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# Congressional Standing to Sue: Whose Vote is This, Anyway?

R. Lawrence Dessem\*

In recent years Members of the United States Congress have brought suit against the executive branch of the federal government with growing frequency. As early as 1978, the United States Court of Appeals for the District of Columbia Circuit noted: "An increasing number of congressmen and senators are repairing to the courts, either instead of, or after, resorting to the political process, to challenge executive actions and policies. Such cases, because of their almost inevitable political overtones, present the courts with some very difficult jurisdictional questions."<sup>1</sup> These "difficult jurisdictional questions" are the subject of this article.

The article is divided into three major sections. Section I traces the development of a separate doctrine of "congressional standing." It examines the doctrine's development from the Supreme Court's initial consideration of legislative standing through the current opinions of the United States Court of Appeals for the District of Columbia Circuit. Section II then analyzes three possible theories of congressional injury and standing. Derivative, representative, and third-party standing theories are all rejected as a basis for congressional standing. While rejecting the suggestion that congressmen possess a personal interest in "their" votes sufficient to constitute the "distinct and palpable injury"<sup>2</sup> required for

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1 *Reuss v. Balles*, 584 F.2d 461, 465 n.14 (D.C. Cir.), *cert. denied*, 439 U.S. 997 (1978) (citation omitted). See also *Gregg v. Barrett*, 771 F. 2d 539, 543 (D.C. Cir. 1985), stating that, "It has become a growing phenomenon to see individual members of Congress challenge actions or failures to act as violations of the members' interests as legislators." Indeed, in 1973 Senator Walter Mondale acknowledged "a greater awareness on the part of Members of the Congress—and the American people—of the dangers of illegal executive branch actions, and the potential of court challenges as a means of correcting such illegality." 119 CONG. REC. 33,796 (1973). As Judge Ruth Bader Ginsburg has noted, these congressional plaintiffs have included both "liberal" and "conservative" legislators. Ginsburg, *Inviting Judicial Activism: A 'Liberal' or 'Conservative' Technique?*, 15 GA. L. REV. 539, 541-42 (1981).

These lawsuits also have sparked commentary in legal journals. See McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241 (1981); Note, *The Justiciability of Congressional-Plaintiff Suits*, 82 COLUM. L. REV. 526 (1982); Note, *Congress Versus the Executive: The Role of the Courts*, 11 HARV. J. ON LEGIS. 352 (1974); Note, *Congressional Access to the Federal Courts*, 90 HARV. L. REV. 1632 (1977); Note, *The Burger Court's Unified Approach to Standing and its Impact on Congressional Plaintiffs*, 60 NOTRE DAME L. REV. 1187 (1985); Note, *Standing to Sue for Members of Congress*, 83 YALE L. J. 1665 (1974); Comment, *Standing Versus Justiciability: Recent Developments in Participatory Suits Brought by Congressional Plaintiffs*, 1982 B.Y.U. L. REV. 371 (1982); Comment, *Standing for State and Federal Legislators*, 23 SANTA CLARA L. REV. 811 (1983); Comment, *Congressional Standing to Challenge Executive Action*, 122 U. PA. L. REV. 1366 (1974).

2 *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

article III standing purposes, the article finds that truly direct injury to an individual Member of Congress is a proper predicate for congressional standing. Section III next considers the circumstances under which the Congress, as an institution, might possess standing and concludes that suits initiated by Congress would not suffer from the same deficiencies as do suits brought by its individual Members. Accordingly, this section of the article concludes that, in appropriate circumstances, the courts should recognize the standing of the Congress to sue the Executive.

The Supreme Court has recognized that in determining the standing to sue of private plaintiffs, "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal court jurisdiction to actual cases or controversies."<sup>3</sup> This same constitutional limitation, and concern, is heightened when the standing to sue of a congressman, rather than of a private person, is at issue. Accordingly, resolution of the issue of congressional standing requires an examination of the "proper role" of both the courts and the Congress in "our system of government."

## I. The Development of a Separate Doctrine of "Congressional Standing"

### A. *The Supreme Court's Initial Consideration of Legislative Standing*

With increasing frequency in recent years, the Supreme Court has addressed the standing to sue of private plaintiffs.<sup>4</sup> The Court has held that "[t]he concept of standing is part of [an article III constitutional] limitation,"<sup>5</sup> the standing question in all cases being "whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf."<sup>6</sup> The Court also has stressed that "[t]he nature of the injury is central to the Art. III inquiry, because standing also reflects a due regard for the autonomy of those most likely to be affected by a judicial decision."<sup>7</sup>

The Supreme Court recently summarized the article III standing requirements as follows:

[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of

3 *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 37 (1976).

