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Congressional Participation in Litigation: Article III and Legislative Standing

Updated March 28, 2019

Congressional Research Service
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R45636

CRS REPORT
Prepared for Members and
Committees of Congress

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SUMMARY

R45636

March 28, 2019

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Congressional Participation in Litigation: Article III and Legislative Standing

Houses, committees, and Members of Congress periodically seek to initiate or participate in litigation to, among other purposes, advance their legislative objectives, argue that the Executive is violating their legislative prerogatives, or defend core institutional interests. However, the constitutionally based doctrine of "standing"—which requires a litigant seeking federal judicial relief to demonstrate (1) a concrete and particularized and actual or imminent injury-in-fact (2) that is traceable to the allegedly unlawful actions of the opposing party and (3) that is redressable by a favorable judicial decision—may prevent legislators from pursuing litigation in federal court. The U.S. Supreme Court and the lower federal courts have issued several important opinions analyzing whether—and under what circumstances—a legislative entity has standing to seek relief.

Although legislative standing jurisprudence defies easy characterization, it is possible to distill several principles from existing precedent. For example, whereas courts commonly allow individual legislators to assert injuries to their own *personal* interests, following the Supreme Court's seminal opinion in *Raines v. Byrd*, 521 U.S. 811 (1997), courts have generally (though not universally) been less willing to permit individual legislators to seek redress for injuries to *a house of Congress as a whole*, at least in the absence of explicit authorization to do so from the legislative body itself. The Supreme Court's case *Coleman v. Miller*, 307 U.S. 433 (1939), is generally understood as setting forth the lone exception, allowing individual legislators to sue when their vote has been "nullified" by some claimed illegal action. In addition, generally speaking, a congressional plaintiff cannot predicate a federal lawsuit solely on a complaint that the executive branch is misapplying or misinterpreting a statute, as litigants must demonstrate concrete and *particularized* injury to themselves.

In addition to *initiating* litigation, Congress also occasionally seeks to *intervene* in *preexisting* litigation. In cases in which the executive branch has declined to defend a federal statute from a constitutional challenge, for example, congressional entities have attempted to intervene as defendants in support of the law. The Supreme Court, in *INS v. Chadha*, 462 U.S. 919 (1983) and *United States v. Windsor*, 570 U.S. 744 (2013), has allowed Congress to intervene to defend a law that the executive branch has declined to defend but still enforces. Nonetheless, neither case resolved whether significant exceptions to this rule exist, let alone explored what rules are in place when the President both declines to defend *and* enforce a federal law. Moreover, in cases that do not involve the executive branch's refusal to defend a federal statute, Congress's ability to intervene as a full party to the case may be more circumscribed.

Even when Congress lacks standing to initiate or intervene in a federal lawsuit as a full-fledged party, Congress may still play a role in litigation by participating as an *amicus curiae*, or "friend of the court." Courts frequently allow Members, houses, and committees of Congress to file amicus briefs in support of (or opposition to) particular parties or positions.

Contents

Introduction 1
Legal Background of Article III Standing 2
Legislative Standing at the Supreme Court 6
Individual Legislators and Standing in the Lower Courts 11
Institutional Injury 11
The District of Columbia Circuit 11
Institutional Injury to Individual Legislators Outside the D.C. Circuit 15
Personal Injury 17
Distinguishing Personal from Institutional Injuries 17
Personal Injury Must Comply with Traditional Standing Requirements 19
Institutional Standing 21
The Significance of Explicit Congressional Authorization 22
When Authorization Is Insufficient for Standing 25
Congressional Intervention to Defend a Statute's Constitutionality: Adversity and Standing Issues 28
Justiciability Issues Involved in Intervention 28
Other Relevant Considerations in Intervention 34
Participation as *Amicus Curiae* 35
Considerations for Congress 36
Areas of Doctrinal Uncertainty 38
What Can Congress (or a Member or Committee) Do? 41

Contacts

Author Information 42

Introduction

Since the founding, the federal courts have played a critical role in adjudicating legal disputes, including ones involving executive action. As the Supreme Court stated in *Marbury v. Madison*, "where a specific duty is assigned by law . . . the individual who considers himself injured[] has a right to resort to the laws of his country for a remedy."[1] Naturally, Congress and its Members have an interest in litigating in federal court, for example, to vindicate their institutional priorities,[2] to argue that the Executive is violating their legislative prerogatives, or to advance their legislative policy interests. During the Obama Administration, for instance, legislative entities brought or joined litigation in federal court for a host of reasons, such as to challenge the Executive's decision to allegedly expend money without a congressional appropriation,[3] to defend the Defense of Marriage Act from constitutional challenge in lieu of the Executive,[4] and to challenge the Executive's decision to engage in military action in Libya.[5] Likewise, during the Trump Administration, legislators have become involved in lawsuits that challenge the President's alleged unconstitutional acceptance of emoluments,[6] suits demanding the production of documents from the Administration,[7] and, in an amicus capacity, challenges to legality of the so-called travel ban.[8] Congressional interest in litigation may increase in salience under the current divided government, as illustrated by the House of Representatives' resolution to authorize the House to participate in ongoing litigation in Texas involving the Affordable Care Act[9] and a recent lawsuit brought by several Members of Congress challenging the President's appointment of an acting attorney general.[10]

However, whenever any party seeks to invoke the power of the federal courts, it must first show that its dispute belongs there. For nearly its entire history, the Supreme Court has emphasized that the role of courts is in "decid[ing] on the rights of individuals."[11] By contrast, "[v]indicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive."[12] The federal courts apply a number of doctrines, known as justiciability doctrines, to ensure that they do not step beyond their bounds and decide issues more properly reserved for the other branches.[13] Foremost among these

[1] 5 U.S. 137, 166 (1803).

[2] Congress does not always have to directly participate in the litigation for it to affect Congress's institutional priorities. For example, in a lawsuit over the extent of the President's authority under the Recess Appointments Clause, the plaintiff was private Pepsi-Cola distributor, even though dispute directly implicated authority of President in relation to the authority of the Senate. *See, e.g.*, NLRB v. Noel Canning, 134 S. Ct. 2550, 2557 (2014).

[3] U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53, 57 (D.D.C. 2015).

[4] United States v. Windsor, 570 U.S. 744, 754 (2013).

[5] Kucinich v. Obama, 821 F. Supp. 2d 110, 113-14 (D.D.C. 2011).

[6] Blumenthal v. Trump, 335 F. Supp. 3d 45, 49-50 (D.D.C. 2018).

[7] Cummings v. Murphy, 321 F. Supp. 3d 92, 112 (D.D.C. 2018).

[8] *See* Brief of Members of Congress as Amici Curiae in Support of Respondents, Trump v. State of Hawaii, No. 17-965, 2018 WL 1586437 (March 30, 2018).

[9] H. Res. 6, 116th Cong. (2018).

[10] Complaint for Declaratory and Injunctive Relief, Blumenthal v. Whitaker, No. 1:18-cv-02664-RDM (D.D.C. Nov. 19, 2018). The plaintiffs in *Blumenthal v. Whitaker* voluntarily dismissed their complaint on February 19, 2019. *See* Notice of Voluntary Dismissal Pursuant to FED. R. CIV. P. 41(a)(1)(A)(i), Blumenthal v. Whitaker, No. 1:18-cv-02664-RDM (D.D.C. Feb. 19, 2018).

[11] Lujan v. Defs. of Wildlife, 504 U.S. 555, 576 (1992) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803)).

[12] *Id.* at 576-77.

[13] *See infra* text accompanying note 41.

doctrines is the requirement that a party seeking judicial relief from a federal court demonstrate "standing."

This report provides an overview of the standing doctrine as it applies to lawsuits involving legislators, committees, and houses of Congress. First, the report lays out the general rules of standing as they apply in every case in the federal courts and the main purpose behind the doctrine. One central purpose of the standing doctrine—protecting the court's role in the constitutional balance of powers—is a theme that underlies this report, as many of these cases involve courts deciding whether they have the power to adjudicate high-profile political disputes between the other two branches of the federal government. Next, the report considers the relatively few Supreme Court cases to discuss legislator standing, explaining the general principles that courts have drawn from those cases. The report then analyzes how lower courts have interpreted the limited Supreme Court case law on the issue, beginning with cases involving individual legislators, and following with cases brought by entire institutions, such as committees or houses of a legislature. The report then considers other issues relating to legislator participation in litigation, such as intervention under the Federal Rules of Civil Procedure or participation purely as an "amicus curiae," or a "friend of the court." The report concludes by identifying unresolved doctrinal questions and offering takeaways for prospective congressional litigants.

Legal Background of Article III Standing

Article III of the Constitution limits the exercise of the federal courts' judicial power to "cases" and "controversies."[14] The Supreme Court has interpreted this "case or controversy" language to impose various restrictions on the "justiciability" of disputes in the federal courts—that is, constraints on the federal courts' power to adjudicate and resolve disagreements between parties.[15] One aspect of justiciability requires a party seeking judicial relief from a federal court to have "standing," such that the party has "a personal stake in the outcome of the controversy as to warrant [the] invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf."[16] Further, a litigant must demonstrate standing for each claim he seeks to press and each form of relief that he seeks to obtain.[17]

The Supreme Court articulated a three-part test for standing in its seminal 1992 decision *Lujan v. Defenders of Wildlife*.[18] To establish standing under that test, a party must show that it has a genuine stake in the relief sought because it has personally suffered (or will suffer) (1) a concrete

[14] U.S. CONST. art. III, § 2 ("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, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;--between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."). *See also* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 (1998) ("Article III, § 2, of the Constitution extends the 'judicial Power' of the United States only to 'Cases' and "Controversies.' We have always taken this to mean cases and controversies of the sort traditionally amenable to and resolved by the judicial process.").

[15] ALAN WRIGHT & ARTHUR R. MILLER, ET AL., 13 FEDERAL PRACTICE AND PROCEDURE § 3529 (3d ed. 2018) (describing the categories of justiciability as "advisory opinions, feigned and collusive cases, standing, ripeness, mootness, political questions, and administrative questions.").

[16] Warth v. Seldin, 422 U.S. 490, 498-99 (1975).

[17] Town of Chester, N.Y. v. Laroe Estates, Inc., 137 S. Ct. 1645, 1650 (2017).

[18] 504 U.S. 555, 560-61 (1992).

and particularized and actual or imminent injury-in-fact (2) that is traceable to the allegedly unlawful actions of the opposing party and (3) that is redressable by a favorable judicial decision.[19] While each of these requirements is complex and can blend into each other, courts generally regard the injury-in-fact requirement to be the "central focus" of the inquiry.[20]

A party that seeks to demonstrate standing must show that his injury is "concrete"—meaning an injury that is "real" and not "abstract."[21] Nonetheless, an injury can be *intangible* in nature, as the deprivation of a constitutional right, like freedom of speech or the free exercise of one's religion, constitutes an injury-in-fact absent any tangible economic loss.[22] While it may sometimes be difficult to draw a distinction between an "intangible" injury and an "abstract" injury,[23] the Court has provided some guidance. For example, the Court has held that an alleged injury sufficient for standing may be one similar to those that have "traditionally been regarded as providing a basis for a lawsuit in English or American courts," such as the interest of a *qui tam* relator in the outcome of his suit.[24] The Court has also stated that Congress can build on common law conceptions of injury, as Congress is "well positioned" to "identify intangible harms that meet minimum Article III requirements" and establish new causes of action to remedy such harms.[25] Finally, the Court has explicitly considered and rejected several types of abstract injuries in previous cases. For instance, in *Valley Forge Christian College v. Americans United for Separation of Church and State*, the Supreme Court held that a public interest organization lacked standing to challenge the transfer of federal land to a religiously affiliated school, as the only injuries identified by the plaintiffs were the "psychological consequence[s] presumably produced

[19] *Id.*

[20] WRIGHT & MILLER, supra note 15, § 3531.4 ("Even as the concepts blend together, however, the central focus is fixed on the injury requirement. The very notion of injury implies a causal connection to the challenged activity; an injury caused by other events is irrelevant to any purpose of standing doctrine. Causation in turn bears on remedial benefit, since a remedy addressed to actions that have not caused the injury will not alleviate the injury. It remains useful nonetheless to separate the three elements, both for purposes of exposition and for purposes of decision.").

[21] *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548-49 (2016).

[22] *See id*. at 1549 (citing cases involving free speech and free exercise injuries). The Court has identified in many cases the sort of "intangible" harm that qualifies as justiciable injury. *See, e.g.*, Dep't of Commerce v. U.S. House of Representatives, 525 U.S. 316, 331-32 (1999) (stating that a plaintiff's "expected loss of a Representative to the United States Congress undoubtedly satisfies the injury-in-fact requirement of Article III standing" and that "voters have standing to challenge an apportionment statute because they are asserting a plain, direct and adequate interest in maintaining the effectiveness of their votes."); *Lujan*, 504 U.S. at 562-63 ("Of course, the desire to use or observe an animal species, even for purely aesthetic purposes, is undeniably a cognizable interest for purposes of standing."); Allen v. Wright, 468 U.S. 737, 755 (1984) ("There can be no doubt that [stigmatization as a result of racial discrimination] is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing.").

[23] WRIGHT & MILLER, supra note 15, § 3531.4 ("One common practice is to distinguish between the mere 'abstract injury' that is not sufficient to confer standing and the 'concrete injury' that is sufficient. Application of this distinction or parallel phrases cannot be explained in the terms of effective advocacy. Standing is regularly recognized for litigants who have suffered only the slightest—the most abstract—of injuries.").

[24] *Spokeo*, 136 S. Ct. at 1549 (citing Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 774-78 (2000)). A *qui tam* action is an "action brought under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive." BLACK'S LAW DICTIONARY 1262 (7th ed. 1999). *Qui tam* actions have a "long tradition" in England and the American colonies, dating back to the 13th century. *See Vt. Agency of Nat. Resources*, 529 U.S. at 774.

[25] *Spokeo*, 136 S. Ct. at 1549. *See also Lujan*, 504 U.S. at 578 (citing Trafficante v. Metropolitan Life Ins. Co, 409 U.S. 205, 208-12 (1972) (discussing individual's personal interest in living in racially integrated community)).

by observation of conduct with which one disagrees."[26] A claim based only on this sort of psychological discomfort will generally not support an injury-in-fact.[27]

Along with the requirement of concreteness, a plaintiff's alleged injury must be "particularized."[28] This requirement focuses on whether the alleged injury affects the plaintiff in a "personal and individual way."[29] Significantly, the need for particularization bars plaintiffs from seeking redress for so-called "generalized grievances."[30] Under this doctrine, a plaintiff "claiming only harm to his and every citizen's interest in proper application of the Constitution and laws"[31] does not state a sufficiently particularized injury. This principle does not mean, however, that injuries suffered by many are not justiciable. Rather, particularization only requires plaintiffs to connect to the injury they allege in some particular way, even if that injury is widely shared.[32] For instance, in *Federal Election Commission v. Akins*, the Supreme Court recognized that individual voters had suffered a justiciable injury based on the Federal Election Commission's allegedly unlawful decision to not obtain and disclose certain information about a political organization.[33] The Court concluded that even though that injury was "widely shared," the deprivation of a statutory right granting access to information "directly related to voting" was sufficiently "specific" to allow Congress to authorize individuals to vindicate that right.[34]

These limitations on the courts, as they are rooted in the Constitution, are not easily circumvented. For example, subject to "limited exceptions," a litigant must assert "his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties."[35] To illustrate, in *Hollingsworth v. Perry*, the Court held that the proponents of a California voter initiative lacked standing to defend that initiative from constitutional challenge when the California Attorney General declined to do so.[36] In that case, the Court agreed that a

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[26] 454 U.S. 464, 485 (1982).

[27] Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 39-40 (1976) ("We note at the outset that the five respondent organizations, which described themselves as dedicated to promoting access of the poor to health services, could not establish their standing on the basis of that goal. Our decisions make clear that an organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by [Article III].") *See also Spokeo*, 136 S. Ct. at 1549 (holding that "bare procedural violation" of a statute, even where Congress had created a cause of action for such violation, would not amount to "concrete" injury sufficient for standing).

[28] *Spokeo*, 136 S. Ct. at 1550 (drawing distinction between "concreteness and particularization" and requiring that litigants show both in order to demonstrate standing).

[29] Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 n.1 (1992).

[30] *Id.* at 573-74.

[31] *Id. See also* Warth v. Seldin, 422 U.S. 490, 499 (1975) ("[W]hen the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction.").

[32] *Spokeo*, 136 S. Ct. at 1548 n.7 ("The fact that an injury may be suffered by a large number of people does not of itself make that injury a nonjusticiable generalized grievance. The victims' injuries from a mass tort, for example, are widely shared, to be sure, but each individual suffers a particularized harm."). *See also* Gill v. Whitford, 138 S. Ct. 1916, 1931-32 (2018) (in gerrymandering case, comparing particularized injury of "vote dilution" with nonparticularized injury of a "shared interest in the composition of 'the legislature as a whole.'").

[33] 524 U.S. 11, 23 (1998).

[34] *Id.* at 24-25.

[35] Hollingsworth v. Perry, 570 U.S. 693, 708 (2013). *See also* Tileston v. Ullman, 318 U.S. 44, 46 (1943) (rejecting claim of standing by doctor challenging Connecticut statutes prohibiting him from prescribing contraceptives where doctor alleged no injury to himself and there was no "basis on which we can say he has standing to secure an adjudication of his patients' constitutional right to life").

[36] 570 U.S. at 702-03. For more on this topic, *see infra* "Congressional Intervention to Defend a Statute's Constitutionality: Adversity and Standing Issues."

"political corporate body" can designate an agent to proceed in court on its behalf, but held that the proponents could not simply assert to be acting in such a capacity.[37] Rather, some evidence of actual agency, such as the principal's right to control the agent, must be present.[38] Because this control was lacking in *Hollingsworth*—the State of California had no power to control or authority over the proponents of the initiative—the proponents could not claim to be proceeding on behalf of the State, and had to rely upon their own interests, which were not sufficiently concrete or particularized to amount to an injury-in-fact.[39]

The requirement of concrete and particular injury is essential in every case, but it is especially significant in cases involving the constitutionality of government action because of the important role that the standing doctrine plays in preserving the separation of powers. As one prominent treatise explains, difficult standing decisions often depend on "the importance of having the issues decided by the courts" versus "the importance of leaving the issues for resolution by other means."[40] In other words, "[s]eparation of powers concerns" often "control the seemingly precise concept of injury."[41] Accordingly, the Supreme Court has long recognized that the separation of powers is the driving force behind the standing doctrine. As the Court explained in *Lujan*, "the Constitution's central mechanism of separation-of-powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts."[42] The doctrine of standing, the Court explained, serves to identify those disputes that are "appropriately resolved in the judicial process."[43] Thus, while the formal standing doctrine has some requirements that express "merely prudential considerations," its "core" is in ensuring that the courts do not stray beyond their essential role.[44]

The doctrine of standing, therefore, forces the courts to police their own jurisdiction,[45] preventing individuals from enlisting the courts in fights that should be resolved through the political process.[46] This conception of standing helps explain why the Court has said that the standing inquiry is "especially rigorous" in cases involving the constitutionality of government action.[47] In

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[37] 570 U.S. at 710.

