman* was distinguishable from the plaintiffs' claims because

> [t]he *Coleman* senators, … 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 fail because they continued, after the votes, to enjoy ample legislative power to have stopped prosecution of the "war."
>
> In this case, 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.[79]

Thus, like the Senators in *Raines*, who could have repealed the Line Item Veto Act or exempted future appropriations bills from its application, the Members in *Campbell* had additional legislative remedies available to them. Therefore, because these legislative remedies existed, there was no vote nullification and the Members could not have standing.

In 2011, *Kucinich v. Obama*,[80] a suit alleging violations of the War Powers Clause of the Constitution stemming from U.S. military operations in Libya, was dismissed because the Member plaintiffs lacked standing. Again, the U.S. District Court for the District of Columbia concluded that the institutional injury asserted by the Members did not rise to the level of vote nullification. The Members retained several possible legislative remedies and therefore, did not satisfy the standing requirements as explained in *Raines*.[81]

More recently, the District Court for the Eastern District of Wisconsin dismissed a lawsuit brought by a Member of Congress and his legislative counsel for lack of standing.[82] In *Johnson v. U.S. Office of Personnel Management*, the plaintiffs challenged an Office of Personnel Management (OPM) rule[83] that provides Members of Congress and congressional staff with a federal contribution towards health insurance premiums for plans purchased on the D.C. Small Business Health Options Program (SHOP), created pursuant to the Patient Protection and Affordable Care Act (ACA).[84] The court concluded that none of the plaintiffs' alleged injuries, which all appear to be personal in nature rather than institutional, could satisfy the standing requirements because they were not concrete and, indeed, speculative in nature.[85]

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[77] *Id*.

[78] *Id*.

[79] *Id*. at 22-23.

[80] Kucinich v. Obama, 2011 U.S. Dist. LEXIS 121349, No. 11-1096 (D.D.C. 2011).

[81] *Id*. at *27-28 (finding that the Members could "hold[] votes on defunding military operations or direct[] the withdrawal of U.S. troops from Libya ... ").

[82] Johnson v. U.S. Office of Pers. Mgmt., No. 14-C-009, slip. op. at *20 (E.D. Wisc. July 21, 2014).

[83] 78 Fed. Reg. 60653 (Oct. 2, 2013).

[84] P.L. 111-148 (2010).

[85] The OPM rule states that a "congressional staff member," defined as an "employee employed by the official office of a Member of Congress," is not eligible to purchase a health benefits plan for which OPM contracts but may purchase a plan from the SHOP. Member offices are responsible for designating an employee as a "congressional staff member."

Congressional Institutions as Plaintiffs

Congressional Authorization for Suits Alleging Institutional Injuries

While Members of Congress often have difficulty establishing standing when alleging an institutional injury, institutional plaintiffs have been more successful at establishing standing under certain circumstances. It appears that an institutional plaintiff has only been successful in establishing standing when it has been authorized to seek judicial recourse on behalf of a house of Congress. Additionally, all of the available cases regarding congressional institutions asserting an institutional injury have dealt with judicial enforcement of a subpoena. It is unclear how or if these precedents would be applied outside of the subpoena enforcement context. While the need for authorization to sue seems clear, there are open questions as to how the *Raines* vote nullification standard should be applied in cases involving an institutional plaintiff.

Although no case has directly addressed this issue, a potential lawsuit recently authorized by the House could shed light on this continuing ambiguity. On July 30, 2014, the House passed H.Res. 676, which authorized the Speaker to institute a suit against the President or any other executive branch official or employee for a failure "to act in a manner consistent with that official's duties under the Constitution and the laws of the United States with respect to implementation" of the ACA.[86] The resolution allows the Speaker to seek "any appropriate relief" from a federal court of competent jurisdiction.[87] While the Speaker's specific claims regarding implementation of the ACA and the potential relief requested are not known at this time, it appears likely that the suit will allege an institutional injury, which may require a court to grapple with the application of *Raines* to suits brought by authorized, institutional plaintiffs.

What Qualifies as Congressional Authorization?