4 *E.g.*, *Diamond v. Charles*, 106 S. Ct. 1697 (1986); *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983); *Valley Forge Christian College v. Americans United For Separation of Church and State*, 454 U.S. 464 (1982); *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976); *Warth v. Seldin*, 422 U.S. 490 (1975); *O'Shea v. Littleton*, 414 U.S. 488 (1974); *Association of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150 (1970); *Baker v. Carr*, 369 U.S. 186 (1962).

5 *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976).

6 *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). Justice Scalia has described standing somewhat more colorfully as follows: "In more pedestrian terms, it is an answer to the very first question that is sometimes rudely asked when one person complains of another's actions: 'What's it to you?'" Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 *SUFFOLK U. L. REV.* 881, 882 (1983).

7 *Diamond v. Charles*, 106 S. Ct. 1697, 1703 (1986).

the defendant,' *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979), and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision,' *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976).<sup>8</sup>

Despite the large number of recent cases in which the Supreme Court has addressed the standing doctrine, it has never directly considered the circumstances under which a Member of Congress possesses standing to sue in his or her official capacity.<sup>9</sup> However, in its 1939 decision in *Coleman v. Miller* the Court did consider the standing to sue of state legislators.<sup>10</sup>

The *Coleman* case involved a dispute over the authority of the Lieutenant Governor of Kansas to cast the tie-breaking vote on a resolution for the ratification of a proposed child labor amendment to the United States Constitution. The *Coleman* plaintiffs consisted of the twenty members of the Kansas Senate who had voted against the resolution.<sup>11</sup> The Kansas Supreme Court upheld both the Lieutenant Governor's authority to cast the deciding vote and the validity of the resolution itself.<sup>12</sup>

The United States Supreme Court's subsequent consideration of the case produced an "Opinion of the Court" authored by Chief Justice Hughes which only two other justices joined. In this opinion, the Chief Justice concluded that at least the twenty senators who had voted against the resolution had standing to challenge its purported ratification by

8 *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982), quoted in *Diamond v. Charles*, 106 S. Ct. 1697, 1707-08 (1986).

9 The Court, however, has granted certiorari in a case which presents the issue of congressional standing. *Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1985), cert. granted sub nom., *Burke v. Barnes*, 106 S. Ct. 1258 (1986). While the issue of congressional standing has been raised in several other cases decided by the Supreme Court, the Court has never directly addressed the issue.

In some of the cases in which congressional standing has been raised, the Supreme Court simply did not address the standing of the congressional plaintiffs. *Goldwater v. Carter*, 444 U.S. 996 (1979) (mem.) (court of appeals' decision upholding standing of congressional plaintiffs to challenge the termination of a mutual defense treaty with the Republic of China vacated, but none of the four separate opinions addressed congressional standing); *Environmental Protection Agency v. Mink*, 410 U.S. 73, 75 n.2 (1973) (because standing of plaintiff congressmen was not reached by court of appeals, issue was not presented to, or considered by, Supreme Court).

In other cases, the Supreme Court has merely affirmed, without opinion, lower court decisions dismissing actions brought by congressional plaintiffs on standing grounds. In *McClure v. Carter*, 513 F. Supp. 265 (D. Idaho), aff'd mem., 454 U.S. 1025 (1981), a three-judge court ruled that Senator James McClure was without standing to challenge the appointment of Abner Mikva as a federal judge. In *Pressler v. Simon*, 428 F. Supp. 302 (D.D.C. 1976) (*per curiam*), aff'd mem., 434 U.S. 1028 (1978), a three-judge court held that a congressman had standing to challenge the constitutionality of two federal pay raises, but ruled against him on the merits. In a separate concurrence to the Supreme Court's affirmance of the lower court in *Pressler*, Justice Rehnquist stated: "Our 'unexplained affirmance' without opinion could rest as readily on our conclusion that appellant lacked standing to litigate the merits of the question as it could on agreement with the District Court's resolution of the merits of the question." 434 U.S. at 1029.

Finally, on at least two recent occasions, the Supreme Court has considered actions brought by legislators challenging their exclusion from the legislative bodies to which they had been elected. *Powell v. McCormack*, 395 U.S. 486 (1969); *Bond v. Floyd*, 385 U.S. 116 (1966). In both of these cases the legislative bodies in question (the United States House of Representatives and the Georgia House of Representatives) refused to seat the plaintiffs or pay them legislative salaries. In neither case was the legislator's standing to sue addressed by the Supreme Court.

10 307 U.S. 433 (1939).

11 *Id.* at 435-36.

12 *Id.* at 436-37.