[38] *Id.*

[39] *Id.*

[40] WRIGHT & MILLER, supra note 15, § 3531.

[41] *Id. See also* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK L. REV. 881, 881-82 (1983) (arguing that the doctrine of standing is "a crucial and inseparable element" of the separation-of-powers principle, necessary to avoid "an overjudicialization of the processes of self-governance.").

[42] 504 U.S. 555, 559-60 (1992).

[43] *Id.* at 560.

[44] *Id.*

[45] *See, e.g.*, Adarand Constructors, Inc. v. Mineta, 534 U.S. 103 (2001) ("We are obliged to examine standing *sua sponte* . . . ."). *See also, e.g.*, Gonzalez v. Thaler, 565 U.S. 134 (2012) ("When a requirement goes to subject-matter jurisdiction, courts are obligated to consider *sua sponte* issues that the parties have disclaimed or have not presented.").

[46] Some scholars have argued that the Supreme Court's approach in limiting the courts to deciding on the rights of individuals is unjustified and forgoes the judiciary's role in ensuring that governmental actors adhere to the Constitution. *See, e.g.*, ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.3.5 (6th ed. 2012) ("Ultimately, two competing visions of the role of the federal judiciary are at stake. Under one, the role of the federal courts is limited to remedying specific injuries suffered by individuals . . . . An alternative view sees the federal judiciary as existing to ensure government compliance with the Constitution . . . . This dispute is a fundamental disagreement over the role of the federal courts in American society.").

[47] *See* Raines v. Byrd, 521 U.S. 811, 819-20 (1997) ("[O]ur standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional."). *See also* WRIGHT & MILLER, *supra* note 15, § 3531.11.2 ("The difficulties [when a public official sues another part of government] continue to be those of separation-of-powers—and

such cases, the courts are being asked to participate in a dispute that may particularly involve the constitutional balance of power, placing the court's role in resolving that dispute under significant scrutiny.

Legislative Standing at the Supreme Court

Separation of powers is logically the central focus when the plaintiff is a branch of government, such as a legislature. Although the Supreme Court has decided relatively few cases involving legislative standing, in those cases it articulated several principles that apply specifically when the plaintiff is a legislative entity.[48]

The first significant Supreme Court case to involve legislators filing a lawsuit challenging a governmental action was the 1939 case *Coleman v. Miller*.[49] *Coleman* involved the Kansas legislature's then-recent approval of the proposed Child Labor Amendment to the U.S. Constitution, which Congress had submitted to the states for ratification 15 years prior.[50] A bare majority of the Kansas legislature voted to ratify the amendment, with the Kansas lieutenant governor casting the tie-breaking vote in favor of ratification in the Kansas Senate.[51] Seeking to undo this ratification, the plaintiffs, individual members of the Kansas legislature who had voted against the amendment, challenged the lieutenant governor's right to cast his tie-breaking vote.[52] The plaintiffs argued that the lieutenant governor was not a part of the "legislature" and so his vote could not be counted to ratify the amendment under Article V of the Constitution.[53] The *Coleman* plaintiffs also argued that the passage of time had sapped the amendment of its vitality.[54] They sued to compel the Kansas secretary of state to annul the ratification.[55]

The Supreme Court splintered and issued three opinions, none of which obtained five votes.[56] However, a majority of the Court concluded that the plaintiff legislators had standing.[57] Chief Justice Charles Evans Hughes, writing the "opinion of the Court" for himself and two other justices, concluded that the petitioners had an "adequate interest to invoke [the Court's] jurisdiction" because the senators' votes "would have been sufficient to defeat ratification" if they had been right that the lieutenant governor's vote was invalid.[58] As a result, their votes had been "held for naught" and "overridden," which ran contrary to the senators' "plain, direct and adequate interest in maintaining the effectiveness of their votes."[59] Justices Butler and

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when state officials are involved—federalism.").

[48] *Raines*, 521 U.S. at 820.

[49] 307 U.S. 433.

[50] *Id.* at 435-36.

[51] *Id.* at 436.

[52] *Id*.

[53] *Id.* at 446-47 (citing U.S. CONST. art. V (stating that amendments must be ratified by "the Legislatures of three fourths of the several States")).

[54] *Id.* at 436.

[55] *Id.*

[56] *See* Raines v. Byrd, 521 U.S. 811, 822 n.5 (1997) (discussing the splintered opinions in *Coleman* as it relates to standing).

[57] *See id*. ("Even though there were only two Justices who joined Chief Justice Hughes' opinion on the merits [in *Coleman*], it is apparent that the two dissenting Justices joined his opinion as to the standing discussion. Otherwise, Justice Frankfurter's opinion denying standing would have been the controlling opinion.").

[58] *Coleman*, 307 U.S. at 438.

[59] *Id.*

McReynolds dissented from the majority's disposition of the case on the merits, but implicitly agreed with its conclusion that the plaintiffs had standing.[60] Justice Frankfurter, writing for four Justices, would have held that the legislators lacked standing.[61] He argued that so-called "intra-parliamentary disputes" should be left to parliaments, and that the injuries suffered here "pertain[ed] to legislators not as individuals but as political representatives executing the legislative process."[62] If these interests were recognized, Frankfurter feared that the courts would end up "sit[ting] in judgment on the manifold disputes engendered by procedures for voting in legislative assemblies."[63] Despite these arguments, Justice Frankfurter's view did not control, and *Coleman* is recognized as the first case in which the Supreme Court acknowledged that legislators' interest in their votes may constitute an injury that could be vindicated in federal court.

The Court returned to the issue of legislator standing 30 years later in *Powell v. McCormack*.[64] In that case, the House Special Subcommittee on Contracts concluded that Congressman Adam Clayton Powell Jr., the chairman of the Committee on Education and Labor, had deceived House authorities as to travel expenses.[65] After voters nonetheless reelected Representative Powell to the House of Representatives in 1966, the House adopted a resolution excluding him from taking his seat, and the House Sergeant at Arms refused to pay Representative Powell his salary.[66] Representative Powell sued the Speaker of the House in his official capacity, seeking a declaratory judgment that his exclusion was unconstitutional, an injunction restraining respondents from excluding him from the House, and an injunction commanding the Sergeant at Arms to pay Representative Powell his salary.[67] After the Supreme Court elected to take review of the case, the Congress that had excluded Powell terminated, and Representative Powell was seated in the House in January 1969.[68]

The Court concluded that Representative Powell's case was justiciable.[69] In particular, the Court looked to see if Representative Powell had a "legally cognizable interest" in the outcome of the case.[70] The Court concluded that Representative Powell's claim for back salary was itself sufficient to "supply the constitutional requirement of a case or controversy."[71] *Powell* thus stands for the proposition that legislators—no less than other individuals—have a personal pecuniary interest in their salary (and other personal prerogatives of office) that can amount to an injury to support standing when a defendant threatens that interest.[72]

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[60] *Id.* at 470 (Butler, J., dissenting).

[61] *Id.* at 460 (Frankfurter, J., concurring in the judgment).

[62] *Id.* at 469-70.

[63] *Id.* at 470.

[64] 395 U.S. 486 (1969).

[65] *Id.* at 489-90.

[66] *Id.* at 490-93.

[67] *Id.* at 494.

[68] *Id.* at 495.

[69] Although the Court framed the question as one of mootness—holding that the seating of Representative Powell in the House in January 1969 did not moot his claim—the Court's treatment of the issue shows how these justiciability doctrines can blur together. *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 499 n.10 (1975) ("The standing question . . . bears close affinity to questions of . . . mootness—whether the occasion for judicial intervention persists.").

[70] *Powell*, 395 U.S. at 496.

[71] *Id.* at 496-97.

[72] The Court also extensively discussed the separation-of-powers issues raised by Powell's claim under the ambit of another justiciability doctrine—the political question doctrine. *Id.* at 518-48. The political question doctrine limits the

The next case[73] concerning legislative standing to come before the Court was 1997's *Raines v. Byrd*.[74] *Raines* concerned a constitutional challenge to the Line Item Veto Act of 1996, which purported to authorize the President to "cancel" certain spending and tax benefit measures after they were signed into law.[75] The statute provided that "[a]ny Member of Congress or any individual adversely affected by [the Line Item Veto Act] may bring an action . . . for declaratory judgment and injunctive relief on the ground that any provision of this part violates the Constitution."[76] Accordingly, the day after the statute was signed into law, four Senators and two Members of the House, including Senator Robert Byrd, all of whom had voted against the act, sued under this provision alleging that the act was unconstitutional.[77] Senator Byrd alleged that the act injured him in his official capacity in three ways: (1) by "alter[ing] the legal and practical effect of all votes" cast in the future on bills that would be subject to the "line item" veto; (2) by divesting him of his constitutional role in the repeal of legislation; and (3) by altering the constitutional balance of powers between the legislative and executive branch.[78]

The Supreme Court held that Senator Byrd and the other legislators lacked standing to bring their claims.[79] Chief Justice Rehnquist's opinion for the Court emphasized that the standing inquiry turns, in part, on "whether the plaintiff is the proper party to bring this suit" and the requirement that the alleged injury be "particularized."[80] The Court's opinion also restated the standing doctrine's important role in "keeping the Judiciary's power within its proper constitutional sphere" and the need to "carefully inquire" as to whether the plaintiffs had a sufficiently personal, particular, and concrete interest so as to justify a court's involvement.[81] Chief Justice Rehnquist observed that, in contrast to the plaintiff in *Powell*, Senator Byrd was not asserting that he was deprived of anything to which he was personally entitled, such as a salary. Instead, Senator Byrd was asserting that he had lost power as a result of the statute because it altered the balance of

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ability of the federal courts to hear constitutional questions even where other justiciability requirements, such as standing, ripeness, and mootness, would otherwise be met. *See* Zivotofsky v. Clinton, 566 U.S. 189, 194-95 (2012) ("In general, the Judiciary has a responsibility to decide cases properly before it . . . . Our precedents have identified a narrow exception to that rule, known as the 'political question' doctrine."). The political question doctrine is driven explicitly by separation-of-powers concerns—in one example, courts generally will find a political question where there has been a "textually demonstrable constitutional commitment" of a question to another branch. *See* Baker v. Carr, 369 U.S. 186, 210 (1962). In *Powell*, the Court found there was no political question because Article I, Section 5's statement that "Each House shall be the Judge of the . . . Qualifications of its own Members" only gave Congress the power to apply the criteria set out in the Constitution, not to invent new criteria—meaning there was no separation-of-powers concern in overriding the House in this respect. *Powell*, 395 U.S. at 547-48.

[73] In between these cases, the court decided *Bowsher v. Synar*, 478 U.S. 714 (1986), a case challenging the constitutionality of the Balanced Budget and Emergency Deficit Control Act brought by Members of Congress as well as by members of the National Treasury Employees Union. *Id.* at 720-21. The Court concluded that it did not need to decide whether the Members independently possessed standing to bring the suit because the members of the union had standing, which was sufficient to satisfy the standing requirement regardless of whether the Members of Congress would have had standing to bring the suit by themselves. *Id.* at 721.

[74] 521 U.S. 811.

[75] *Id.* at 814-15.

[76] *Id.* at 815-16 (quoting 2 U.S.C. § 692(a)(1) (1996)).

[77] *Id.* at 814-16. The Court considered the standing question, in spite of the statute purporting to give Members a right to bring the suit in question. As the Court explained, "[i]t is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Id.* at 820 n.3.

[78] *Id.* at 816.

[79] *Id.* at 818.

[80] *Id.* at 818-19.

[81] *Id.* at 820.

power between Congress and the President.[82] Thus, the individual legislators were, in the majority's view, impermissibly attempting to assert an "institutional injury" that they shared in common with the entire Congress.[83] Such injuries, in the form of the dilution of the power of the legislative body, could not give rise to standing because they were neither concrete—they were "wholly abstract"—nor were they particularized—they were "widely dispersed."[84]

The Court acknowledged that, in *Coleman*, it had upheld standing for legislators claiming a similar institutional injury—an interest in the effectiveness of their votes.[85] However, unlike the plaintiffs in *Coleman*, Senator Byrd was not complaining that some illegal action had prevented his vote from counting, causing the bill to be passed in spite of his vote.[86] Rather, Senator Byrd had voted, and he had "simply lost that vote."[87] In other words, as the Chief Justice explained, individual legislators could validly assert the institutional injury in *Coleman* only because the Kansas senators' votes would have actually been enough to defeat the measure at issue, but were "completely nullified" by the allegedly illegal action.[88] Senator Byrd, in contrast, alleged "wholly abstract and widely dispersed" diminution of his future voting power.[89] The Court went on to explain that Members of Congress had an alternative remedy to their judicial challenge—they could repeal the Line Item Veto Act.[90] Further, the Court noted that the statute was not immune from other judicial challenges—an individual with a cognizable injury could still bring suit.[91] *Raines* thus greatly limited the ability of individual legislators to sue on behalf of their institutions. Nevertheless, the 1997 decision reaffirmed *Coleman*, thereby not completely closing off the possibility that an individual legislator could assert an institutional injury.[92]

In *Raines*, the Court found it "of some importance" that the various houses of Congress did not authorize Byrd and the other plaintiffs to bring the suit.[93] Although Congress had created a right to challenge the statute's constitutionality in the Line Item Veto Act itself, the plaintiffs had brought their suit only on their own behalf, and the plaintiffs' respective houses of Congress as a whole had opposed it on the merits.[94] This factor would turn out to be decisive in the next legislative standing case to come before the Court,[95] *Arizona State Legislature v. Arizona*

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[82] *Id.* at 820-21.

[83] *Id.* at 821.

[84] *Id.* at 829.

[85] *Id.* at 821-22.

[86] *Id.* at 824.

[87] *Id.*

[88] *Id.* at 824-25.

[89] *Id.* at 829.

[90] *Id.*

[91] *Id.* The Court would go on to strike down the Line Item Veto Act in *Clinton v. City of New York*, 524 U.S. 417 (1998). In that case, the Court held that the City of New York, among others, had standing to challenge a particular cancellation under the Act. *Id.* at 425.

[92] *See Raines*, 521 U.S. at 823-24 & n.8.

[93] *Id.* at 829.

[94] *Id.*

[95] In 2013, the Supreme Court decided *United States v. Windsor*, 570 U.S. 744 (2013), in which the Court permitted the Bipartisan Legal Advisory Group to intervene on behalf of the House of Representatives and defend the constitutionality of the Defense of Marriage Act in lieu of the executive branch. In that case, discussed in greater detail *infra*, the majority sidestepped the standing question but several dissenting Justices adopted competing conceptions of legislative standing to assert an institutional injury. Justice Scalia, joined in relevant part by Chief Justice Roberts and Justice Thomas, contended that Congress cannot "pop immediately into court, in [its] institutional capacity, whenever the President . . . implements a law in a manner that is not to Congress's liking." *Id.* at 789 (Scalia, J., dissenting).

Independent Redistricting Commission.[96] In that case, the Arizona state legislature—as a whole—sued the Arizona Redistricting Commission (Commission), an independent commission vested by popular initiative with the authority to draw redistricting maps for congressional districts.[97] The Arizona legislature sought to challenge the map adopted by the Commission for the 2012 elections as unconstitutional.[98] The Arizona legislature argued that, under the Elections Clause of the Constitution, the "Legislature" of a state had to have "primary responsibility" to set the manner of elections, and the Commission did not qualify as a legislature.[99]

The Court concluded that, in contrast with the individual Member plaintiffs in *Raines*, the Arizona legislature had standing. The Court found that the key difference between the Arizona legislature and the plaintiffs in *Raines* was that the former was "an institutional plaintiff asserting an institutional injury [that had] commenced this action after authorizing votes in both of its chambers."[100] The problem with the individual Members asserting institutional injury in *Raines*, as the *Arizona State Legislature* Court saw it, was that the injury was "widely dispersed," and no plaintiff in the 1997 case could "tenably claim a personal stake in the suit."[101] In contrast with *Raines*, the Court concluded, *Arizona State Legislature* was closer to the *Coleman* facts, in that the Commission's authority "completely nullif[ied]" any vote by the legislature purporting to adopt a redistricting plan—and that injury was adequately particularized to the plaintiff that was bringing the suit.[102] Importantly, however, the Court stated in a footnote that the standing inquiry might have been different had the suit involved Congress mounting a legal challenge to the President, which would have raised "separation-of-powers concerns absent here."[103]

A few key principles can be drawn from this line of Supreme Court cases. With respect to cases brought by individual legislators, *Raines* drew a fundamental distinction between so-called "institutional injury" and the sort of personal injury that was at issue with the plaintiff's lost salary in *Powell*.[104] As the Court would go on to explain in *Arizona State Legislature*, an "institutional injury" is an injury that "scarcely zeroe[s] in on any individual member," but rather "impact[s] all Members of Congress and both Houses . . . equally."[105] The *Arizona State Legislature* court, interpreting *Raines*, explained that individual legislators generally cannot assert institutional injuries: "[h]aving failed to prevail in their own Houses, the suitors [in *Raines*] could not repair to the Judiciary to complain."[106] However, *Raines* also determined that there was an

According to this view, Congress may not "hale the Executive before the courts" merely "to correct a perceived inadequacy in the execution of its laws;" instead, a legislative plaintiff possesses standing only to vindicate interests that are unique to Congress. *Id.* Justice Alito, by contrast, took the slightly broader view that Congress potentially possesses standing to participate in federal litigation whenever it faces "impairment" of its "central [legislative] function," as may occur if the executive branch opts not to defend a federal statute from a constitutional challenge. *Id.* at 805 (Alito, J., dissenting). This report analyzes these competing positions in greater detail *infra* at "Congressional Intervention to Defend a Statute's Constitutionality: Adversity and Standing Issues."

[96] 135 S. Ct. 2652 (2015).

[97] *Id.* at 2658.

[98] *Id.* at 2658-59 (citing U.S. CONST. art. I, § 4, cl. 1).

[99] *Id.* at 2663.

[100] *Id.* at 2664.

[101] *Id.* (internal quotation marks omitted).

[102] *Id.* at 2665.

[103] *Id.* at 2665 n.12.

[104] Raines v. Byrd, 521 U.S. 811, 820-21 (1997).