Express Congressional Authorization Is Likely Required

In 1928, the Supreme Court decided *Reed v. County Commissioners of Delaware County, Pennsylvania,*[88] holding that the Court did not have jurisdiction to decide the case. Although this case was decided by interpreting a jurisdictional statute, not standing requirements, it appears to be the first articulation of what it means for a congressional body to be authorized to sue. *Reed* involved a U.S. Senate special committee charged, by Senate resolution, with investigating the

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See 78 Fed. Reg. 60653-56. The plaintiffs alleged three injuries: (1) that the rule "imposes an administrative burden" on the Member and his staff, "forcing them to determine which members of his staff are 'congressional staff' ... on a yearly basis"; (2) that the rule required complicity in conduct that "violates federal law" and harms the Member's credibility and reputation with his constituents; (3) that the rule deprives the Member of "the status of solidarity and equal treatment with his constituents that the ACA created." *See Johnson*, No. 14-C-009, slip. op. at *7.

[86] H.Res. 676, 113th Cong., 2nd Sess. (2014). The suit may challenge the "Patient Protection and Affordable Care Act, title I or subtitle B of title II of the Health Care and Education Reconciliation Act of 2010, including any amendment made by such provision, or any other related provision of law, including a failure to implement any such provision." *Id*. Although the resolution does not identify the employer mandate provision specifically, news sources suggest that the Administration's delayed enforcement of that provision will be the focus of the suit. *See e.g.*, Michael A. Memoli, *House Lawsuit Over Obamacare to Focus on Employer Mandate Delay*, L.A. Times (July 10, 2014).

[87] *Id*.

[88] 277 U.S. 376 (1928).

means used to influence the nomination of candidates for the Senate.[89] The special committee was authorized to "require by subpoena or otherwise the attendance of witnesses, the production of books, papers, and documents, and to do such other acts as may be necessary in the matter of said investigation."[90] During the course of its investigation into the disputed election of William B. Wilson to the Senate, the committee sought to obtain the "boxes, ballots, and other things used in connection with the election."[91] The County Commissioners of Delaware County, who were the legal custodians of said materials, refused to provide them to the committee, thus leading to litigation. The Supreme Court, after affirming the Senate's powers to "obtain evidence relating to the matters committed to it by the Constitution"[92] and having "passed laws calculated to facilitate such investigations,"[93] dismissed the case on jurisdictional grounds.

Citing the existing statute conferring jurisdiction for suits "brought by the United States, or by any officer thereof authorized by law to sue," the Court held that the Senate Resolution creating the special committee did not authorize the Senators to sue. According to the Court, the Senator's authority to take "such other acts as may be necessary" could not be interpreted "to include everything that under any circumstances might be covered by its words."[94] As a result, the Court held that "the Senate did not intend to authorize the committee, or anticipate that there might be need, to invoke the power of the Judicial Department. Petitioners are not 'authorized by law to sue.'"[95] *Reed* stands for the proposition that Congress must expressly authorize the commencement of litigation if it wishes to allow individual Senators or a committee to represent it in the courts. However, *Reed* did not specify how this authorization should be provided, leaving open the question or whether a law, passed by both houses and presented to the President, is required or if a concurrent or one-house resolution is sufficient.

One-House Resolutions Have Been Accepted as Congressional Authorization

On several occasions the House of Representatives has authorized committee counsel to intervene in civil litigation by passing a House resolution. For example, in June, 1976, the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce issued subpoenas to the American Telephone and Telegraph Company (AT&T). The subcommittee sought copies of "all national security request letters sent to AT&T and its subsidiaries by the FBI as well as records of such taps prior to the time when the practice of sending such letters was initiated."[96] Before AT&T could comply with the subpoena, the Department of Justice (DOJ) and the subcommittee's chairman, Representative John Moss, entered into negotiations to reach an alternate agreement preventing AT&T from having to submit all of its records.[97] When these negotiations broke down, the DOJ sought an injunction in the U.S. District Court for the District of Columbia to prohibit AT&T from complying with the subcommittee's subpoenas.

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[89] *Id.* at 378 (citing S. Res. 195, 69th Cong., 1st Sess. (1926)).

[90] *Id.* at 378-79.

[91] *Id.* at 387.

[92] *Id.* at 388 (citing McGrain v. Daugherty, 273 U.S. 135, 160-174 (1927)).

[93] *Id.* (citing R.S. §§101-104, (codified as amended at 2 U.S.C. §§192, 194 (2012))).

[94] *Id.* at 389.

[95] *Id.*

[96] United States v. Am. Telephone & Telegraph Co., 551 F.2d 384, 385 (D.C. Cir. 1976) [hereinafter *AT&T I*]

[97] *Id.* at 386. The precise details of the delicate negotiations between the DOJ and the subcommittee are explained by the court and, therefore, will not be recounted here. *See id.* at 386-88.