[105] *Arizona State Legislature*, 135 S. Ct. at 2664.

[106] *Id.*

exception to this general rule based on the Court's holding in *Coleman v. Miller*, "[t]he one case in which [the Court] upheld standing for legislators . . . claiming an institutional injury."[107] The Court justified this exception because the plaintiffs in *Coleman*, if they had been correct on the merits of their claim, would have been in a situation where "their votes not to ratify the amendment were deprived of all validity."[108] The challenge, then, for any individual legislator asserting an institutional injury is to show that the asserted injury is analogous to the "vote nullification" that took place in *Coleman*.[109] These principles will be discussed in the next section.

Individual Legislators and Standing in the Lower Courts

Institutional Injury

Much of the lower court case law on legislative standing has focused on when an individual can assert an institutional injury akin to the injury asserted by the plaintiffs in *Coleman*. The courts inside and outside the D.C. Circuit[110] have taken slightly different approaches to analyzing this question.

The District of Columbia Circuit

Because Members of Congress serve in the federal government in Washington, DC, and because the District is also the site of executive branch actions that could be the subject of a congressional lawsuit, such cases are often initiated in D.C. federal court. As a result, the federal appellate body in DC, the D.C. Circuit—often referred to as the second most important court in the country[111]—has a significant influence over the case law concerning congressional standing.[112]

In a pair of cases following *Raines*, the D.C. Circuit considered when individual Member plaintiffs can assert institutional injuries: the 1999 case *Chenoweth v. Clinton*,[113] and the 2000 case *Campbell v. Clinton*.[114] In *Chenoweth*, three Members of the House sued to enjoin the American Heritage Rivers Initiative (AHRI), a program promulgated by executive order that required certain federal agencies to support local efforts to preserve certain historically significant rivers and riverside communities.[115] The Member plaintiffs argued that the AHRI violated the Constitution by depriving them of their constitutional role in the passage of legislation by creating

[107] 521 U.S. at 821.

[108] *Id.* at 822.

[109] *Id.* at 826 ("There 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.").

[110] This report references a significant number of decisions by federal appellate courts of various regional circuits. For purposes of brevity, references to a particular circuit in the body of this report (e.g., the D.C. Circuit) refer to the U.S. Court of Appeals for that particular circuit.

[111] *See, e.g.*, Richard J. Pierce Jr., *The Special Contributions of the D.C. Circuit to Administrative Law*, 90 GEO. L.J. 779, 779 (2002).

[112] *See infra*.

[113] 181 F.3d 112 (D.C. Cir. 1999).

[114] 203 F.3d 19 (D.C. Cir. 2000).

[115] 181 F.3d at 112-13.

the AHRI via executive order.[116] The Members argued that their injury was more severe than the injury at stake in *Raines* because the President's action had "denied Members of Congress any opportunity to vote for or against the AHRI."[117] The D.C. Circuit disagreed, concluding instead that the injury asserted by the plaintiffs in *Chenoweth* was fundamentally the same as that asserted in *Raines*—that their injury was an "alter[ation] [in] the constitutional balance of powers between the Legislative and Executive Branches."[118] Further, the court observed that here, as in *Raines*, it was "uncontested that the Congress could terminate the AHRI were a sufficient number in each House so inclined," meaning that, as in *Raines*, Congress had a legislative remedy.[119] The *Chenoweth* court acknowledged that, following *Coleman*, it might be a different case if the Representatives alleged that the necessary majorities in Congress had voted to block the AHRI.[120] In such a case, legislators could argue that their votes had been "effectively nullified," but because plaintiffs in *Chenoweth* made no such allegations, the court dismissed the case for want of standing.[121]

The second of the influential post-*Raines* D.C. Circuit decisions is *Campbell v. Clinton*, decided the year after *Chenoweth*.[122] That case challenged the legality of the United States' involvement in NATO air and cruise missile attacks in Yugoslavia.[123] Prior to the lawsuit, Congress had voted on four resolutions related to the conflict, including an "authorization" of the air strikes that failed by a tie vote, 213-213, and a declaration of war that failed 427-2.[124] Congress also voted against requiring the President to immediately end U.S. participation in the conflict and voted to fund the involvement.[125] After these votes, the plaintiffs, 31 Members of Congress who were opposed to U.S. military involvement filed suit, alleging that the President's use of American forces violated the Constitution's War Powers Clause and the War Powers Resolution.[126] Representative Tom Campbell and the other Member plaintiffs argued that the Executive's action had "completely nullified" the tie vote against the airstrikes and the vote against the declaration of war, equating themselves to the Kansas senators in *Coleman*.[127]

The D.C. Circuit disagreed, concluding that the reason the *Coleman* plaintiffs' votes had been "nullified" was because of the unique context of a vote against a constitutional amendment,

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[116] *Id.* at 113.

[117] *Id.* at 116.

[118] *Id.*

[119] *Id.*

[120] *Id.* at 117.

[121] *Id.* at 116-17. Prior to *Raines*, the D.C. Circuit had developed a complex edifice of case law surrounding legislative standing, essentially separating standing analysis from a doctrine of "equitable discretion," which allows a court to decline to hear a case when necessary to avoid an "intrusion by the judiciary into the legislative arena." *See id.* at 114 (citing Riegle v. Fed. Open Mkt. Comm., 656 F.2d 873, 881 (D.C. Cir. 1981)). In *Chenoweth*, the D.C. Circuit recognized that significant portions of these cases were "untenable" after *Raines*, which left "no room" for the "broad theory of legislative standing" adopted in previous cases and likely required the court to merge its standing and equitable discretion doctrines. *See id*. at 115-16 (citing Moore v. U.S. House of Representatives, 733 F.2d 946 (D.C. Cir. 1984) and Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974)). *But see* Blumenthal v. Trump, 335 F. Supp. 3d 45, 59 (D.D.C. 2018) (suggesting that *Kennedy* remains "good law").

[122] 203 F.3d 19 (D.C. Cir. 2000).

[123] *Id.* at 20.

[124] *Id.*

[125] *Id.*

[126] *Id.* (citing U.S. CONST. art. I, § 8, cl. 11 and 50 U.S.C. §§ 1541 *et seq.*).

[127] *Id.* at 22.

which left them without any alternative remedy.[128] The appellate court argued that, in *Coleman*, the Kansas senators were in a unique position because they were "powerless" to rescind the ratification by legislative action—according to the court, it was "not at all clear" whether the ratification could have been rescinded once it was deemed ratified.[129] The court saw *Raines* as having attached critical importance to this absence of legislative remedy; this fact is what "nullified" the Kansas senators' votes and supplied the necessary concrete injury.[130] In contrast, the *Campbell* plaintiffs had several legislative remedies, including the power to withdraw appropriations and impeachment.[131] As a result, the court concluded that their vote had not been "nullified" in the same manner as the *Coleman* plaintiffs. Rather, the court viewed the *Campbell* plaintiffs' argument to essentially be that the President acted illegally in excess of his constitutional authority and in violation of a statute.[132] As a result, the circuit court determined that the case was indistinguishable from *Raines*, and the plaintiffs had not suffered a concrete and particularized injury.

Following these precedents, the trial courts in the D.C. Circuit have generally been hesitant to find concrete and particularized injury in cases involving individual legislators asserting institutional injuries, especially where the legislature as a whole possessed other potential avenues for relief through the legislative process. For example, in 2002, the court concluded that 32 Members of the House of Representatives lacked standing to challenge President George W. Bush's unilateral withdrawal from 1972's Anti-Ballistic Missile Treaty.[133] As in *Campbell*, the court emphasized the "widely dispersed" nature of the injury and the "extensive self-help" remedies available to Congress that could be used to remedy the President's allegedly illegal actions, such as the appropriations power, or, as a last resort, impeachment.[134] The court concluded that the availability of these alternate remedies, combined with the fact that Congress as a whole had not authorized these individual Members to represent its interests in federal litigation, demonstrated that the plaintiffs could not assert the institutional injury alleged.[135] Similarly, in a 2011 case, a D.C. district court determined that 10 Members of the House lacked standing to challenge President Obama's alleged violation of the War Powers Clause of the Constitution and the War Powers Resolution.[136] In that case, the plaintiffs alleged that the President had pursued military action in Libya without seeking any approval from Congress and had spent funds on an "unauthorized war."[137] The court, again following *Campbell*, emphasized that "nullification necessitates the absence of a legislative remedy" and found that the plaintiffs had "voted on essentially what the plaintiffs now ask this Court to award . . . . Thus, the plaintiffs' votes were given full effect. They simply lost that vote."[138]

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[128] *Id.* at 23-24.

[129] *Id.* at 23.

[130] *Id.*

[131] *Id.*

[132] *Id.* at 22.

[133] Kucinich v. Bush, 236 F. Supp. 2d 1, 2 (D.D.C. 2002).

[134] *Id.* at 10-11.

[135] *Id.* at 12. The court also concluded that the case presented a nonjusticiable political question. *Id.* at 14-18 (concluding that judicial action would "simply encourage congressmen to run to court any time they disagreed with Presidential action").

[136] Kucinich v. Obama, 821 F. Supp. 2d 110, 112 (D.D.C. 2011).

[137] *Id.* at 113-14.

[138] *Id.* at 120 (quoting Raines v. Byrd, 521 U.S. 811, 824 (1997)) (internal quotation marks omitted).

The one post-*Raines* ruling from a D.C. district court to reach a contrary conclusion and find legislative standing was the 2018 case *Blumenthal v. Trump*.[139] The plaintiffs in *Blumenthal*—approximately 201 minority Members of the Senate and House—alleged that President Donald Trump, by receiving benefits from his business entities' dealings with foreign governments, had violated the Foreign Emoluments Clause of the Constitution, which prohibits persons holding certain offices from receiving any "present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."[140] Plaintiffs sought declaratory as well as injunctive relief preventing the President from accepting any further emoluments without the consent of Congress.[141] The plaintiffs argued that they had suffered injury because the President's conduct, in allegedly accepting emoluments and failing to submit those emoluments to Congress, had nullified their votes by "den[ying] them a voting opportunity to which the Constitution entitles them."[142]

The district court reasoned that, although this injury was an institutional injury dispersed among all Members of Congress, it nonetheless was comparable to the injury upheld in *Coleman* because the plaintiffs in *Blumenthal*, like the plaintiffs in *Coleman*, were not complaining about dilution of legislative power, but rather about the complete nullification of their votes.[143] This distinction turned decisively on the plaintiffs' lack of a legislative remedy.[144] The *Blumenthal* court contrasted the case with *Raines* and *Chenoweth*, in which the plaintiffs "either lost the vote in Congress or did not have the political influence to bring their bill to a vote."[145] By contrast, in the view of the district court, Senator Blumenthal and the other Member plaintiffs lacked any legislative means to remedy their complaints because the President never provided them with the opportunity to approve the emoluments in the first place.[146] Although the defendants suggested several potential nonjudicial remedies, such as a vote by Congress rejecting specific supposed emoluments, or a bill defining emoluments and prohibiting the receipt of them, the court went on to reject all of these proposed possible legislative remedies as inadequate, asserting that none would require the President to submit his emoluments for congressional consent for prior approval or even force him to provide information about future emoluments to Congress.[147] Further, the court determined that appropriations remedies that the D.C. Circuit saw as adequate in *Campbell* and *Chenoweth* would not work in this case, as there are no federal appropriations

[139] 335 F. Supp. 3d 45 (D.D.C. 2018). For more details on the merits of this case, see CRS In Focus IF11086, *The Emoluments Clauses of the U.S. Constitution*, by Kevin J. Hickey and Michael A. Foster. The government has asked the district court for permission to immediately appeal its ruling that the plaintiffs have standing to sue. *See* Defendant's Motion for Certification of the Court's Sept. 28, 2018 Order Pursuant to 28 U.S.C. § 1292(b), Blumenthal v. Trump, 335 F. Supp. 3d 45 (D.D.C. 2018) (No. 1:17-CV-01154). As of the date of this report, the court has not yet ruled on the government's request.

[140] *Blumenthal*, 335 F. Supp. 3d at 50 (quoting U.S. CONST. art. I, § 9, cl. 8 ("No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.")).

[141] *Id.*

[142] *Id.* at 54.

[143] *Id.* at 63-64.

[144] *Id.* at 66.

[145] *Id.*

[146] *Id.*

[147] *Id.* at 67-68.

associated with the President's alleged receipt of emoluments.[148] Finally, the court concluded that impeachment was too "extreme" to be considered an adequate remedy.[149]

Institutional Injury to Individual Legislators Outside the D.C. Circuit

Whereas the D.C. Circuit and the U.S. District Court for the District of Columbia have generally concluded that whether individual legislators possess standing largely turns on the availability of alternative legislative remedies,[150] other circuits considering the question have not arrived at the same consensus. These courts have generally viewed the *Coleman* exception even more narrowly than the D.C. Circuit, further limiting the availability of legislative standing.[151]

In *Baird v. Norton*, for example, the Sixth Circuit ruled that Members of the Michigan state legislature lacked standing to challenge the procedures followed by their legislature in approving certain gaming compacts between the State of Michigan and Indian tribes.[152] The plaintiffs alleged that the legislature had unlawfully approved the gaming compacts without complying with certain procedural safeguards required by the Michigan Constitution.[153] First, the court held that the procedural harm inflicted by this neglect of constitutional procedures was only a "generalized grievance shared by all Michigan residents" and could not give rise to standing.[154] Second, in response to the argument that the use of these procedures had "nullified" the plaintiffs' votes in the legislature, the court, analyzing *Raines* and *Coleman*, concluded that "[f]or legislators to have standing as legislators, then, they must possess votes sufficient to have either defeated or approved the measure at issue."[155] As this court read *Coleman*, standing required that the lawsuit be joined by sufficient members of their respective houses to defeat the legislation in order to

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[148] *Id.* at 68.

[149] *Id.* The court acknowledged that its holding was at least somewhat in tension with a previous D.C. District Court case, *Kucinich v. Bush*, 236 F. Supp. 2d 1 (2002), which, as explained above, had concluded that Members of Congress did not have standing to sue the President about the President's unilateral withdrawal from a treaty. *See Blumenthal*, 335 F. Supp. 3d at 61 n.7. The *Blumenthal* court justified this by arguing that *Kucinich* "did not discuss whether the plaintiffs' votes had been nullified." *Id.* While the *Kucinich* case did not discuss 'nullification' explicitly in those terms, the case did discuss *Campbell* and concluded that Representative Dennis Kucinich and the other Members plaintiffs had "extensive" self-help remedies available. *Kucinich*, 236 F. Supp. 2d at 10. The court argued, for example, that though the appropriations power or legislation could not be used directly to affect the President's withdrawal from the treaty, it could be used to "influence the President's actions." *Id.* at 10-11. The difference between *Kucinich* and *Blumenthal* appears to be driven, at least in part, by the judges' differing views on the effectiveness of such indirect legislative remedies in these different contexts.

[150] *See, e.g.*, Campbell v. Clinton, 203 F.3d 19, 23 (D.C. Cir. 2000) (characterizing *Coleman* as "narrow . . . exception" to *Raines* that applies only when votes are "nullified" but does not apply to situations where Congress "enjoy[s] ample legislative power"). *But see* Cummings v. Murphy, 321 F. Supp. 3d 92, 112 (D.D.C. 2018) (arguing that "[t]his court is not of the view that complete vote nullification is the *only* instance in which an individual legislator can assert institutional injury" and analyzing historical practice, congressional authorization, and alternative remedies in determining whether institutional injury is sufficiently concrete and particularized).

[151] The Third Circuit has seemingly, albeit in a different context, adopted the view of the D.C. Circuit that the availability of an alternative legislative remedy is the key factor in considering legislative standing. In *Russel v. DeJongh*, 491 F.3d 130, 135-36 (3d Cir. 2007), a Virgin Islands senator sought to sue the governor over his alleged failure to timely submit nominations to the Islands' Supreme Court. *Id.* The court held that there was no standing because the Virgin Islands' legislature "was free to confirm, reject, or defer voting on the Governor's nominees." *Id.* at 136. The court concluded that this alternative legislative option took the plaintiffs' injury out of the category of "vote nullification." *Id.*

[152] 266 F.3d 408, 409-10 (6th Cir. 2001).

[153] *Id.* at 411.

[154] *Id.*

[155] *Id.* at 412.

show that actual nullification occurred.[156] Because the legislators in *Baird* could not make that showing, the court concluded that they lacked standing without examining the availability of alternative legislative remedies.[157]

Reading *Raines* even more narrowly, the Tenth Circuit has concluded that individual legislators *can never* bring suit to assert institutional injuries.[158] In *Kerr v. Hickenlooper*, on remand to the Tenth Circuit after the Supreme Court's decision in *Arizona State Legislature*,[159] the court considered whether then-current Colorado state legislators could have standing to challenge an amendment to the Colorado Constitution that required voter approval in advance for new taxes.[160] The Tenth Circuit had previously concluded that the legislators had standing because this amendment "deprive[d] them of their ability to perform the legislative core functions of taxation and appropriation," rendering their votes "advisory."[161] On remand, however, the court changed its view, and read *Raines* and *Arizona State Legislature* together to conclude that "individual legislators may not support standing by alleging only an institutional injury," which only institutional plaintiffs like the Arizona state legislature could assert.[162] *Arizona State Legislature*, the court determined, had changed the law such that the nature of the injury—whether it was personal or institutional—was the determinative factor.[163] The Tenth Circuit concluded that *Coleman*, which *Raines* had characterized as an institutional injury case, was in fact a case involving a "personal" injury to the senators whose votes were allegedly nullified.[164] This injury was not, in the Tenth Circuit's view, "institutional" as the Supreme Court used that term in *Arizona State Legislature* because institutional injuries necessarily affect all members of a legislature in equal measure, and in *Coleman*, the only injured legislators were those who had their votes nullified.[165] As a result, the court concluded that the plaintiffs in *Kerr* had asserted only institutional injuries to the power of the legislature, and they accordingly lacked standing.[166]

The views on institutional injuries announced in *Baird* and *Kerr* appear to contrast with the somewhat more receptive standard that has developed in the D.C. Circuit. In both *Baird* and *Kerr*, the court interpreted the standing upheld in *Coleman*, the so-called vote nullification injury, as being about the deprivation inflicted on individual legislators by virtue of their vote being defeated by the allegedly unlawful action.[167] In contrast, after *Campbell*, the D.C. Circuit has

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[156] *Id.* at 412-13.