The House of Representatives responded to the litigation by passing a House resolution directing Chairman Moss to represent the Committee and the full House in the litigation "to secure information relating to the privacy of telephone communications now in the possession of [AT&T]."[98] In addition, the resolution authorized Chairman Moss to hire a special counsel, use not more than $50,000 from the contingent fund of the Committee to cover expenses, and to report to the full House on related matters as soon as practicable.[99] The resolution was adopted by the House by a vote of 180-108 on August 26, 1976.[100]

The district court noted Chairman Moss's intervention into the proceedings and seemingly neither AT&T nor the DOJ contested it.[101] Chairman Moss remained an intervener pursuant to the House resolution through the district court proceeding and two appeals to the U.S. Court of Appeals for the District of Columbia Circuit, at which point an agreement was reached with respect to the disclosure of the documents sought. During the first appeal, the court recognized Chairman Moss's standing, pursuant to the House resolution, by stating: "It is clear that the House as a whole has standing to assert its investigatory power, and can designate a member to act on its behalf."[102] Therefore, according to *United States v. American Telephone & Telegraph Co.* (*AT&T*), a one-House resolution appears to be sufficient to authorize a single Member or committee to represent the full chamber in a suit alleging an institutional injury.[103]

The House again authorized Chairman Moss to intervene in 1976, in litigation between Ashland Oil and the Federal Trade Commission (FTC). This case arose when Ashland Oil sought to enjoin the FTC from transferring its information to the Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce, at the request of Subcommittee Chairman Moss. After Ashland Oil obtained a temporary restraining order preventing disclosure, the Subcommittee issued a subpoena for the documents. Additionally, Chairman Moss filed a resolution for House authorization to allow him to intervene, with special counsel, in Ashland Oil's suit against the FTC.[104] The district court granted Chairman Moss's motion to intervene and ultimately refused to grant the injunction against the FTC.[105] The court of appeals affirmed the decision on the merits, never addressing any defects in Chairman Moss's standing to sue.

In *Committee on Judiciary, U.S. House of Representatives v. Miers*[106] and *Committee on Oversight and Government Reform v. Holder*,[107] two different judges for the U.S. District Court for the District of Columbia heard cases involving a House committee seeking to enforce a congressional subpoena against current or former executive branch officials through a civil suit. In 2008, the district court in *Miers* held that the Judiciary Committee "had been expressly

[98] H.Res. 1420, 94th Cong., 2nd Sess. (1976).

[99] *Id.*

[100] *See* 122 CONG. REC. 27,865-866 (August 26, 1976).

[101] *See* United States v. Am. Telephone & Telegraph Co., 419 F. Supp. 454, 458 (D.D.C. 1976) (stating that "[t]he effect of any injunction entered by this Court enjoining the release of materials by AT&T to the Subcommittee would have the same effect as if this Court were to quash the Subcommittee's subpoena. In this sense the action is one against the power of the Subcommittee and should be treated as such, assuming that Representative Moss has authority to speak for the Subcommittee.").

[102] *AT&T I*, 551 F.2d at 391.

[103] *See id*.

[104] *See generally,* Ashland Oil, Inc. v. FTC, 548 F.2d 977 (D.C. Cir. 1976); *see also* H.R. 899, 94th Cong., 1st Sess. (1975); 121 CONG. REC. 41,707 (1976).

[105] Ashland Oil, Inc. v. FTC, 409 F. Supp. 297, 301 (D.D.C. 1976).

[106] 558 F. Supp. 2d 53 (D.D.C. 2008).

[107] 979 F. Supp. 2d 1 (D.D.C. 2013).

authorized by the House of Representatives *as an institution*" to bring the suit by House resolution.[108] According to the court, *Miers* existed in "the permissible category of an institutional plaintiff asserting an institutional injury (*AT&T I* ...)."[109] Therefore, since the Committee was authorized to sue, its Article III standing was preserved. In 2013, the district court in *Holder* adopted this same reasoning and cited the D.C. Circuit stating that "[i]t is clear that the House as a whole has standing to assert its investigatory power.... "[110] Since the Committee asserted a concrete and particular injury to this investigatory power and was authorized to sue, it satisfied the Article III standing requirements.[111]