[157] *Id.* at 413. The Sixth Circuit reaffirmed *Baird*'s holding in its 2017 decision in *Crawford v. United States Dep't of the Treasury*, 868 F.3d 438, 453-54 (6th Cir. 2017). There, Senator Rand Paul sought to sue the Executive to enjoin the implementation of the Foreign Account Tax Compliance Act by way of intergovernmental agreements, which he alleged the Executive should have submitted to the Congress for approval, thus depriving him of his constitutional right to vote for or against the agreements. *Id.* at 444. Relying on *Baird*, the Court held that Senator Paul lacked standing because he lacked the votes sufficient to repeal the Act in question. *Id.* at 454.

[158] Kerr v. Hickenhooper, 824 F.3d 1207, 1216-17 (10th Cir. 2016).

[159] *Id.* at 1213 (citing Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652 (2015)).

[160] *Id.* at 1211.

[161] *Id.* at 1212 (quoting Kerr v. Hickenlooper, 744 F.3d 1156 (10th Cir. 2014), *vacated sub nom.*, 135 S. Ct. 2927 (2015)).

[162] *Id.* at 1214.

[163] *Id.* at 1217.

[164] *Id.* at 1215.

[165] *Id.*

[166] *Id.* at 1217.

[167] *See id.* at 1216-17 ("[T]he legislator-plaintiffs allege . . . that they have been individually disempowered only concomitantly as a result of [the Amendment's] diminution of the General Assembly's authority as an institution."); Baird v. Norton, 266 F.3d 408, 413 (6th Cir. 2001) ("Under *Raines* and *Coleman*, the issue is whether Baird can

focused on the lack of a legislative remedy and whether the legislature as a whole continues to enjoy "ample legislative power" to remedy the alleged wrong.[168]

Personal Injury

As the Supreme Court explained in *Raines*, there may be fewer obstacles for legislators to sue for "something to which they are personally" entitled, such as the loss of salary claimed by Representative Powell in *Powell v. McCormack*.[169] This section examines how lower courts have distinguished between "personal" and "institutional" injuries and the other justiciability considerations that have been applied to injuries that were undoubtedly personal.

Distinguishing Personal from Institutional Injuries

In *Raines* and *Arizona State Legislature*, the alleged injuries were clearly institutional because the alleged wrongful conduct represented diminution in the power of the legislature as a whole, affecting "all Members of Congress and both Houses . . . equally."[170] However, it is possible for an injury to have apparently unequal effects within the legislature but nonetheless be "institutional." Best illustrating this principle is a pair of cases from different districts considering claims brought under 5 U.S.C. § 2954—which provides that executive agencies, on request of the House Committee on Oversight and Reform or the Senate Homeland Security and Governmental Affairs Committee, or "any seven members thereof," "shall submit any information requested of it relating to any matter within the jurisdiction of the committee."[171] Known as the "Seven-Member Rule,"[172] this statute authorizes Members of the minority party to obtain information from the administration, but does not provide explicitly for judicial enforcement.[173]

In *Waxman v. Thompson*, a 2006 case out of the Central District of California, 18 Members of the House sued under Section 2954 after they had received an allegedly incomplete response from the Executive to their demand for documents relating to the anticipated cost of the Medicare Prescription Drug and Modernization Act of 2003.[174] The court determined that the plaintiffs had not shown that their vote had been nullified within the meaning of *Coleman*—plaintiffs had

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demonstrate that *her vote* was sufficient to defeat the compacts had the constitutionally required procedure been followed. Because Baird cannot do so, she lacks standing."). *See also* Corman v. Torres, 287 F. Supp. 3d 558, 568 (M.D. Pa. 2018) (holding that state legislative leaders had no standing to challenge state supreme court's redrawing of election districts as usurpation of authority under Elections Clause; observing important fact that legislative leaders could not command two-thirds majority necessary in both chambers to override a gubernatorial veto, and that "[t]wo votes could not on their own have defeated or enacted any proposed remedial redistricting legislation").

[168] Campbell v. Clinton, 203 F.3d 19, 22-23 (D.C. Cir. 2000).

[169] Raines v. Byrd, 521 U.S. 811, 820-21 (1997) (citing Powell v. McCormack, 395 U.S. 486, 496 (1969)).

[170] Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2664 (2015) (quoting *Raines*, 521 U.S. at 829).

[171] 5 U.S.C. § 2954.

[172] *See, e.g.*, Nolan D. McCaskill, *House Democrats File Lawsuit over Access to Trump Hotel Documents*, POLITICO (Nov. 2, 2017), https://www.politico.com/story/2017/11/02/trump-hotel-documents-lawsuit-244455.

[173] 5 U.S.C. § 2954.

[174] No. CV 04-3467 MMM (MANx), 2006 WL 8432224, at *12 (C.D. Cal. July 24, 2006). In *Waxman v. Evans*, No. CV014530LGB(AJWX), 2002 WL 32377615, at *1(C.D. Cal. Jan. 18, 2002), a different judge in the Central District of California granted summary judgment in favor of similar legislative plaintiffs on a similar claim brought under the Seven-Member Rule. However, the court did not discuss standing in its opinion. *See id.* at *1-10. The Ninth Circuit later vacated this decision on other grounds. *See* Waxman v. Evans, 52 F. App'x 84 (9th Cir. 2002) (holding that action was moot in light of *Carter v. United States Department of Commerce*, 307 F.3d 1084 (9th Cir. 2002)).

alleged only that they "ha[d] been required to vote and legislate without full access to information."[175] The plaintiffs, however, argued that their injury was personal, not institutional, because they had a "distinct legal entitlement not shared by all Members of Congress."[176] The court disagreed. Rather, the court explained, the right the plaintiffs asserted "runs with their congressional and committee seats."[177] Their injury, in the view of the court, was not an injury to themselves personally, but an injury to "Congress, on whose behalf they acted," and it was the same type of institutional injury that the Supreme Court deemed insufficient to confer standing in *Raines*.[178]

This same issue arose again in 2018, in the case *Cummings v. Murphy* in the U.S. District Court for the District of Columbia.[179] As in *Waxman*, the *Cummings* plaintiffs were minority Members of the House Oversight Committee who sought documents from an executive agency under Section 2954.[180] The court observed that the "Plaintiffs tie[d] their injury directly to their constitutional duties as legislators, claiming their alleged harm to be impedance of the oversight and legislative responsibilities that have been delegated to them by Congress" and that the injury alleged ran "in a sense with the Plaintiff's seat."[181] Despite these facts, the plaintiffs argued, as in *Waxman*, that because their injury was not shared by all Members of Congress equally, their injury was not institutional in nature.[182] The court disagreed. Relying on *Raines*, the court concluded that the plaintiffs' injury was institutional because it was "rooted in a right granted to them as Members of Congress."[183] Further, because any violation of the "Seven-Member Rule" was an institutional injury, the court determined that, although the Member plaintiffs had a "stronger case" for standing than the plaintiffs had in *Raines*, historical practice, a lack of congressional authorization, and the availability of alternative remedies demonstrated that the injury was too "wholly abstract" and "widely dispersed" to confer standing on an individual Member.[184]

These cases make clear that the difference between a "personal" and an "institutional injury" does not hinge on the issue of particularization. Rather, the difference is the source of the right that has been violated. The Seven-Member Rule cases demonstrate that, even where an injury has a particular effect on certain Members, it can nonetheless be insufficiently "concrete" under *Raines* if the Member's injury does not deprive him of something to which he is *personally* entitled.[185] In other words, where the right alleged to have been violated is tied to a right granted to a plaintiff

[175] 2006 WL 8432224, at *7.

[176] *Id.* at *8 (internal quotation marks omitted).

[177] *Id.* at *11.

[178] *Id.* at *12.

[179] 321 F. Supp. 3d 92 (D.D.C. 2018). Notably, the plaintiffs in *Cummings* have appealed the district court's order dismissing their claims on standing grounds to the D.C. Circuit. Notice of Appeal, Cummings v. Murphy, No. 18-5305 (D.C. Cir. Oct. 16, 2018). As of the date of this report, the D.C. Circuit has not yet ruled on the Members' appeal. The parties' final briefs are due on May 22, 2019.

[180] 321 F. Supp. 3d at 95-96.

[181] *Id.* at 108 (internal quotation marks omitted).

[182] *Id.* at 109.

[183] *Id.*

[184] *Id.* at 112-17. Unlike the cases discussed above, which generally treat *Coleman* as the sole exception to *Raines*, the court in *Cummings* read *Raines* differently to determine that "complete nullification is [not] the *only* instance in which an individual legislator can assert institutional injury." *Id.* at 112. Despite this, the court still concluded that the plaintiffs had fallen short of showing standing based on the factors listed above. *Id.* at 112-17.

[185] *Id.* at 109-110.

"as [a] Member[] of Congress," all of Congress *is* harmed equally, as a diminution of that right affects the institution as a whole, even if it is only a single Member who is asserting that right at a given moment.

Personal Injury Must Comply with Traditional Standing Requirements

Even if a legislator alleges an injury that seems to be genuinely "personal" rather than "institutional," that injury must nonetheless meet the typical standing requirements of particularization and concreteness.[186] Further, that injury must be likely and imminent as opposed to merely speculative, causally connected to the challenged action, and redressable by the court.[187] A number of cases illustrate how an alleged injury to legislators can fail to meet these requirements.

For example, post-*Raines*, federal courts of appeals have generally concluded that a mere possibility of electoral or reputational harm to a legislator is too speculative to support Article III standing.[188] In *Schaffer v. Clinton*, the Tenth Circuit dismissed a claim brought by Representative Bob Schaffer, a Member of Congress who alleged that the cost of living adjustment (COLA) in the Ethics Reform Act of 1989 violated the 27th Amendment to the Constitution.[189] Representative Schaffer, who received an increase in pay based on the COLAs, argued that they were "damaging to his political position and his credibility among his constituency" because the COLAs involved paying him with monies allegedly "appropriated unconstitutionally."[190] This argument relied heavily on a pre-*Raines* D.C. Circuit case, *Boehner v. Anderson*.[191] In *Boehner*, the D.C. Circuit had concluded that Congressman John Boehner had standing to challenge the COLAs based on his claim that it undermined his "political position."[192] However, as the Tenth Circuit observed, this case predated *Raines*, and its analysis was "cursory."[193] Rejecting *Boehner*, the Tenth Circuit concluded that Congressman Schaffer's asserted injury was supported by no concrete evidence of reputational injury and was much like the injury rejected in *Raines*—an

[186] Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

[187] *Id.*

[188] At least one court has concluded that legislators attempting to assert injuries as a representative of their constituents lack a sufficiently concrete injury. In the 2002 case *Kucinich v. Defense Finance & Accounting Service*, 183 F. Supp. 2d 1005 (N.D. Ohio 2002), Congressman Kucinich sued an agency of the Department of the Defense, alleging that it had violated federal law and the Constitution by awarding a contract that would have caused displacement of workers and job losses in his district. *Id.* at 1006. The court concluded that because allowing Representatives to challenge executive action on behalf of their constituents would raise "grave separation-of-powers dangers," Congressman Kucinich's remedy resided with Congress. *Id.* at 1011-12.

[189] Schaffer v. Clinton, 240 F.3d 878, 880 (10th Cir. 2001). The 27th Amendment states that "No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened." U.S. CONST. amend. XXVII.

[190] *Schaffer*, 240 F.3d at 885. Congressman Schaffer also raised two other arguments, neither of which was sufficient to give rise to standing. First, he argued that he was harmed by "personal offense," but generally speaking, the "psychological consequence presumably produced by observation of conduct with which one disagrees" is not a sufficient injury to convey Article III standing. *Id.* at 884. Second, he argued that the COLAs harmed him "professionally" because they affected his pay. *Id.* However, the court held that this alleged injury did not suffice because the COLAs *increased* his pay, not decreased it. *Id.* at 884-85.

[191] 30 F.3d 156 (D.C. Cir. 1994).

[192] *Id.* at 160.

[193] *Schaffer*, 240 F.3d at 886.

abstract claim that applied to every Member of Congress.[194] As a result, the injury alleged was insufficiently concrete and particularized to give rise to standing.[195]

Another pair of cases illustrates how alleged injuries to legislators can fail to meet standing requirements on causation and redressability, even if the injuries alleged are seemingly sufficiently concrete and particular. The first of these cases is a 2018 case from the Middle District of Pennsylvania, *Corman v. Torres*.[196] *Corman* involved a challenge brought by several parties to the Pennsylvania Supreme Court's 2018 decision to strike the 2011 redistricting map and issue its own replacement map.[197] Among the challengers were eight Republican Members of Pennsylvania's delegation to the U.S. House of Representatives, who challenged the Pennsylvania Supreme Court's decision as a violation of the Elections Clause of the Constitution.[198] The Members argued that they were injured by the alterations to their districts, thereby reducing their incumbency advantage, and by wasting time, energy, and resources expended in their former districts.[199] The court set aside the question of whether these injuries were sufficiently concrete and particular, but nonetheless observed that no case supported "the proposition that an elected representative has a legally cognizable interest in the composition of his or her electoral district."[200] Irrespective of this question, the court concluded that the Members' claim failed on the causation prong of standing. Because the plaintiff Members conceded that the state supreme court had the authority to *order* the redrawing of the redistricting map, they could not trace their injuries to the substantive decisions that actually led to the court-drawn map:

> Even if the Pennsylvania Supreme Court had simply ordered that a new redistricting map be drawn, but had given the General Assembly free substantive rein . . . to accomplish that objective, the . . . injury would persist. In that circumstance, the court would not have committed any of the improprieties alleged in the verified complaint, but district boundaries would still have changed.[201]

The court concluded that the plaintiffs could not bridge this "gap" in the causal chain and dismissed the Members' claims.[202]

Another case in which a legislator's purported claims could not overcome the second two elements of the standing inquiry is *Rangel v. Boehner*, a 2013 case out of the District Court for

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[194] *Id.* at 885-86.

[195] *Id.* The Seventh Circuit explicitly joined this analysis, and rejected *Boehner*, in *Johnson v. United States Office of Personnel Management*, 783 F.3d 655, 666-69 (7th Cir. 2015). In *Johnson*, Senator Ron Johnson sought to challenge an OPM rule allowing Members of Congress and their staffs to take advantage of an Affordable Care Act insurance exchange reserved for small businesses. *Id.* at 658. The court concluded that "[t]he possibility of electoral or reputational harm, therefore, is much too 'conjectural or hypothetical' to establish Article III standing." *Id.* at 669 (quoting City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983)).

[196] 287 F. Supp. 3d 558 (M.D. Pa. 2018).

[197] *Id.* at 561.

[198] *Id. See also supra* text accompanying note 167 (discussing the standing of the state legislators who brought the challenge).

[199] *Corman*, 287 F. Supp. 3d at 569. The Supreme Court "assum[ed], without deciding" that a similar injury was legally cognizable in *Wittman v. Personhuballah*, 136 S. Ct. 1732, 1737 (2016). However, the Court in that case dismissed the Members' claim because they submitted no evidence establishing their alleged harm. *Id.*

[200] 287 F. Supp. 3d at 570.

[201] *Id.* at 571.

[202] *Id.*

the District of Columbia.[203] *Rangel* arose out of disciplinary proceedings and a vote of censure against Congressman Charles Rangel.[204] Representative Rangel alleged that certain improprieties had colored the proceedings of the Ethics Committee that had investigated him. He sued officials of the House, but not the House itself, seeking declaratory relief and an injunction requiring the defendants to "remove the recording of censure."[205] Representative Rangel claimed four separate injuries that he argued gave rise to standing: damage to his reputation,[206] the loss of his status on the House Ways and Means Committee,[207] "political injury,"[208] and a violation of his due process rights.[209] On these alleged injuries, the court generally concluded that Representative Rangel's claims failed on grounds of lack of causation and redressability. For example, although the court had no doubt that alleged injury to Representative Rangel's reputation was sufficiently concrete and particularized, the plaintiff's failure to sue the House itself doomed his ability to show causation. After all, the actions of the individual defendant House Members did not cause his injury—it was, as the court noted, the House that censured him, not the individual Member defendants.[210] Similarly, Representative Rangel was unable to demonstrate redressability because the court determined that it had no authority to order the House to rescind his censure, as authority over the House's Journal was constitutionally vested in the House itself.[211] As a consequence, a legislator plaintiff having a concrete and particularized injury is not alone sufficient to establish Article III standing, especially when the plaintiff seeks to involve the court in the internal affairs of the other branches of government.

Institutional Standing

The Supreme Court's decision in *Arizona State Legislature v. Arizona Independent Redistricting Commission* reinforces that an institutional plaintiff, like the Arizona state legislature, will typically have standing to assert an "institutional injury."[212] In that case, discussed above, the Court determined that the Arizona state legislature had standing based on the Redistricting Commission's usurpation of its "primary responsibility" for redistricting under the Constitution's Elections Clause.[213] Although the Court concluded that the legislature did not, in fact, have the exclusive authority it alleged, the Court nonetheless determined that this merits determination did not undercut the legislature's claim of injury for the purposes of justiciability.[214] This analysis indicates that an institution, such as a legislature as a whole, may potentially assert an institutional injury and obtain standing in federal court. The Court left open, however, the

[203] 20 F. Supp. 3d 148 (D.D.C. 2013), *aff'd on other grounds*, 785 F.3d 19 (D.C. Cir. 2015).

[204] *Id.* at 156-58.

[205] *Id.* at 157.

[206] *Id.* at 160.

[207] *Id.* at 162.

[208] *Id.* at 164.

[209] *Id.* at 165.

[210] *Id.* at 160-61.

[211] *Id.* at 175-76. In concluding that it could not grant the requested relief, the court relied on the political question doctrine, determining that it was constitutionally forbidden from injecting itself into review of the House's internal disciplinary process. *Id.*

[212] 135 S. Ct. 2652, 2664-65 (2015).

[213] *Id.* at 2663.

[214] *Id.* at 2665 ("one must not 'confus[e] weakness on the merits with absence of Article III standing.'") (quoting Davis v. United States, 564 U.S. 229, 249 n.10 (2011)).

possibility that separation-of-powers considerations could lead to a different result if the case instead involved Congress suing the President.[215]

In addition to the separation-of-powers concerns that might arise, *Arizona State Legislature* raises questions regarding who constitutes an institutional plaintiff and which institutional injuries are sufficiently concrete and particularized to give rise to standing.[216] These questions are the focus of the following sections.

The Significance of Explicit Congressional Authorization

Courts have routinely concluded that congressional plaintiffs who obtain authorization to sue before initiating litigation[217] are significantly more likely to have standing.[218] As one court has explained, the presence of authorization is the "key factor" when determining whether a congressional plaintiff possesses standing to vindicate an institutional injury on behalf of the authorizing institution.[219] When a legislative plaintiff possesses authorization to pursue litigation from its respective institution, it decreases the likelihood that the plaintiff is impermissibly attempting to assert the rights of a third party instead of proceeding on the institution's behalf.[220]

Although the *Arizona State Legislature* Court deemed it important that the legislative plaintiffs commenced the lawsuit after "authorizing votes in both of its chambers,"[221] that does not mean that a congressional plaintiff must always obtain the imprimatur of *both* the Senate and the House of Representatives in order to bring suit. Rather, courts have held that a plaintiff may sue on behalf of a single house of Congress to vindicate that particular chamber's unique institutional interests.[222]

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[215] *See id*. at 2665 n.12 ("The case before us does not touch or concern the question whether Congress has standing to bring a suit against the President. There is no federal analogue to Arizona's initiative power, and a suit between Congress and the President would raise separation-of-powers concerns absent here. The Court's standing analysis, we have noted, has been 'especially rigorous when reaching the merits of the dispute would force [the Court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.'") (quoting Raines v. Byrd, 521 U.S. 811, 819-20 (1997)).

[216] *Id.* at 2665 (holding that the Legislature's injury was sufficiently concrete because the Redistricting Commission's authority "completely nullif[ied]" any vote of the Legislature nor or in the future).

[217] The applicable procedure for obtaining congressional authorization to file and pursue a lawsuit varies depending on the circumstances. *See, e.g.*, 2 U.S.C. § 288b(b) ("[Senate Legal Counsel] shall bring a civil action to enforce a subp[o]ena of the Senate or a committee or subcommittee of the Senate . . . only when directed to do so by the adoption of a resolution by the Senate.").

[218] *See, e.g.*, *Ariz. State Legislature*, 135 S. Ct. at 2664; Comm. on the Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53, 71 (D.D.C. 2008).

[219] *See, e.g.*, *Miers*, 558 F. Supp. 2d at 71.

[220] *Compare, e.g.*, Hollingsworth v. Perry, 570 U.S. 693, 708 (2013) ("[I]n the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties.") (quoting Powers v. Ohio, 499 U.S. 400, 410 (1991)), *with, e.g.*, United States v. Am. Tel. & Tel. Co., 551 F.2d 384, 391 (D.C. Cir. 1976) ("The House of Representatives . . . authoriz[ed] Chairman Moss's intervention on behalf of the Committee and the House . . . 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.").

[221] 135 S. Ct. at 2664.

[222] *See* U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53, 71 n.21 (D.D.C. 2015) ("It is of course true that the House is but one chamber of Congress, and the Senate is not a plaintiff in this suit . . . Yet the House remains an institution claiming an institutional injury . . . The Court finds that the injury, although arguably suffered by the House and the Senate alike, is sufficiently concentrated on the House to give it independent standing to sue."). *See also, e.g.*, *AT&T*, 551 F.2d at 391 (determining "that the House [of Representatives] as a whole ha[d] standing to assert its investigatory power"); U.S. House of Representatives v. U.S. Dep't of Commerce, 11 F. Supp. 2d 76, 89 (D.D.C. 1998)

Several courts have considered what sort of authorization, short of authorizing votes in both chambers leading to a suit being brought by the institution itself, suffices to permit a suit on behalf of a legislative institution. A number of cases prior to *Arizona State Legislature* considered this question. The most common setting for these cases involved legislative demands for information. The Supreme Court has long recognized "that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function."[223] In other words, Congress has an interest in obtaining information necessary to fulfill its constitutionally designated role in the tripartite system of American government.[224] At the same time, however, courts have acknowledged a distinction between a chamber of Congress utilizing its *own* powers to demand and obtain information and invoking the *federal courts*' power to enforce its demands.[225] In order to utilize the judicial process—rather than the political process—to enforce congressional demands for information, Supreme Court precedent requires the plaintiffs to show that they are validly acting on behalf of the injured institution.[226]

In the 1976 case of *United States v. AT&T Co.*, for instance, the D.C. Circuit ruled that the chairman of the House Subcommittee on Oversight and Investigations had standing to appear in federal court to challenge the executive branch's objection to a subpoena that the subcommittee had issued to a private party.[227] The court reasoned "that the House as a whole has standing to assert its investigatory power, and can designate a member to act on its own behalf."[228] Crucially, because the House of Representatives had passed a resolution authorizing the chairman to participate in the case "on behalf of the Committee and the House," the chairman did not encounter the standing obstacles that might exist if "a single [M]ember of Congress" attempted "to advocate his own interest in the congressional subpoena power" without the affirmative consent of his or her respective chamber[229] or if "a wayward committee" were "acting contrary to the will of the House."[230] Although *AT&T* predates *Raines* and the subsequent D.C. Circuit cases interpreting it, courts have generally concluded that *AT&T*'s holding—namely, that congressional plaintiffs usually have standing to assert Congress's interests in obtaining information so long as they have congressional authorization to do so—survives *Raines*.[231] *AT&T's* holding comports

(concluding that "the House of Representatives" by itself had "pleaded a legally cognizable injury and satisfied Article III").

[223] *See* McGrain v. Daugherty, 273 U.S. 135, 174 (1927).

[224] *See id*.

[225] *See, e.g.*, Reed v. Cty. Comm'rs of Del. Cty., Pa., 277 U.S. 376, 389 (1928) ("Authority to exert the powers of the Senate to compel production of evidence differs widely from authority to invoke judicial power for that purpose.").

[226] *See, e.g.*, *id*. ("[T]he Senate did not intend to authorize the committee . . . to invoke the power of the Judicial Department. Petitioners are not authorized by law to sue.").

[227] 551 F.2d at 385-85, 387, 391. *AT&T* involved a congressional attempt to intervene in an ongoing lawsuit as a defendant, rather than an attempt to initiate a lawsuit as a plaintiff. *See id*. at 387 ("The Justice Department . . . brought an action in the name of the United States . . . and obtained a temporary restraining order prohibiting AT&T from complying with the Subcommittee subpoena. Chairman Moss was allowed to intervene as a defendant."). In line with the case law on intervention, *see infra* "Congressional Intervention to Defend a Statute's Constitutionality: Adversity and Standing Issues," courts have relied on *AT&T* when evaluating whether a congressional plaintiff has standing to initiate a lawsuit against the executive branch. *See, e.g.*, Comm. on Oversight & Gov't Reform v. Holder, 979 F. Supp. 2d 1, 21 (D.D.C. 2013); Comm. on the Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53, 71 (D.D.C. 2008).

[228] 551 F.2d at 391.

[229] *See id*.

[230] *See id*. at 393.

[231] *See, e.g.*, U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53, 68 (D.D.C. 2015) ("This Court agrees that *AT & T* survives *Raines*."); *Holder*, 979 F. Supp. 2d at 21 ("*Raines* . . . did not overrule or limit the precedent

with broader standing principles that a plaintiff may "designate agents to represent it in federal court" without running afoul of the standing requirement.[232]

In this vein, courts have held that a house of Congress can authorize a committee to sue on its behalf. For example, in the District Court for the District of Columbia's 2008 opinion in *Committee on the Judiciary, U.S. House of Representatives v. Miers*,[233] the House Committee on the Judiciary filed suit in federal court to enforce a subpoena it had issued against certain executive officials.[234] Critically, before the committee filed its lawsuit, the full House of Representatives passed a resolution authorizing the chairman of the committee "to initiate a civil action in federal court" to enforce the subpoena.[235] The court therefore ultimately concluded "that the Committee ha[d] standing to enforce its duly issued subpoena through a civil suit."[236] According to the court, the fact that the committee had "been expressly authorized by House Resolution to proceed on behalf of the House of Representatives *as an institution*" distinguished *Miers* from cases like *Raines* in which individual legislators had invalidly attempted to assert injuries to their respective institutions as a whole rather than to themselves personally.[237] In other words, "the fact that the House ha[d] issued a subpoena and explicitly authorized th[e] suit" was "the key factor that move[d *Miers*] from the impermissible category of an *individual* plaintiff asserting an *institutional* injury . . . to the permissible category of an *institutional* plaintiff asserting an *institutional* injury."[238] Thus, the committee, acting on the full House's behalf with the House's imprimatur, could validly sue "to vindicate both its right to the information that [was] the subject of the subpoena and its institutional prerogative to compel compliance with its subpoenas."[239]

Where, by contrast, a legislative plaintiff has *not* obtained congressional authorization to represent his respective house via an authorizing vote, courts have typically determined that the plaintiff lacks standing to sue to enforce subpoenas or otherwise assert an informational injury to Congress as a whole. For instance, in *Cummings v. Murphy*, the Seven-Member Rule case discussed above,[240] the court concluded that individual Members lacked standing to argue that they were, in fact, validly proceeding on behalf of the institution. As the court explained, "[i]ndividual Members of Congress generally do not have standing to vindicate the institutional interests of the house in which they serve"[241] unless they have obtained affirmative authorization

established in *AT & T I*."); *Miers*, 558 F. Supp. 2d at 71 ("The precedential value and force of *AT & T I* survive *Raines*."). *But see infra* "When Authorization Is Insufficient for Standing."

[232] *Cf.* Hollingsworth v. Perry, 570 U.S. 693, 710 (2013).

[233] *See* 558 F. Supp. 2d at 65-78.

[234] *See id*. at 55, 60, 64.

[235] *Id*. at 63.

[236] *Id*. at 68.

[237] *Id*. at 71 (emphasis in original).

[238] *Id*. (emphasis added).

[239] *Id*. at 78. *See also* Comm. on Oversight & Gov't Reform v. Holder, 979 F. Supp. 2d 1, 2-3, 20-21 (D.D.C. 2013) (concluding that House committee had standing to sue "to enforce a subpoena it issued to the Attorney General of the United States" in part because "the House of Representatives ha[d] specifically authorized the initiation of th[e] action to enforce the subpoena"). *Cf.* U.S. House of Representatives v. U.S. Dep't of Commerce, 11 F. Supp. 2d 76, 86 (D.D.C. 1998) ("[T]he House has Article III standing because it alleges that the use of statistical sampling will cause it to fail to receive census information to which it is entitled as a matter of law.").

[240] *See supra* "Distinguishing Personal from Institutional Injuries."

[241] 321 F. Supp. 3d 92, 105 (D.D.C. 2018). *Cf., e.g.*, Corman v. Torres, 287 F. Supp. 3d 558, 567 (M.D. Pa. 2018) ("We do not gainsay that these Senate leaders are in some sense aggrieved by the Pennsylvania Supreme Court's actions. But that grievance alone does not carry them over the standing bar. United States Supreme Court precedent is clear—a

from their respective chambers of Congress.[242] The court opined that "requiring authorization protects Congress' institutional concerns from the caprice of a restless minority of Members."[243] *Cummings* thus demonstrates that "it is not simply enough" for individual legislators "to point to an informational injury arising from an unmet statutory demand to demonstrate standing;"[244] courts generally also "look to the presence of authorization as a necessary . . . factor in evaluating standing in cases that pit the Executive and Legislative Branches against each other."[245]

Significantly, at least one opinion suggests that to validly authorize a plaintiff to pursue litigation on an institution's behalf, that institution must expressly authorize the plaintiff to bring *that specific lawsuit* prior to the commencement of that suit; a freestanding authorization to pursue litigation may not always suffice to confer standing. Namely, in *Walker v. Cheney*,[246] the Comptroller General[247] sought a court order requiring the Vice President to produce certain documents.[248] To support his argument that he possessed congressional authorization—and thus standing—to pursue this lawsuit on Congress's behalf, the Comptroller General invoked 31 U.S.C. § 716(b)(2), which purports to authorize the Comptroller General to "bring a civil action in the district court of the United States for the District of Columbia to require the head of [an executive] agency to produce a record."[249] The court, however, rejected that argument, concluding that this "*generalized* allocation of enforcement power" did not suffice to establish "that the current Congress ha[d] authorized the Comptroller General to pursue a judicial resolution of the *specific* issues" in the case before the court.[250] To support that conclusion, the court emphasized that no committee requested the documents or issued a subpoena requiring the Vice President to produce them.[251] Thus, in spite of the aforementioned statutory language purporting to empower the Comptroller General to bring suit, the court determined that "neither House of Congress, and no congressional committee, ha[d] authorized the Comptroller General to pursue the requested information through [a] judicial proceeding."[252]

When Authorization Is Insufficient for Standing

Even where a legislature as a whole has purported to authorize a particular plaintiff to file suit on its behalf, that plaintiff must still satisfy the various requirements of standing, including the

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legislator suffers no Article III injury when alleged harm is borne equally by all members of the legislature.").

[242] *See* 321 F. Supp. 3d at 105-06 ("[Cases in which courts have permitted individual legislators to sue] have arisen almost exclusively in the subpoena enforcement context and have involved circumstances in which the plaintiff was a congressional committee that was duly authorized to bring suit by House resolution. In those cases, courts have found congressional authorization to be the key distinguishing factor, moving the case from the impermissible category of an individual plaintiff asserting an institutional injury in *Raines* to the permissible category of an institutional plaintiff asserting an institutional injury.") (internal citations, brackets, and quotation marks omitted).

[243] *Id*. at 115.

[244] *Id*. at 107.

[245] *Id*. at 115.

[246] 230 F. Supp. 2d 51 (D.D.C. 2002).

[247] The Comptroller General, as head of the Government Accountability Office, is generally deemed "an agent of the Legislative Branch." *Id*. at 53.

[248] *See id*. at 58.

[249] *See id*. at 54.

[250] *Id.* at 69 (emphasis added).

[251] *Id*. at 68 ("[T]he record reflects that Congress as a whole has undertaken no effort to obtain the documents at issue, that no committee has requested the documents, and that no congressional subpoena has been issued.").

[252] *Id*. at 61-62.

requirements of concrete and particular injury as to that institution.[253] To illustrate, whereas a legislative plaintiff acting pursuant to the authorization of its respective institution generally possesses standing to sue to redress concrete and particular informational injuries to that institution,[254] even an entire legislative body proceeding under valid authorization will not have standing to assert abstract or nonparticular injuries.[255] As an example of a putative injury in the latter category, courts have generally rejected the idea that legislatures have standing based on their duty to legislate to challenge allegedly illegal acts by the Executive.[256] In *Alaska Legislative Council v. Babbitt*, for instance, the D.C. Circuit determined that the Alaska Legislative Council lacked standing to challenge federal management of subsistence taking of fish and wildlife on federal lands in Alaska.[257] The council claimed that it was injured because individual Alaskan legislators had a "duty to legislate for the management of all the State's resources" and the federal program interfered with this duty.[258] Although the Alaska legislature had not explicitly voted to authorize the council to sue, the court assumed the plaintiff possessed such authorization because of its status as a "permanent interim committee and service agency of the legislature."[259] Despite this authorization, the court concluded that the committee lacked standing because its injuries did not belong to it, but rather, belonged to the "State itself," and only the governor could bring that suit on behalf of Alaska.[260] The legislature had thus failed to identify a "separate [and] identifiable" injury entitling it to sue.[261]

Additionally, several courts have concluded that legislative plaintiffs lack standing to assert a generalized interest in the proper interpretation or application of a statute irrespective of whether the full legislative body has authorized the plaintiffs to sue. For instance, *Newdow v. U.S. Congress* involved a challenge brought by an individual plaintiff to the constitutionality of the Pledge of Allegiance's use of the phrase "under God."[262] After the Ninth Circuit had issued a ruling allowing the case to proceed, the Senate moved to intervene in the case pursuant to a provision of the U.S. Code giving the Senate Legal Counsel the right to intervene unless the Senate would lack "standing to intervene under . . . [A]rticle III of the Constitution."[263] The court concluded that this language required it to examine the Senate's putative interest in the case at

[253] *Cf.* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2665 (2015) (holding that state legislature's alleged injury was not "too 'conjectural' or 'hypothetical' to establish standing").

[254] *See, e.g.*, Comm. on the Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53, 71 (D.D.C. 2008) ("The injury incurred by the Committee, for Article III purposes, is both the loss of information to which it is entitled and the institutional diminution of its subpoena power.").

[255] *See, e.g.*, Alaska Legislative Council v. Babbitt, 181 F.3d 1333, 1338 (D.C. Cir. 1999) (concluding that individual legislators' asserted injury was "nothing more than an 'abstract dilution of institutional legislative power'" and was therefore insufficient to confer standing) (quoting Raines v. Byrd, 521 U.S. 811, 826 (1997)).

[256] *See, e.g.*, *id*. at 1337-38 (rejecting argument that state legislators possessed standing in furtherance of their putative "affirmative duty to legislate for the management of all of the State's resources").

[257] *See id*. The court also concluded that individual Alaskan state legislators lacked standing because their injury was "nothing more than an 'abstract dilution of institutional legislative power'" that was indistinguishable from the injury rejected in *Raines*. *Id.* at 1338.

[258] *Id.* at 1337.

[259] *Id.* at 1335.

[260] *Id.* at 1338-39.

[261] *Id.* at 1339.

[262] 313 F.3d 495, 496 (9th Cir. 2002) (challenging 4 U.S.C. § 4).

[263] *Id.* at 497. The problems particular to intervention cases in general are discussed in greater detail below. *See* "Congressional Intervention to Defend a Statute's Constitutionality: Adversity and Standing Issues." However, the nature of the statute at issue caused the court to examine injury-in-fact as it would apply in a straightforward standing case. *Newdow*, 313 F.3d at 496.

hand.[264] The Ninth Circuit denied the Senate's motion,[265] concluding that the Senate lacked standing to defend the law's constitutionality.[266] The court explained that a "general desire to see the law enforced as written" did not suffice to give standing to a house of Congress to defend the law.[267]

A more recent consideration of institutional standing occurred in the 2015 case of *United States House of Representatives v. Burwell*.[268] In that case, the House of Representatives asserted two claims against various executive branch entities: (1) a constitutional claim that the defendants "spent billions of unappropriated dollars to support the Patient Protection and Affordable Care Act" (ACA) in violation of the Appropriations Clause of the U.S. Constitution;[269] and (2) a statutory claim that the Secretary of the Treasury, "under the guise of implementing regulations," had "effectively amended" certain aspects of the ACA "by delaying its effect and narrowing its scope."[270] The court concluded that the House possessed standing to pursue the constitutional claim but not the statutory claim.[271] The court first determined that the House had standing to pursue its constitutional claim[272] because "Congress (of which the House and Senate are equal) is the only body empowered by the Constitution to adopt laws directing monies to be spent from the U.S. Treasury," and the Executive's alleged circumvention of that structure was a sufficiently concrete and particularized injury as to the House as a whole.[273] However, the district court then ruled that the House lacked standing to pursue its parallel challenges to the Executive's alleged violation of the statutory scheme,[274] reasoning that Article III does not create "general legislative standing" by which the branches of Congress may sue the Executive for any alleged violation of statutes or the Constitution by the Executive.[275] Because the Executive's alleged violation of the ACA would cause the House "no *particular* harm," the House lacked standing to pursue its statutory claim.[276]

Burwell also rejected the argument that separation-of-powers concerns required the dismissal of the House's claims.[277] In *Arizona State Legislature*, the Court had noted that such concerns might be significant in a dispute between Congress and the President,[278] but the *Burwell* court dismissed such concerns as *dicta* and did not find them controlling.[279] Instead, the court determined that the case presented a "plain dispute over a constitutional command" that the judiciary was well suited

[264] 313 F.3d at 498 ("As the intervention statute at hand expressly recognizes, the Senate must show that it does have constitutional standing to intervene. That means at the very least that it must show that it has 'suffered an "'injury in fact'—an invasion of a legally protected interest which is . . . concrete and particularized.'"').