Unauthorized Institutions Will Likely Lack Standing

Members Purporting to Represent a Congressional Institution

In Re Beef Industry Antitrust Litigation[112] provides an example of what may occur if a house of Congress does not expressly authorize a committee to represent it in court. In *In Re Beef*, the chairmen of two subcommittees of the House of Representatives[113] sought to intervene in a pending antitrust dispute, to obtain trial documents that were subpoenaed by the subcommittees. The subpoenaed documents were gathered during discovery and subject to a standing court protective order. The district court refused to modify its protective order, which would have allowed the party to comply with the subpoena.[114] The subcommittee chairmen appealed to the U.S. Court of Appeals for the Fifth Circuit.

On appeal, the Fifth Circuit heard a motion to dismiss by a plaintiff who argued that the chairmen had not obtained House authorization before filing their initial motion to intervene in the district court. The plaintiff relied on what was then House Rule XI, cl. 2(m)(2)(B), which provided that "[c]ompliance with any subpena [sic] issued by a committee or subcommittee ... may be enforced only as authorized or directed by the House."[115] In response, the subcommittee chairmen argued that the rule did not apply since they sought not to enforce a subpoena, but rather to modify a protective order. Therefore, the chairmen argued House authorization to appear in court was unnecessary.[116]

The Fifth Circuit rejected the chairmen's arguments, noting specifically that the House Rules "require[] House authorization not only for direct enforcement of a subpoena but also in any instance when a House committee seeks to institute or to intervene in litigation and, of course, to appeal from a court decision, particularly when the purpose is, as here, to obtain the effectuation

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[108] *Id.* at 71 (emphasis in original). *See* H.Res. 980, 110th Cong., 2nd Sess. (2008).

[109] *Miers*, 558 F. Supp. 2d at 71.

[110] *Holder*, 979 F. Supp. 2d at 20 (*citing AT&T I*, 551 F.2d at 392).

[111] *Id*. at 20-22. *See* H.Res. 706, 112th Cong., 2nd Sess. (2012).

[112] 589 F.2d 786 (5th Cir. 1979) [hereinafter *In re Beef*].

[113] The Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce, and the Subcommittee on SBA and SBIC Authority and General Small Business Problems of the Committee on Small Business. *See id.* at 788.

[114] *See In re Beef Indus. Antitrust Litigation*, 457 F. Supp. 210, 212 (N.D. Tex. 1978) (stating that "the persons whom the Subcommittees have subpoenaed would not have possession of the subpoenaed documents but for the discovery rules of the Federal Courts. Congress by subpoenaing these documents is interfering with the processes of a Federal Court in an individual case.").

[115] *In Re Beef*, 589 F.2d at 789.

[116] *Id.*

of a subpoena."[117] The court pointed to *Ashland Oil*, noting that, like this case, the chairman in *Ashland Oil* was not seeking to enforce a subpoena directly but merely attempting to prevent an injunction from being issued.[118] The subcommittee chairmen's failure to obtain an authorizing resolution from the full House, therefore, required the dismissal of the appeal without any decision on the merits.[119]

As recently as 2006, the court in *Waxman v. Thompson* continued this line of argument, stating that the holdings in *Reed* and *AT&T*[120] suggested that "legislative branch suits to enforce requests for information from the executive branch are justiciable *if authorized by one or both Houses of Congress*."[121] *Waxman* was a case brought in the U.S. District Court for the Central District of California by minority members of the House Government Reform Committee.[122] These Member plaintiffs sought a court order, pursuant to 5 U.S.C. §§ 2954 and 7211, granting them access to Department of Health and Human Services records related to the anticipated costs of the Medicare Prescription Drug Improvement and Modernization Act of 2003.[123] The plaintiffs argued that 5 U.S.C. § 2954, which requires an executive agency to submit any information relating to matters within the Committee's jurisdiction when *any seven members* of the House Committee on Government Operations request it,[124] implicitly delegated to Members the right to sue to enforce their informational demands.[125]

The court, in rejecting this argument, relied on the Supreme Court's holding in *Reed*.[126] Specifically, the court noted that *Reed*'s holding "put Congress on notice that it was necessary to make authorization to sue to enforce investigatory demands explicit if it wished to ensure that such power existed."[127] According to the court, like the Senate resolution at issue in *Reed*, because § 2954 is silent with respect to civil enforcement, arguably Congress never intended to provide Members with the power to seek civil judicial orders to enforce their document demands. Therefore, because the Members were not actually authorized to sue pursuant to § 2954, they could not establish standing, and the suit was dismissed without reaching the merits of the claim.