[265] *Id.* at 500.

[266] *Id.* at 497-98.

[267] *Id.* at 498.

[268] 130 F. Supp. 3d 53 (D.D.C. 2015).

[269] *See* U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . .").

[270] 130 F.3d at 57.

[271] *Id.* at 70-72.

[272] *Id.* at 62-63.

[273] *Id.* at 71.

[274] *Id.* at 75-77.

[275] *Id.* at 75.

[276] *Id.* at 74.

[277] *Id.* at 80.

[278] Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2665 n.12 (2015).

[279] *Burwell*, 130 F.3d at 69.

to resolve.[280] These separation-of-powers concerns, particularly as they relate to Congress's interests with respect to the executive branch's execution of a statutory scheme, play a particularly important role in answering the question of when Congress can intervene in litigation, as discussed below.[281]

Congressional Intervention to Defend a Statute's Constitutionality: Adversity and Standing Issues

Whereas the analysis above focuses mainly on congressional entities filing their *own* lawsuits as *plaintiffs*, legislators or a legislature as a whole may also attempt to participate in *ongoing* litigation between nonlegislative parties in a variety of ways. The procedural rules governing the federal courts contemplate that, subject to specified conditions, a nonparty may "intervene" in an existing federal case.[282] Generally, if a court permits an entity to intervene in a case, that entity becomes a full party to the litigation and may freely participate in the case to the same extent as the original parties.[283] For instance, subject to certain exceptions and conditions, an intervenor may generally (among other things) file briefs and motions, participate in discovery, and appeal adverse judgments.[284]

As relevant here, congressional litigants periodically attempt to intervene in existing federal cases initiated by noncongressional parties.[285] As explained in the following subsections, whether such attempts ultimately succeed depends on a variety of factors that to a large degree mirror the considerations relevant to whether a legislative plaintiff may initiate new litigation in federal court.[286]

Justiciability Issues Involved in Intervention

One potentially key—albeit infrequent[287]—situation in which a congressional entity may attempt to intervene in an ongoing lawsuit is when the executive branch declines to defend the

[280] *Id*. at 80.

[281] *See infra* "Justiciability Issues Involved in Intervention."

[282] *See generally* FED. R. CIV. P. 24.

[283] *See, e.g.*, United States v. Cal. Mobile Home Park Mgmt. Co., 107 F.3d 1374, 1378 (9th Cir. 1997) ("[I]ntervening parties have full party status in the litigation commencing with the granting of the motion to intervene."); Schneider v. Dumbarton, 767 F.2d 1007, 1017 (D.C. Cir. 1985) ("When a party intervenes, it becomes a full participant in the lawsuit and is treated just as if it were an original party.").

[284] *See, e.g.*, Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 375-76 (1987) ("An intervenor, whether by right or by permission, normally has the right to appeal an adverse final judgment by a trial court."); Danielle R. Holley, *Narrative Highground: The Failure of Intervention as a Procedural Device in Affirmative Action Litigation*, 54 CASE W. RES. L. REV. 103, 110 (2003) ("Intervenors may file motions, participate in discovery, introduce direct testimony, conduct cross-examination, and appeal adverse rulings.").

[285] *See, e.g.*, Smith v. Nat'l Provisioner, Inc. (*In re* Beef Indus. Antitrust Litig.), 589 F.2d 786, 787 (5th Cir. 1979) ("The chairmen of two subcommittees of the House of Representatives . . . seek to intervene in an antitrust suit pending in district court among private litigants in order to gain access to documents subpoenaed by the subcommittees from a party to the litigation.").

[286] *Compare, e.g.*, Paisley v. CIA, 724 F.2d 201, 204 (D.C. Cir. 1984) ("The motion of the Senate Select Committee on Intelligence to intervene is granted."), *with, e.g.*, S. Christian Leadership Conference v. Kelley, 747 F.2d 777, 778 (D.C. Cir. 1984) ("We affirm denial of the [Senator's] motion for intervention because the movant lacks a protectable interest sufficient to confer standing.").

[287] *See* Tara Leigh Grove & Neal Devins, *Congress's (Limited) Power to Represent Itself in Court*, 99 CORNELL L. REV. 571, 595 (2014) ("From December 1975 to May 2011, the DOJ notified Congress that it would not defend seventy-five

constitutionality of a federal statute.[288] For instance, the U.S. House of Representatives recently intervened in the case of *Texas v. United States* to defend the constitutionality of provisions of the Affordable Care Act after the executive branch declined to defend the law in its entirety.[289] As explained below, at least two questions may arise when Congress (or a Member, committee, or house thereof) attempts to intervene to defend a statute's validity: (1) whether the executive branch's refusal to defend the statute renders the original parties insufficiently adverse to create a justiciable controversy; and (2) whether Congress possesses standing to intervene in the case.

With regard to the first question, whenever a plaintiff sues the United States to invalidate a federal statute, and the United States does not dispute the plaintiff's assertion that the statute is unconstitutional, the fact that none of the named litigants wishes to defend the statute's validity creates a potential risk that the original parties are not truly adverse to each other.[290] The Supreme Court has ruled that "the business of federal courts" is limited "to questions presented in an adversary context," rather than lawsuits between friendly parties.[291] Like standing, this "adversity" requirement is a justiciability doctrine that the Supreme Court has derived (at least in part) from Article III's "case or controversy" language.[292] The Supreme Court has held that where "both litigants desire precisely the same result" in a particular case, there is generally "no case or controversy within the meaning of [Article] III of the Constitution," and a federal court accordingly lacks jurisdiction over the case.[293] In addition to this constitutional foundation, the Supreme Court has recognized that the adversity requirement also has a prudential dimension.[294] In other words, "even when Article III permits the exercise of federal jurisdiction, prudential considerations" may sometimes counsel against adjudicating a lawsuit where the parties lack that "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[295]

With respect to the second question, while the standing doctrine is generally concerned with whether a *plaintiff* is a proper party to a particular lawsuit, other putative parties who are not plaintiffs, but are seeking distinct judicial relief from a federal court—such as intervenor-

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different statutory provisions. In only five of those cases did either chamber step in to defend the federal law (sometimes as amicus, sometimes as intervenor).").

[288] *See, e.g.*, Windsor v. United States, 797 F. Supp. 2d 320, 321-22, 324 (S.D.N.Y. 2011) ("[BLAG] decided to seek approval to intervene in this litigation to defend the constitutionality of Section 3 of DOMA . . . BLAG has a cognizable interest in defending the enforceability of statutes the House has passed when the President declines to enforce them.").

[289] *See* Motion of the U.S. House of Representatives to Intervene at 3, Texas v. United States, No. 19-10011 (5th Cir. Jan. 7, 2019). *See also* Order, Texas v. United States, No. 19-10011 (5th Cir. Feb. 14, 2019) ("IT IS ORDERED that the opposed motion to intervene filed by the U.S. House of Representatives is GRANTED.").

[290] *See* United States v. Windsor, 570 U.S. 744, 761 (2013) (acknowledging the Court's "concerns . . . against hearing an appeal from a decision with which the principal parties agree"); *id*. at 762 ("The Executive's failure to defend the constitutionality of an Act of Congress . . . has created a procedural dilemma.").

[291] GTE Sylvania, Inc. v. Consumers Union of United States, Inc., 445 U.S. 375, 382 (1980) (quoting Flast v. Cohen, 392 U.S. 83, 95 (1968)).

[292] U.S. CONST. art. III, § 2, cl. 1.

[293] Moore v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 47, 48 (1971).

[294] *See Windsor*, 570 U.S. at 756 ("The amicus submits that once the President agreed with Windsor's legal position and the District Court issued its judgment, the parties were no longer adverse . . . This position, however, elides the distinction between two principles: the jurisdictional requirements of Article III and the prudential limits on its exercise."); INS v. Chadha, 462 U.S. 919, 940 (1983) ("Of course, there may be prudential, as opposed to Art. III, concerns about sanctioning the adjudication of this case in the absence of any participant supporting the validity of § 244(c)(2).").

[295] *Windsor*, 570 U.S. at 760 (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).

defendants or defendant-appellants—likewise need to demonstrate that they possess standing in order to obtain the relief sought.[296] For example, in *Diamond v. Charles*, the Supreme Court concluded that an intervenor lacked standing to appeal an adverse judgment against the original defendant after that defendant declined to file an appeal of its own.[297] Under Supreme Court precedent, as long as the existing parties to the case present a justiciable controversy on their own, an intervenor need not independently possess standing to participate in the lawsuit so long as the intervenor seeks the same judicial relief as one or more of the existing parties.[298] To the extent an intervenor seeks "relief that is different from that which is sought by a party with standing," however, that intervenor must independently "possess Article III standing to intervene" in the case.[299]

The Supreme Court has periodically considered how the adversity and standing doctrines apply in the congressional intervention context and has ultimately concluded that cases in which the executive branch declines to defend a federal statute and Congress steps in to defend the law may potentially be justiciable.[300] For instance, in *Immigration and Naturalization Service (INS) v. Chadha*, an alien challenged the constitutionality of a particular provision of the Immigration and Nationality Act that had authorized one house of Congress, by resolution, to invalidate the decisions of the executive branch.[301] Because the INS agreed with the alien that this "one-house veto" provision was unconstitutional,[302] the Court needed to examine whether the case presented "a genuine controversy" rather than a nonjusticiable "non-adversary[] proceeding" between two friendly parties.[303] Crucially, however, both the Senate and the House had intervened in the case to defend the statute's constitutionality.[304] The Court therefore held that, because Congress was "a proper party to defend the constitutionality of" this statute, "the concrete adverseness" required by Article III existed "beyond doubt" "from the time of Congress' formal intervention" in the case.[305] Going further, the Court also explained in *dicta* that "there was adequate [Article] III

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[296] *See* Matthew L. Hall, *Standing of Intervenor-Defendants in Public Law Litigation*, 80 FORDHAM L. REV. 1539, 1541 (2012) ("The doctrine of standing is generally understood to limit the ability of plaintiffs to seek relief in federal court . . . What has gone largely unnoticed . . . is the degree to which Article III restricts who may defend against a claim in federal court. This aspect of standing doctrine is so under-appreciated that some courts and scholars have even asserted, incorrectly, that Article III's standing restrictions apply only to plaintiffs."). *See also* Town of Chester, N.Y. v. Laroe Estates, Inc., 137 S. Ct. 1645, 1651 (2017) ("An intervenor of right must have Article III standing in order to pursue relief that is different from that which is sought by a party with standing."); Wittman v. Personhuballah, 136 S. Ct. 1732, 1734-37 (2016) (deciding that intervenor-defendants lacked Article III standing to appeal adverse judgment); Hollingsworth v. Perry, 570 U.S. 693, 697-715 (2013) (same).

[297] 476 U.S. 54, 56-70 (1986).

[298] *See Windsor*, 570 U.S. at 761-62 ("The prudential and Article III requirements are met here; and, as a consequence, the Court need not decide whether BLAG would have standing to challenge the District Court's ruling and its affirmance in the Court of Appeals on BLAG's own authority."); McConnell v. Fed. Election Comm'n, 540 U.S. 93, 233 (2003) (Rehnquist, C.J., opinion of the Court with respect to BCRA Titles III and IV) ("It is clear, however, that the Federal Election Commission (FEC) has standing, and therefore we need not address the standing of the intervenor-defendants, whose position here is identical to the FEC's."), *overruled on other grounds by* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

[299] *Town of Chester*, 137 S. Ct. at 1648, 1651.

[300] Brianne J. Gorod, *Defending Executive Nondefense and the Principal-Agent Problem*, 106 NW. U. L. REV. 1201, 1249 (2012) ("The ability of Congress as an institution to participate in litigation has repeatedly been recognized especially in cases where the Executive Branch has failed to defend the statute at issue.").

[301] 462 U.S. 919, 923 (1983).

[302] *Id*. at 928, 939.

[303] *Id*. at 939.

[304] *Id*. at 930 n.5.

[305] *Id*. at 939.

adverseness" in the case even "*prior* to Congress' intervention" because the "INS would have deported" the alien against his wishes if the federal courts had rejected the alien's constitutional challenge.[306] In other words, because the INS would have *enforced* the challenged statute despite its unwillingness to *defend* the statute's constitutionality in a judicial proceeding, the majority viewed the case as presenting a justiciable controversy between the INS and the alien even if Congress had never intervened.[307] Although the *Chadha* Court also acknowledged that "there may be prudential, as opposed to [Article] III, concerns about sanctioning the adjudication of th[e] case in the absence of any participant supporting the validity of" the provision's constitutionality, the Supreme Court explained that the lower court had "properly dispelled any such concerns by inviting and accepting briefs from both Houses of Congress."[308] The Court further opined that "Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with [the] plaintiffs that the statute is inapplicable or unconstitutional."[309]

Prior to the Supreme Court's 2013 decision in *United States v. Windsor*, one might plausibly read *Chadha* to stand for the limited proposition that Congress may intervene to defend an undefended federal law (albeit one that the Executive has continued to enforce) only when the judicial invalidation of that law would directly affect Congress's institutional powers, such as by eliminating Congress's ability to validly utilize a one-house legislative veto.[310] In *Windsor*, however, the Court appeared to implicitly adopt a broader conception of *Chadha* by permitting a congressional entity to intervene to defend an undefended law even though the statute at issue had no direct bearing on Congress's institutional powers.[311] The respondents in *Windsor* challenged the constitutionality of a provision of the Defense of Marriage Act (DOMA) on equal protection grounds.[312] During the course of the litigation, however, "the Attorney General of the United States notified the Speaker of the House of Representatives . . . that the Department of Justice would no longer defend the constitutionality of" the challenged provision.[313] Nevertheless, the Attorney General stated that he would continue to *enforce* the provision in order to "provid[e] Congress a full and fair opportunity to participate in the litigation" over the provision's validity, and accordingly appealed the lower court's judgment invalidating the statute to the Supreme Court.[314] After the Attorney General announced that he would not defend the statute, the House's

[306] *Id*. at 939-40 (emphasis added).

[307] *Id*. *See also* Michael Sant'Ambrogio, *Standing in the Shadow of Popular Sovereignty*, 95 B.U. L. REV. 1869, 1911 (2015) (describing "the executive's actions in *Chadha*" as "enforcing, but not defending the challenged law, and appealing adverse judicial decisions").

[308] 462 U.S. at 940.

[309] *Id*.

[310] *See* United States v. Windsor, 570 U.S. 744, 783 (2013) (Scalia, J., dissenting) ("Because *Chadha* concerned the validity of a mode of congressional action—the one-house legislative veto—the House and Senate were threatened with destruction of what they claimed to be one of their institutional powers. The Executive choosing not to defend that power, we permitted the House and Senate to intervene. Nothing like that is present here."). *See also* Matthew I. Hall, *Making Sense of Legislative Standing*, 90 S. CAL. L. REV. 1, 20 (2016) ("*Chadha* can be read either broadly—as permitting legislative standing to defend any of Congress's 'legislative handiwork' against challenge—or narrowly—as recognizing legislative injury only from potential invalidation of a statute that confers a concrete power on Congress.").

[311] *See* 570 U.S. at 758-60 (majority opinion). *But see* Hall, *supra* note 310, at 20 (arguing that the Court has not yet explicitly resolved whether *Chadha* stands for the broader principle that Congress has "standing to defend any of Congress's 'legislative handiwork' against challenge" or the narrower principle that only "potential invalidation of a statute that confers a concrete power on Congress" suffices to constitute a "legislative injury").

[312] 570 U.S. at 751.

[313] *Id*. at 753.

[314] *Id*. at 754.

Bipartisan Legal Advisory Group (BLAG)—which is "composed of the Speaker and the majority and minority leaderships" of the House[315]—"voted to intervene in the litigation to defend the constitutionality of" the provision.[316] The district court permitted BLAG to intervene.[317]

Because "the Government largely agree[d] with the opposing part[ies] on the merits of the controversy,"[318] the Supreme Court needed to determine whether the executive branch's "concession that [the challenged provision was] unconstitutional" rendered the case nonjusticiable on adversity grounds.[319] The Court first concluded that the case presented "a justiciable dispute as required by Article III" because (1) the executive branch had announced its "inten[tion] to enforce the challenged law" if the court ultimately deemed the provision constitutional;[320] and (2) the lower court had "order[ed] the United States to pay money" to the challengers "that it would not disburse but for the court's order."[321] The Court accordingly determined that "the United States retain[ed] a stake sufficient to support Article III jurisdiction on appeal and in proceedings before th[e] Court."[322]

The Court next concluded that the legislative branch's presence in the case alleviated any purely prudential concerns posed by the executive branch's refusal to defend the provision's validity.[323] The Court explained that "BLAG's sharp adversarial presentation of the issues satisfie[d] the prudential concerns that otherwise might counsel against hearing an appeal from a decision with which the principal parties agree."[324] Critically, because Windsor and the United States presented a justiciable controversy within the meaning of Article III on their own, the Court did not need to resolve whether BLAG would have independently possessed Article III standing to intervene in the case and defend the statute on its own authority.[325] As explained in greater detail below, however, the Court also implied that it might have deemed the case nonjusticiable if the Executive had declined to *enforce* the challenged statute in addition to merely refusing to defend its constitutionality.[326]

Chadha and *Windsor* thus stand for the propositions that (1) the Executive's refusal to defend a statute will not always render the lawsuit challenging that statute nonjusticiable; and (2) congressional intervention in ongoing federal litigation does not necessarily raise Article III standing problems[327]—at least as long as Congress does not pursue additional relief beyond a

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[315] H.R. RULE II(8)(b) (116th Cong.).

[316] 570 U.S. at 754.

[317] Windsor v. United States, 797 F. Supp. 2d 320, 321-26 (S.D.N.Y. 2011).

[318] 570 U.S. at 759 (quoting INS v. Chadha, 462 U.S. 919, 940 n.12 (1983)).

[319] *Id*. at 756.

[320] *Id*. at 759.

[321] *Id*. at 758.

[322] *Id*. at 757.

[323] *See id*. at 759-63.

[324] *Id*. at 761. *See also id*. at 763 ("The capable defense of the law by BLAG ensures that these prudential issues do not cloud the merits question, which is one of immediate importance to the Federal Government and to hundreds of thousands of persons.").

[325] *See id*. at 761-62 ("The prudential and Article III requirements are met here; and, as a consequence, the Court need not decide whether BLAG would have standing to challenge the District Court's ruling and its affirmance in the Court of Appeals on BLAG's own authority.").

[326] *See id*. at 758 ("It would be a different case if the Executive had taken the further step of paying Windsor the refund to which she was entitled under the District Court's ruling.").

[327] *See* Grove & Devins, *supra* note 287, at 623 (emphasizing that, despite the doctrinal disagreements between the majority and dissenting justices, "no Justice in *Windsor* challenged the power of the House or the Senate to sometimes

judgment in the United States' favor.[328] To that end, lower federal courts have frequently permitted legislative actors to intervene as defendants in cases where the executive branch agreed with the plaintiff that a challenged statute was unconstitutional.[329]

Still, the federal courts' Article III jurisdiction to adjudicate such cases may not be unlimited. Although *Chadha* and *Windsor* suggest that Congress may help alleviate prudential *adversity* problems created by the executive branch's nondefense of a statute by intervening to defend the challenged law, neither case says anything definitive about whether a congressional intervenor would have independently possessed *Article III standing* in those cases, especially in cases where the Executive refuses to enforce the underlying statute.[330] Because the Executive continued to enforce the challenged statutes in *Chadha* and *Windsor* despite its refusal to defend their constitutionality,[331] the Court concluded that the "refusal of the Executive to provide the relief sought" by the plaintiff "suffice[d] to preserve a justiciable dispute as required by Article III"[332] regardless of whether or not Congress had intervened to mitigate any purely prudential obstacles to justiciability resulting from the Executive's refusal to defend the law.[333] In other words, because "the United States retains a stake sufficient to support Article III jurisdiction" when it continues to enforce a statute that it declines to defend in court, the existence of a justiciable controversy between the plaintiff and the United States relieved the congressional intervenors in *Chadha* and *Windsor* of the burden to independently demonstrate Article III standing of their own

stand in for the executive and defend federal statutes").

[328] *See supra* notes 298-299 and accompanying text.

[329] *See, e.g.*, Adolph Coors Co. v. Brady, 944 F.2d 1543, 1546 (10th Cir. 1991) ("The Treasury admitted in its answer that [certain challenged statutory provisions] are unconstitutional under the First Amendment . . . The House, however, moved to intervene in order to defend the constitutionality of the statute."); Lear Sigler, Inc. v. Lehman, 893 F.2d 205, 206-07 (9th Cir. 1989) (explaining that Senate and House of Representatives were permitted to intervene to defend constitutionality of statute that "the Navy originally had treated as unconstitutional"); Synar v. United States, 626 F. Supp. 1374, 1378-1379 (D.D.C. 1986), *aff'd*, Bowsher v. Synar, 478 U.S. 714 (1986) (permitting the U.S. Senate and the Speaker and Bipartisan Leadership Group of the House of Representatives to intervene "in support of the constitutionality of" a statute that, in the executive branch's view, "violate[d] the principle of separation-of-powers"); Ameron, Inc. v. U.S. Army Corps. of Eng'rs, 607 F. Supp. 962, 963 (D.N.J. 1985), *aff'd as modified*, 809 F.2d 979 (3d Cir. 1986) (granting "motions to intervene . . . from the Speaker and Bipartisan Leadership Group of the House of Representatives and from the U.S. Senate" on the ground that "Congress is the proper party to defend the validity of a statute when [the executive branch argues] that the statute is inapplicable or unconstitutional") (quoting INS v. Chadha, 462 U.S. 919, 940 (1983)). *Cf., e.g.*, Benny v. England (*In re* Benny), 812 F.2d 1133, 1135 (9th Cir. 1987) ("The Department of Justice intervened . . . in support of Benny's position that the sections were unconstitutional. The United States Senate . . . and the Speaker and Bipartisan Leadership Group of the House of Representatives . . . sought leave to intervene, which the court granted, and argued that the sections were constitutional."); Moody v. Empire Life Ins. Co. (*In re* Moody), 46 B.R. 231, 232-33 (M.D.N.C. 1985) (granting motion of the "Speaker of the House of Representatives[] to intervene" to "present the official constitutional defense" to a challenged statute after the United States intervened to argue that sections of the statute were unconstitutional).

[330] *See* Bradford C. Mank, *Does* United States v. Windsor *(The DOMA Case) Open the Door to Congressional Standing Rights?*, 76 U. PITT. L. REV. 1, 1-2 (2014).

[331] *Windsor*, 570 U.S. at 754-55 ("Although the President instructed the Department [of Justice] not to defend the statute . . . he also decided that Section 3 will continue to be enforced by the Executive Branch . . . The United States has not complied with the judgment. Windsor has not received her refund, and the Executive Branch continues to enforce § 3 of DOMA.") (internal quotation marks and ellipses omitted); *Chadha*, 462 U.S. at 939 ("The INS's agreement with Chadha's position does not alter the fact that the INS would have deported Chadha absent the Court of Appeals' judgment.").

[332] *Windsor*, 570 U.S. at 759.

[333] *See Chadha*, 462 U.S. at 939 (concluding that "there was adequate Art[icle] III adverseness" in the case even "*prior* to Congress' intervention") (emphasis added).

before participating in the case.[334] The *Windsor* Court expressly declined to decide, however, "whether BLAG would have standing to" defend DOMA "on BLAG's own authority" if the Executive had also refused to *enforce* the statute in addition to merely refusing to defend it.[335]

The dissenting Justices in *Windsor*—who disagreed with the majority on the issue of adversity and therefore had to reach the standing question—could not agree on whether and when a house of Congress possesses standing to defend an undefended statute.[336] Justice Alito, for instance, reasoned that "in the narrow category of cases in which a court strikes down an Act of Congress and the Executive declines to defend the Act, Congress both has standing to defend the undefended statute and is a proper party to do so."[337] According to Justice Alito, "because legislating is Congress' central function," a judicial decision "striking down an Act of Congress" injures each chamber of Congress as an institution by "impair[ing] Congress' legislative power."[338] By contrast, Justice Scalia, joined by Chief Justice Roberts and Justice Thomas, instead suggested that the legislative branch possesses standing to intervene in such lawsuits only when the case implicates "the validity of a mode of congressional action," such as the one-house legislative veto challenged in *Chadha*.[339] According to Justice Scalia, Congress may only "hale the Executive before the courts . . . to vindicate its own institutional powers to act," not "to correct a perceived inadequacy in the execution of its laws"—which, in Justice Scalia's view, does not constitute an institutional injury to Congress itself.[340] As this exchange between the dissenting Justices in *Windsor* reflects, the circumstances under which Congress may permissibly intervene to defend the validity of a statute the Executive refuses to enforce remains an unanswered question, and the answer to that question will likely implicate the same sorts of policies and principles that animate the doctrines governing whether and when a plaintiff may sue to vindicate Congress's institutional interests.[341]

Other Relevant Considerations in Intervention

In addition to the adversity and standing doctrines discussed above, other legal principles may also affect whether a congressional entity may permissibly intervene in a federal case to defend a statute's constitutionality or for some other purpose. For one, just as a legislator ordinarily may not *initiate* a lawsuit without the affirmative consent of his or her respective house,[342] a congressional entity typically cannot *intervene* in a preexisting federal case without first obtaining authorization to do so.[343] Where congressional entities have first obtained authorization to

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[334] *Windsor*, 570 U.S. at 757.

[335] *Id*. at 761. *See also id*. at 758 ("It would be a different case if the Executive had taken the further step of paying Windsor the refund to which she was entitled under the District Court's ruling."); Bradford C. Mank, *Does a House of Congress Have Standing Over Appropriations?: The House of Representatives Challenges the Affordable Care Act*, 19 U. PA. J. CONST. L. 141, 177 (2016) ("The Court avoided the contentious issue of whether Congress or a house of Congress would have had standing to appeal if the executive branch had refused to enforce DOMA entirely.").

[336] *Compare* 570 U.S. at 783 (Scalia, J., dissenting), *with id.* at 807 (Alito, J., dissenting).

[337] *Id*. at 807 (Alito, J., dissenting).

[338] *Id*. at 805.

[339] *Id*. at 783 (Scalia, J., dissenting).

[340] *Id*. at 788-89.

[341] *See supra* "Institutional Injury."

[342] *See supra id*.

[343] *See, e.g.*, Smith v. Nat'l Provisioner, Inc. (*In re* Beef Indus. Antitrust Litig.), 589 F.2d 786, 787 (5th Cir. 1979) (rejecting attempt by "[t]he chairmen of two subcommittees of the House of Representatives" to "intervene in an antitrust suit . . . among private litigants in order to gain access to documents subpoenaed by the subcommittees"

participate in an ongoing lawsuit from their respective houses, however, courts have typically allowed those entities to intervene.[344] However, a congressional entity seeking to intervene in ongoing litigation must comply with all applicable statutory[345] and procedural[346] rules governing legislative intervention in federal court.[347]

Participation as *Amicus Curiae*

If Congress (or a unit or individual Member thereof) cannot participate as a full party to a particular lawsuit due to one or more of the constitutional, statutory, procedural, and prudential obstacles discussed above, it may still be able to participate in the case in a more limited capacity as an *amicus curiae*.[348] An *amicus curiae*—a Latin term for "friend of the court"—is an entity with "a strong interest in the subject matter" of a particular case that may submit legal briefs or other filings to the court in support of (or against) a particular position,[349] but may not otherwise participate in the suit to the same extent as an original party or an intervenor.[350]

Members, houses, and committees of Congress have successfully filed amicus briefs in a wide variety of cases.[351] To name just a few salient examples, after the executive branch declined to defend the validity of the independent counsel provision of the Ethics in Government Act, "both

because the chairmen "failed to obtain a House resolution or any other similar authority before they sought to intervene"); Ctr. for Biological Diversity v. Brennan, 571 F. Supp. 2d 1105, 1126 (N.D. Cal. 2007) (denying individual legislators' attempt to intervene in case without first obtaining "authoriz[ation] to represent their respective Houses of Congress in th[e] action").

[344] *See* United States v. AT&T Co., 551 F.2d 384, 391 (D.C. Cir. 1976) ("Congressman Moss was allowed to intervene as a defendant on his own behalf and on behalf of the Committee and the House . . . [T]he House of Representatives passed H.Res. 1420, authorizing Chairman Moss's intervention on behalf of the Committee and the House . . . Thus, we need not consider the standing of a single [M]ember of Congress to advocate his own interest in the congressional subpoena power. 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."). *See also Windsor*, 570 U.S. at 754 (noting that the district court "grant[ed] intervention by BLAG as an interested party" after BLAG "voted to intervene in the litigation to defend the constitutionality of § 3 of DOMA").

[345] *See, e.g.*, 2 U.S.C. § 288b(c) ("[Senate Legal Counsel] shall intervene [in a pending federal case] only when directed to do so by a resolution adopted by the Senate when such intervention . . . is to be made in the name of the Senate or in the name of an officer, committee, subcommittee, or chairman of a committee or subcommittee of the Senate.").

[346] *See, e.g.*, FED. R. CIV. P. 24 (procedural rules governing intervention in federal district courts).

[347] *See, e.g.*, S. Christian Leadership Conference v. Kelley, 747 F.2d 777, 778 (D.C. Cir. 1984) (denying Senator's motion to intervene in case because the Senator lacked the requisite "protectable interest" in the case as required by Federal Rule of Civil Procedure 24(a)); *Brennan*, 571 F. Supp. 2d at 1128 (denying individual Members' motion to intervene because, among other things, the Members had "not demonstrated a legally protectable interest" as required by Rule 24(a)).

[348] *See, e.g.*, Newdow v. U.S. Congress, 313 F.3d 495, 500 (9th Cir. 2002) ("[T]he motion of the Senate to intervene is DENIED. However, if the Senate wishes to have us deem its proposed brief to be an amicus brief and to consider it on that basis, we will do that.").

[349] *See* BLACK'S LAW DICTIONARY (10th ed. 2014). *See also, e.g.*, Animal Prot. Inst. v. Martin, No. CV-06-128 BW, 2007 WL 647567, at *1 (D. Me. Feb. 23, 2007) ("An amicus is not a party and 'does not represent the parties but participates only for the benefit of the court.'") (quoting Resort Timeshare Resales, Inc. v. Stuart, 764 F. Supp. 1495, 1501 (S.D. Fla. 1991)); Gorod, *supra* note 300, at 1242 (noting that, because amici are not full parties to the case, they generally may not "develop the factual record before the trial court").

[350] *See supra* note 284 and accompanying text.

[351] *See, e.g.*, Auto. Club of N.Y., Inc. v. Port Auth. of N.Y. & N.J., No. 11 Civ. 6746(RJH), 2011 WL 5865296, at *1 (S.D.N.Y. Nov. 22, 2011) (allowing individual Member of House of Representatives to file amicus brief); Holtzman v. Richardson, 361 F. Supp. 544, 553 (E.D.N.Y. 1973) (granting certain "Members of Congress . . . leave to file briefs in the case as *amici curiae*").

houses [of Congress] filed amicus briefs defending the legislation's constitutionality."[352] Similarly, two opposing coalitions of individual Members of Congress filed dueling amicus briefs in a Supreme Court case concerning the continued vitality of *Roe v. Wade*.[353]

The procedural rules governing the submission of amicus briefs may vary from court to court.[354] Ultimately, however, federal courts possess broad discretion to decide whether to allow a nonparty to submit an amicus brief in a particular case.[355] Thus, on rare occasions, some courts have exercised that discretion to reject congressional attempts to file amicus briefs.[356] For instance, the U.S. Court of Federal Claims recently prohibited the House of Representatives from filing an amicus brief in a private party's lawsuit against the United States.[357] The court, noting that "the sole purpose of the House's proposed amicus brief [was] to urge a ground for dismissing [the] plaintiff's complaint that was not raised by the [Department of Justice] in its motion to dismiss," reasoned that allowing the House to participate as an amicus would "improperly intrud[e] on the DOJ's 'exclusive and plenary' authority to litigate the case on the United States' behalf."[358]

Considerations for Congress

As discussed, courts have identified several considerations that may be relevant when assessing whether a legislative entity has suffered a justiciable injury-in-fact[359] allowing it to seek judicial relief from a federal court, including

- the presence of congressional authorization;[360]

[352] Gorod, *supra* note 300, at 1234-35.

[353] *See, e.g.*, Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1633 n.376 (1987) ("82 [M]embers of Congress urged the Court to overrule *Roe* . . . But 81 [M]embers of Congress filed a brief in opposition to the Reagan administration's position and urged the upholding of *Roe*.").

[354] *See* Ruben J. Garcia, *A Democratic Theory of Amicus Advocacy*, 35 FLA. ST. U. L. REV. 315, 322 (2008) (noting that "[i]ndividual circuits can adopt variations to the rules" governing the filing of amicus briefs). *See also, e.g.*, SUP. CT. R. 37 (governing amicus briefs in the Supreme Court); FED. R. APP. P. 29 (governing amicus briefs in the federal courts of appeals).

[355] *E.g.*, Strasser v. Dooley, 432 F.2d 567, 569 (1st Cir. 1970) ("[T]he acceptance of amicus briefs is within the sound discretion of the court . . . .").

[356] *See, e.g.*, Planned Parenthood of Greater Wash. & N. Idaho v. U.S. Dep't of Health & Human Servs., 337 F. Supp. 3d 976, 988 (E.D. Wash. 2018) (denying motion by certain Members of Congress to file an amicus brief in a lawsuit against the Department of Health and Human Services on the ground that the plaintiffs did "not have standing to bring th[eir] suit," thereby rendering the Members' proposed amicus brief in support of those plaintiffs moot). As of the date of this report, an appeal of the court's order dismissing this case on standing grounds is presently pending.

[357] *See* Health Republic Ins. Co. v. United States, 129 Fed. Cl. 115, 116 (Fed. Cl. 2016).

[358] *Id.* at 118.

[359] *E.g.*, Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016) ("Our cases have established that the 'irreducible constitutional minimum' of standing consists of three elements. The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.") (internal citations omitted).

[360] *See, e.g.*, Raines v. Byrd, 521 U.S. 811, 829 (1997) ("We attach some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in this action . . . ."); Comm. on the Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53, 71 (D.D.C. 2008) ("The fact that the House has . . . explicitly authorized this suit . . . is the key factor that moves this case from the impermissible category of an individual plaintiff asserting an institutional injury . . . to the permissible category of an institutional plaintiff asserting an institutional injury . . . .").

- the absence of other legislative or nonlegislative remedies;[361]
- allegations of vote nullification;[362]
- historical practice;[363]
- availability of alternative plaintiffs to bring a judicial challenge;[364] and
- whether the lawsuit is an attempt to assert an interest other than the generalized interest in the proper application and implementation of the law.[365]

While these considerations provide some guidance with regard to the standing inquiry in lawsuits involving a legislative entity, they do not comprehensively resolve every question that may arise. Additionally, the legal principles that courts have articulated in congressional standing cases to date are not always perfectly consistent with each other, making it difficult to predict whether any particular legislative attempt to participate in litigation will overcome the standing hurdle.[366] Further compounding that difficulty is the fact that there are very few cases analyzing the legislative standing doctrine and only a handful of rulings on the issue from the Supreme Court itself. As a consequence, it is important to identify areas of lingering doctrinal uncertainty,[367] as well as measures that Members, committees, and houses of Congress may take to increase the likelihood that any given lawsuit will surmount the standing barrier.[368]

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[361] *See, e.g.*, *Raines*, 521 U.S. at 829 (concluding that the individual Members did not lack "an adequate remedy" because Congress could "repeal the [challenged] Act or exempt appropriations bills from its reach"); Blumenthal v. Trump, 335 F. Supp. 3d 45, 54 (D.D.C. 2018) ("The Court is persuaded that plaintiffs have sustained their burden to show that they have standing to bring their claims . . . Plaintiffs have no adequate legislative remedy . . . .").

[362] *Raines*, 521 U.S. at 823 ("*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."); *Blumenthal*, 335 F. Supp. 3d at 65 ("Although the injury is an institutional one, the injury is personal to legislators entitled to cast the vote that was nullified.").