Legislative Agencies as Institutional Plaintiffs

In *Walker v. Cheney*,[128] a 2002 case in the U.S. District Court for the District of Columbia, the then General Accounting Office (GAO), pursuant to its authority under 31 U.S.C. § 716(b)(2), filed suit seeking records regarding the National Energy Policy Development Group (NEPDG).[129]

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[117] *Id.* at 790-91.

[118] *Id.* at 790.

[119] *Id.* at 791.

[120] 567 F.2d 121.

[121] *Waxman v. Thompson*, No. 04-3467, slip op. at *29 (C.D. Cal. July 24, 2006) (emphasis added).

[122] *Id.*

[123] *Id.* at *2.

[124] 5 U.S.C. §2954 (2000) (emphasis added). This statute is commonly referred to as the "rule of seven."

[125] *Waxman v. Thompson*, No. 04-3467, slip op. at *21 (C.D. Cal. July 24, 2006).

[126] *Id.* at *21, n. 42.

[127] *Id.*

[128] 230 F. Supp. 2d 51 (D.D.C. 2002).

[129] The National Energy Policy Development Group was created by President Bush via presidential memorandum and tasked with developing a national energy policy "designed to help the private sector, and government at all levels, promote dependable, affordable, and environmentally sound production and distribution of energy for the future." The President's memorandum directed the Vice President to serve as chair, with membership extended to the Secretary of

Representative Henry Waxman and John Dingell, then members of the minority party, asked GAO to initiate an investigation regarding NEPDG's activities, based on reports that task force meetings included "exclusive groups of non-governmental participants."[130] After initiating its investigation, GAO asked Vice President Cheney for information regarding NEPDG, including the names and titles of all individuals present at the meetings, the purpose and agenda of the meetings, the process for determining who would be invited to such meetings, and whether minutes or notes were kept.[131] After several attempts to obtain this information were unsuccessful, GAO issued a demand letter pursuant to 31 U.S.C. § 716(b),[132] requesting the aforementioned records, copies of the minutes or meeting notes, and any information presented by private sector attendees.[133]

After the demand letter yielded no disclosure of documents, the Comptroller General filed suit. The court in *Walker* dismissed the suit after conducting an "especially rigorous" standing inquiry because the case presented "core separation of powers questions at the heart of the relationship among the three branches of our government."[134] The court held that the Comptroller General's alleged injury was not personal, stressing that his interest in the suit was "solely institutional, relating exclusively to his duties in his official capacity."[135] Rather, the Comptroller General's alleged institutional injury—the Vice President's refusal to provide the information requested pursuant to GAO's statutory investigative and access enforcement authority—was insufficient to establish standing. The court predicated this finding on its conclusion that the Comptroller General was acting as an agent of Congress in demanding information and bringing suit. He had no "freestanding institutional injury or personal injury of his own to assert;"[136] he only represented Congress's alleged institutional injury. The court then reiterated that justiciability requires that "the plaintiff himself has suffered some threatened or actual injury."[137]

Additionally, the court noted that Congress had not expressly authorized GAO's suit, one factor that led to the conclusion that the plaintiff lacked standing.[138] The court stated that the "highly generalized allocation of enforcement power to the Comptroller General ... hardly gives this Court confidence that the current Congress has authorized this Comptroller General to pursue a

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the Treasury, the Secretary of the Interior, the Secretary of Agriculture, the Secretary of Commerce, the Secretary of Transportation, the Secretary of Energy, as well as several other federal officers. The memorandum also directed the Department of Energy to make funds available to the NEPDG to cover the costs of support staff.

[130] Letter from Reps. Waxman and Dingell to GAO, April 19, 2001.

[131] For detailed chronologies of interactions between the Office of the Vice President and GAO, *see* Letter from Vice President Cheney to the House of Representatives, August 2, 2001; *see also* GAO Report on Vice President Cheney's Refusal to Release Records, August 17, 2001.

[132] "When an agency record is not made available to the Comptroller General within a reasonable time, the Comptroller General may make a written request to the head of the agency.... The head of the agency has 20 days after receiving the request to respond." 31 U.S.C. §716(b)(1).

[133] GAO Demand Letter to Vice President Cheney, July 18, 2001.