[363] *Raines*, 521 U.S. at 826 ("Not only do appellees lack support from precedent, but historical practice appears to cut against them as well."). *Compare, e.g.*, *Miers*, 558 F. Supp. 2d at 71 ("Courts have entertained subpoena enforcement actions . . . where the political branches have clashed over congressional subpoenas . . . ."), *with, e.g.*, Walker v. Cheney, 230 F. Supp. 2d 51, 53 (D.D.C. 2002) ("Historically, the Article III courts have not stepped in to resolve disputes between the political branches over their respective Article I and Article III powers; this case . . . is not the setting for such unprecedented judicial action.").

[364] *Raines*, 521 U.S. at 829-30 ("We note that our conclusion . . . [does not] foreclose[] the Act from constitutional challenge."); *Blumenthal*, 335 F. Supp. 3d at 71 (considering ability of another plaintiff to bring the case in question).

[365] *See, e.g.*, *Blumenthal*, 335 F. Supp. 3d at 69-70 ("This is not a situation in which plaintiffs disagree with the manner in which the President is administering or enforcing the law.").

[366] *See, e.g.*, Hall, *supra* note 310, at 4 (arguing that "legislative standing case law has failed to develop a clear doctrine capable of generating predictable outcomes"); Jonathan Remy Nash, *A Functional Theory of Congressional Standing*, 114 MICH. L. REV. 339, 342 (2015) (describing existing precedent "on congressional standing" as "both scarce and inconsistent"). *Compare, e.g.*, *Walker*, 230 F. Supp. 2d at 75 (stating that "separation-of-powers considerations" are "incorporated into the standing analysis required under *Raines*"), *with, e.g.*, U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53, 71 n.19 (D.D.C. 2015) ("The Secretaries stake a fifth argument, that '[t]he separation-of-powers forecloses the House's claim of standing,' which the Court *will not consider* in its standing analysis . . . [S]eparation-of-powers concerns are properly accounted for in a justiciability analysis, not a jurisdictional analysis.") (emphasis added, internal citations omitted).

[367] *See infra* "Areas of Doctrinal Uncertainty."

[368] *See infra* "What Can Congress (or a Member or Committee) Do?"

Areas of Doctrinal Uncertainty

One of the key unanswered questions regarding legislative standing concerns what form of authorization is necessary to empower a legislative plaintiff to assert an institutional injury on behalf of his respective institution.[369] In *Raines v. Byrd*, for instance, the Supreme Court concluded that the individual Member plaintiffs "ha[d] not been authorized to represent their respective Houses of Congress" for standing purposes[370] even though Congress specifically enacted a statute purporting to authorize "any Member of Congress" to "bring an action . . . for declaratory judgment and injunctive relief on the ground that any provision of [the Line Item Veto Act] violates the Constitution."[371] Similarly, in *Walker v. Cheney*, the court concluded that 31 U.S.C. § 716(b)(2)—which purports to grant the Comptroller General freestanding authority to "bring a civil action . . . to require the head of [an] agency to produce a record"[372]—nonetheless did not authorize the Comptroller General to sue the Vice President.[373] These cases suggest that a congressional litigant asserting an institutional injury who obtains express authorization to participate in a specifically identified lawsuit is more likely to satisfy the standing requirement than a litigant who does not.[374] It remains uncertain, however, when (if ever) a statute purporting to authorize an entity to litigate on Congress's behalf generally—without a specific vote authorizing that entity to participate in a particular case—would satisfy the authorization prong of the standing analysis.[375]

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[369] *See supra* "Institutional Standing."

[370] 521 U.S. 811, 829 (1997).

[371] 2 U.S.C. § 692(1) (1996).

[372] 31 U.S.C. § 716(b)(2).

[373] *See* 230 F. Supp. 2d 51, 69-70 (D.D.C. 2002) ("[31 U.S.C. § 716(b)(2)'s] highly generalized allocation of enforcement power to the Comptroller General twenty-two years ago hardly gives this Court confidence that the current Congress has authorized this Comptroller General to pursue a judicial resolution of the specific issues affecting the balance of power between the Article I and Article II Branches that have crystalized during the course of this dispute and lawsuit.").

[374] The same judge that decided *Walker*, for instance, concluded in *Miers* that the House Committee on the Judiciary possessed standing to assert an institutional injury in part because in contrast to *Walker*, "the full House ha[d] specifically authorized filing [the] suit." *See* Comm. on the Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53, 70-71 (D.D.C. 2008).

[375] *Cf. Walker*, 230 F. Supp. 2d at 69-70 ("Much less does the blanket authorization embodied in [31 U.S.C.] § 716 compel the conclusion that Congress needs the court to resolve at this time whether it has either the power to investigate the process by which the President seeks opinions and formulates recommendations or the constitutional authority to bring enforcement actions against the Executive Branch in aid of its investigations."). *See generally* Gladstone Realtors v. Vill. of Bellwood, 441 U.S. 91, 100 (1979) ("In no event . . . may Congress abrogate the Art[icle] III minima [for standing] . . . .").

This report does not explore the potential effect that an internal congressional rule may have on the standing inquiry, such as a rule purporting to delegate the decision whether to authorize a litigant to represent the full institution's interests to a subset of its Members. *See* 165 CONG. REC. H30 (daily ed. Jan. 3, 2019) (statement of Rep. McGovern) (stating that, under House Rule II(8)(b), "a vote of the BLAG to authorize litigation" is ordinarily "the equivalent of a vote of the full House of Representatives"). The effect that such a rule could have on Article III questions implicates unique separation-of-powers questions, as federal courts have traditionally been reluctant to scrutinize the import of an internal congressional rule. *See generally* U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings . . . ."); NLRB v. Noel Canning, 573 U.S. 513, 555 (2014) (emphasizing that the judiciary must ordinarily "'respect . . . coequal and independent departments' by, for example, taking [a house of Congress]'s report of its official action at its word") (quoting Marshall Field & Co. v. Clark, 143 U.S. 649, 672 (1892)); United States v. Ballin, 144 U.S. 1, 5 (1892) (stating that, with certain exceptions, "all matters of method are open to the determination of the house").

An additional open question that existing precedent does not conclusively resolve is whether and under what circumstances the general availability of blunt legislative remedies—such as impeachment—will deprive a legislative litigant of standing to seek judicial relief against the executive branch. In *Campbell v. Clinton*, for instance, the D.C. Circuit concluded that individual Members lacked standing to sue the President in part because "there always remains the possibility of impeachment should a President act in disregard of Congress' authority."[376] In *Blumenthal v. Trump*, by contrast, the court concluded that a group of individual Members *did* have standing to sue the President, stating (with little explanation) that "the availability of the extreme measure of impeachment to enforce the President's compliance with the [Emoluments] Clause is not an adequate remedy."[377] Further litigation will likely be necessary to resolve these conflicting strands of congressional standing precedent.

Perhaps the most difficult open question raised by the legislative standing jurisprudence concerns what sort of institutional injury is sufficient to afford a legislative entity standing. At one end of the spectrum, courts have generally recognized that institutional plaintiffs may sue to remedy discrete injuries, such as informational injuries resulting from an executive branch agency's refusal to comply with a subpoena.[378] At the other end, courts have typically determined that even institutional plaintiffs cannot assert a generalized, nonparticularized interest in the proper application, interpretation, or enforcement of the law.[379] Some recent cases from the district courts, however, appear to envision a broader conception of institutional injury.[380] The court in *U.S. House of Representatives v. Burwell*, for example, concluded that the House possessed standing to pursue constitutional claims "that the Executive ha[d] drawn funds from the Treasury without a congressional appropriation."[381] Critical to the court's holding was the fact that the Constitution designated "the Congress (of which the House and Senate are equal)" as "the only body empowered . . . to adopt laws directing monies to be spent from the U.S. Treasury."[382] According to the court, the "constitutional structure would collapse, and the role of the House would be meaningless, if the Executive could circumvent the appropriations process and spend funds however it pleases."[383] Similarly, the *Blumenthal v. Trump* court concluded that the individual Member plaintiffs possessed standing in part because they did not merely "disagree with the manner in which the President [wa]s administering or enforcing the law," but were instead wholly prevented from discharging their constitutionally designated role in the

[376] 203 F.3d 19, 23 (D.C. Cir. 2000). *See also* Kucinich v. Bush, 236 F. Supp. 2d 1, 10 (D.D.C. 2002) ("Plaintiffs here had extensive 'self-help' remedies available to pressure President Bush . . . Congressmen can certainly influence a President's actions through the appropriations power, by, for example, attempting to deny funding . . . and as a last resort, Congress always has the option of impeachment.").

[377] 335 F. Supp. 3d 45, 68 (D.D.C. 2018).

[378] *See Miers*, 558 F. Supp. 2d at 71 ("The injury incurred by the Committee, for Article III purposes, is both the loss of information to which it is entitled and the institutional diminution of its subpoena power."). *See also, e.g.*, Comm. on Oversight & Gov't Reform v. Holder, 979 F. Supp. 2d 1, 10-11 (D.D.C. 2013) (following the approach set forth in *Miers*).

[379] *See, e.g.*, U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53, 76 (D.D.C. 2015) (holding that "the 'psychic satisfaction' of knowing 'that the Nation's laws are faithfully enforced' . . . is 'not an acceptable Article III remedy because it does not redress a cognizable Article III injury'") (quoting Steel Co. v. Citizens for Better Env't, 523 U.S. 83, 107 (1998)).

[380] *See, e.g.*, Nicholas Bagley, *Oh boy. Here we go again.*, THE INCIDENTAL ECONOMIST, Sept. 9, 2015 (arguing that "Judge Collyer's opinion [in *Burwell*] can be read to suggest that standing rules should be relaxed when it comes to the Appropriations Clause").

[381] 130 F. Supp. 3d at 70.

[382] *Id.* at 71.

[383] *Id.*

emoluments process.[384] *Burwell* and *Blumenthal* thus suggest that Congress could have a justiciable injury when the executive branch violates the Constitution in a way that specifically undermines Congress's authority in a particular governmental process.[385]

It is unclear whether the Supreme Court or the federal appellate courts would ultimately endorse the broad conceptions of congressional standing that the *Burwell* and *Blumenthal* courts adopted.[386] Because the parties in *Burwell* ultimately settled their dispute,[387] neither the D.C. Circuit nor the Supreme Court ever determined whether the district court's standing conclusions were correct.[388] Nor has the D.C. Circuit resolved whether the district court correctly concluded that the plaintiffs in *Blumenthal* possess standing to pursue their Emoluments Clause challenges.[389] Some (though not all)[390] academics have argued, however, that the *Burwell* and *Blumenthal* courts' expanded conception of standing may be unsound,[391] As these decisions would appear to authorize congressional litigants to hale executive branch entities into the federal courts in a fairly broad array of factual circumstances that implicate separation-of-powers principles.[392] *Burwell*, for instance, contains language suggesting that at least some congressional litigants possess standing to sue the executive branch whenever it spends unappropriated funds.[393] *Blumenthal* likewise contains language suggesting that legislative litigants—including individual Members—could very well possess standing to sue the President in a variety of contexts in which the Constitution offers Congress (or a house thereof) an opportunity to provide prior approval to a

[384] 335 F. Supp. 3d 45, 69-70 (D.D.C. 2018).

[385] *See, e.g.*, Mank, *supra* note 335, at 189 (arguing that "*U.S. House of Representatives v. Burwell* appropriately found congressional standing to challenge President Obama's alleged misuse of the appropriations process because a core institutional power of Congress was at stake").

[386] *See* Nash, *supra* note 366, at 342 (stating that "the lower courts have . . . generally been more open to[] claims of congressional standing" than the Supreme Court).

[387] *See* Settlement Agreement, U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53 (D.D.C. 2015) (No. 1:14-CV-01967), ECF No. 83-1.

[388] McKaye Neumeister, *Reviving the Power of the Purse: Appropriations Clause Litigation and National Security Law*, 127 YALE L.J. 2512, 2533 (2018) ("*Burwell* was not resolved by the D.C. Circuit because the parties reached a settlement . . . ."). *See also* Order, Azar v. U.S. House of Representatives, No. 16-5202 (D.C. Cir. May 16, 2018) ("The appeal is hereby dismissed . . . .").

[389] *See* Defendant's Motion for Certification of the Court's Sept. 28, 2018 Order Pursuant to 28 U.S.C. § 1292(b), Blumenthal v. Trump, 335 F. Supp. 3d 45 (D.D.C. 2018) (No. 1:17-CV-01154).

[390] *See, e.g.*, Mank, *supra* note 335, at 189 (arguing that "*U.S. House of Representatives v. Burwell* appropriately found congressional standing to challenge President Obama's alleged misuse of the appropriations process because a core institutional power of Congress was at stake").

[391] *See* Bagley, *supra* note 380 (characterizing the district court's standing determination in *Burwell* as "incoherent" and "untenable" and predicting that the D.C. Circuit would not "let the judge's decision stand"); Hall, *supra* note 310, at 44 (criticizing the *Burwell* "court's decision to grant standing to the House" as an "unprecedented . . . error," but nonetheless describing the court's supposed "error" as "an understandable" one because "the Supreme Court's legislative standing case law is far from crystalline").

[392] *See* Hall, *supra* note 310, at 44 (arguing that "the district court's theory of legislative standing" in *Burwell* "would undermine the Framers' intentions and drag the federal courts into partisan wrangling between elected officials"); Bagley, *supra* note 380 (claiming that "accepting Judge Collyer's order [in *Burwell*] would mark an unprecedented expansion of judicial authority into interbranch" disputes).

[393] *See* 130 F. Supp. 3d 53, 72-73 (D.D.C. 2015) ("Because the House occupies a unique role in the appropriations process prescribed by the Constitution, not held by the ordinary citizen, perversion of that process inflicts on the House a particular injury quite distinguishable from any suffered by the public generally . . . The House *does* have a continuing and direct interest in the appropriation process, for that is its role in our constitutional system and the source of virtually all of the House's political power.").

particular executive action,[394] such as appointments.[395] Future judicial decisions may provide further guidance on whether, how, and under what circumstances this sort of freestanding congressional authority to summon executive branch entities before a federal judge is consistent with the Supreme Court's admonition that the "standing inquiry" is "especially rigorous when reaching the merits of the dispute would require [a court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional."[396]

What Can Congress (or a Member or Committee) Do?

The fact that standing is a constitutional requirement circumscribes Congress's ability to alter the aforementioned standing rules by enacting legislation. The Supreme Court has repeatedly reaffirmed "that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."[397] At the same time, however, the Court has also recognized "that Congress may 'elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.'"[398] It is therefore possible that, even though Congress may not "abrogate the Art[icle] III minima,"[399] Congress may under presently undefined circumstances enact a statute that grants it standing to pursue a claim in federal court that it could not pursue in that statute's absence. However, whether (and to what extent) Congress possesses such power to do so in the context of legislative standing may need to await further explication from the courts.[400]

In the absence of such guidance from the judiciary, a congressional litigant's best strategy may be to attempt to satisfy as many of the considerations listed above—that is, to

- attempt to obtain authorization to pursue the specific lawsuit in question from one or both houses of Congress;[401]
- attempt to persuade the court that all possible legislative remedies would be futile;[402]

[394] *See* 335 F. Supp. 3d 45, 63 (D.D.C. 2018) ("Plaintiffs' alleged injury is caused by the President's alleged refusal to give them the opportunity to exercise their constitutional right to vote on whether to consent prior to his acceptance of prohibited foreign emoluments.").

[395] *See* U.S. CONST. art. II, § 2, cl. 2 (providing that the President "shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States," but only "*by and with the Advice and Consent of the Senate*") (emphasis added).

[396] Raines v. Byrd, 521 U.S. 811, 819-20 (1997).

[397] Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547-48 (2016) (quoting Raines v. Byrd, 521 U.S. 811, 820 n.3 (1997)).

[398] *Id*. at 1549.

[399] *See* Gladstone Realtors v. Vill. of Bellwood, 441 U.S. 91, 100 (1979).

[400] *Cf. Spokeo*, 136 S. Ct. at 1550-53 (Thomas, J., concurring) (discussing limitations on Congress's ability to create private causes of action to vindicate so-called "public rights").

[401] *See, e.g.*, Raines v. Byrd, 521 U.S. 811, 829 (1997) ("We attach some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in this action . . . .").

[402] *See, e.g.*, *Raines*, 521 U.S. at 829 (concluding that the individual Members did not lack "an adequate remedy" because Congress could "repeal the [challenged] Act or exempt appropriations bills from its reach").

- argue that the allegedly unlawful action has deprived Members of Congress of the efficacy of their votes;[403]
- analogize to historical precedent in which courts entertained similar challenges by congressional litigants;[404]
- demonstrate that no other litigant would possess standing to vindicate the congressional interest in dispute; and[405]
- avoid framing the legal theory as a generalized grievance challenging the opposing party's implementation or interpretation of a federal statute.[406]

Nonetheless, as several scholars have emphasized, "not all interbranch disputes—even constitutional disputes—need to be resolved in the courts."[407] Indeed, the federal judiciary has in many cases expressed marked hesitance to interpose itself between dueling branches of the U.S. government.[408] The lack of a judicial remedy to a congressional complaint may indicate that Congress's most promising means for resolving disputes with the executive branch may be the political process, where a significant amount of constitutional decisionmaking occurs.[409]

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[403] *Raines*, 521 U.S. at 823 ("*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.").

[404] *See, e.g.*, *Raines*, 521 U.S. at 826 ("Not only do appellees lack support from precedent, but historical practice appears to cut against them as well.").

[405] *See, e.g.*, *Raines*, 521 U.S. at 829-30 ("We note that our conclusion . . . [does not] foreclose[] the Act from constitutional challenge.").

[406] *See, e.g.*, *Blumenthal*, 335 F. Supp. 3d at 69-70 ("This is not a situation in which plaintiffs disagree with the manner in which the President is administering or enforcing the law."). *See also* Warth v. Seldin, 422 U.S. 490, 499 (1975) ("[W]hen the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction.").

[407] Vicki C. Jackson, *Congressional Standing to Sue: The Role of Courts and Congress in U.S. Constitutional Democracy*, 93 IND. L.J. 845, 892 (2018).

[408] *See, e.g.*, Kucinich v. Bush, 236 F. Supp. 2d 1, 11 (D.D.C. 2002) ("It is appropriate to defer to the political branches of government, out of respect for the traditional restricted role of the judiciary in disputes between the Legislative and Executive Branches, and in keeping with the Constitution's separation-of-powers structure.").

[409] *See* Michael J. Gerhardt, *The Constitution Outside the Courts*, 51 DRAKE L. REV. 775, 777 (2003) ("It is hard to overstate the range or significance of constitutional decision making that occurs outside the Court."). *See also* Jackson, *supra* note 407, at 892 (arguing that, with certain exceptions, it is "ordinarily . . . the better part of wisdom for courts to presume the good faith of other branches and to continue to structure standing law on the assumption that most controversies between the branches are best addressed through political mechanisms").

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