[134] *Walker*, 230 F. Supp. 2d at 65 (quoting *Raines*, 521 U.S. at 819).

[135] *Id.* at 66.

[136] *Id.*

[137] *Id.* at 67 (quoting Warth v. Seldin, 422 U.S. 490, 499 (1975)).

[138] *Id.* at 68. The court noted several other factors that contributed to its holding. In particular, the court found it significant that Congress had an "alternate remedy" to cure its alleged injury, in that it could issue a subpoena for the information. *Id.* at 30. Also, the court gave some weight to the fact that while its decision prevented the Comptroller General from gaining access to the NEPDG documents, private parties were seeking similar information in other suits. *See id.* at 31 n.14. Finally, the court was further influenced by the fact that there was no precedent for a suit by a Comptroller General for access to executive branch records. *Id.* at 32-33.

judicial resolution of the specific issues affecting the balance of power" between the executive and legislative branches.[139]

Effect of *Raines v. Byrd* on Institutional Plaintiff Standing

Few cases have addressed the relationship between *Raines* and pre-*Raines* precedents regarding congressional institutional plaintiff standing.[140] The *Miers* case provides the most significant analysis. In *Miers*, the District Court for the District of Columbia explicitly applied the reasoning in *AT&T* and concluded that the Committee plaintiff had standing to enforce a subpoena because it was authorized to sue via House resolution.[141] The court emphasized that it could not conclude that *Raines* overruled or undermined *AT&T*.[142] The reason why *Raines* did not apply to *Miers* was the fact that the House explicitly authorized the *Miers* plaintiffs to bring suit. That authorization was "the key factor that moves this case from the impermissible category of an individual plaintiff asserting an institutional injury (*Raines*, *Walker*) to the permissible category of an institutional plaintiff asserting an institutional injury (*AT&T* ...)." Several years later in *Holder*, the District Court for the District of Columbia reinforced the *Miers* reasoning that *AT&T* is the controlling precedent and that *Raines* "did not overrule or limit the precedent established in *AT&T I*."[143] The court went on to distinguish *Raines* and its progeny further by stating that "[n]one of those cases involved a suit specifically authorized by a legislative body to redress a clearly delineated, concrete injury to the institution.... "[144]

One important question remains unanswered by the courts: does the *Raines* vote nullification standard apply at all in cases where an authorized institutional plaintiff alleges an institutional injury? While it is clear that the *Miers* and *Holder* plaintiffs were able to establish standing, the courts did not address whether the vote nullification standard should be applied. Even if the standard is applied, it appears that it may not prohibit an authorized institutional plaintiff from suing to enforce a subpoena since there is no legislative alternative for direct enforcement. However, outside the subpoena context, if the vote nullification standard applied, it may prohibit some authorized institutional plaintiffs from establishing standing where their injury has a legislative remedy.

Conclusion

An individual Member's ability to bring litigation before an Article III court remains severely limited by the Supreme Court's decision in *Raines*. For Member plaintiffs to successfully establish standing, they must assert either a personal injury, like the loss of their congressional seat, or an institutional injury that amounts to vote nullification, which requires that no other legislative remedy exists to redress the alleged injury. Considering that legislative remedies are rarely entirely foreclosed, these Member plaintiff suits are unlikely to satisfy the standing requirements imposed by *Raines* and its progeny. It appears that more successful suits could be brought by either Congress as a whole, a house of Congress, or a committee, so long as the entity

[139] *Id*. at 69-70.

[140] *See Miers*, 558 F. Supp. 2d at 68; *Holder*, 979 F. Supp. 2d at 20-22.

[141] *Miers*, 558 F. Supp. 2d at 68.

[142] *Id.* at 66-70 (noting that "*Raines* and subsequent cases have not undercut either the precedential value of *AT&T I* or the force of its reasoning" and that "*Raines* did not overrule or otherwise undermine *AT&T I*, and neither Raines nor Walker is inconsistent with *AT&T I*.").

[143] *Holder*, 979 F. Supp. 2d at 21.

[144] *Id*.

is acting with the authorization of one or both houses. Institutional plaintiffs with authorization to sue have established standing in several cases when seeking judicial enforcement of a subpoena. However, it remains unclear how or if the *Raines* vote nullification standard is supposed to be applied to an institutional plaintiff asserting an institutional injury outside of the subpoena enforcement context.

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