Kansas.<sup>13</sup> The Chief Justice reasoned: "Here, the plaintiffs include twenty senators, whose votes against ratification have been overridden and virtually held for naught although, if they are right in their contentions, their votes would have been sufficient to defeat ratification. We think that these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes."<sup>14</sup>

Justice Frankfurter, in a separate opinion in which Justices Roberts, Black, and Douglas joined, asserted that the state legislators were without standing to sue.<sup>15</sup> Justice Frankfurter argued that the state senators had no "specialized interest of their own to vindicate" in the lawsuit.<sup>16</sup> Instead, he asked, "What is their distinctive claim to be here, not possessed by every Kansan? . . . In no respect . . . do [plaintiffs'] objections relate to any secular interest that pertains to these Kansas legislators apart from interests that belong to the entire commonality of Kansas."<sup>17</sup>

Justice Frankfurter also distinguished precedents involving the votes of private citizens, concluding that "a voter's franchise is a personal right, assessable in money damages," while the votes of elected officials "pertain to legislators not as individuals but as political representatives executing the legislative process."<sup>18</sup> Accordingly, because Frankfurter believed the Court should "leave intra-parliamentary controversies to parliaments and outside the scrutiny of law courts,"<sup>19</sup> he concluded that the Kansas legislators were without standing to sue.

*Coleman's* authority as precedent for modern congressional standing cases is problematic. Neither Chief Justice Hughes nor Justice Frankfurter mustered a majority of the Court in support of their respective opinions. Moreover, *Coleman* dealt with the standing to sue of state legislators rather than of Members of Congress.<sup>20</sup> Furthermore, the *Coleman* plaintiffs included every state senator who had voted against the child labor resolution, and the votes of these senators, if plaintiffs' legal theory was correct, would have been sufficient to defeat the adoption of the resolution. Quite different concerns may, and should, apply in actions

<sup>13</sup> *Id.* at 446.

<sup>14</sup> *Id.* at 438. However, after concluding that the senators had standing to sue, the Chief Justice's opinion did not reach the merits of plaintiff's claims because of the political question doctrine. *Id.* at 446-56.

<sup>15</sup> *Id.* at 460-70. In addition to this separate opinion which explicitly addressed standing, implicit in Justice Butler's dissent (in which Justice McReynolds joined) is the presumption that the legislators possessed standing to sue. *Id.* at 470-74.

<sup>16</sup> *Id.* at 464.

<sup>17</sup> *Id.* In an aside Justice Frankfurter also opined that, if the Kansas legislators were found to have standing, "[b]y as much right could a member of the Congress who had voted against the passage of a bill because moved by constitutional scruples urge before this Court our duty to consider his arguments of unconstitutionality." *Id.* at 465.

<sup>18</sup> *Id.* at 469, 470.

<sup>19</sup> *Id.* at 469.

<sup>20</sup> The United States Court of Appeals for the District of Columbia Circuit has distinguished *Coleman* from congressional standing cases as follows:

The major distinguishing factor between *Coleman* and the present case lies in the fact that the plaintiffs in *Coleman* were state legislators. A separation of powers issue arises as soon as the *Coleman* holding is extended to United States legislators. If a federal court decides a case brought by a United States legislator, it risks interfering with the proper affairs of a co-equal branch.

Harrington v. Bush, 553 F.2d 190, 204-05 n.67 (D.C. Cir. 1977).

brought by individual congressmen who cannot even convince their fellow legislators of the correctness of their cause.<sup>21</sup>

Despite the weaknesses of *Coleman* as a judicial precedent, the case represents the Supreme Court's only specific consideration of legislative standing. Thus, after *Coleman* the lower federal courts were left to grapple with the issue of congressional standing to sue.

### B. *The Initial Congressional Standing Decisions In The Lower Federal Courts*

Despite the acceptance of legislative standing by Chief Justice Hughes in *Coleman*, it was not until the early 1970's that congressmen attempted to resort to the federal courts in significant numbers. The initial congressional lawsuits challenged miscellaneous actions of the executive branch.<sup>22</sup> However, the issue that served as the catalyst for the growing number of such lawsuits was American military involvement in Southeast Asia.

Indeed, lawsuits challenging the legality of American involvement in Southeast Asia resulted in consideration of congressional standing by three separate United States courts of appeals.<sup>23</sup> In two of these cases the plaintiff congressmen were found to lack standing.<sup>24</sup> The third decision recognized congressional standing but provided only a short-lived precedent even in the circuit in which it was decided.<sup>25</sup> However, the decision of the United States Court of Appeals for the District of Columbia Circuit in *Mitchell v. Laird* is instructive, for it represents perhaps the broadest appellate construction of congressional standing to sue.

In *Mitchell v. Laird* the court of appeals upheld the standing of thirteen Members of Congress to challenge the constitutionality of the United States' involvement in Southeast Asia. The Court found congressional standing because the declaratory judgment sought "would bear upon the duties of plaintiffs to consider whether to impeach defendants, and upon plaintiffs' quite distinct and different duties to make appropriations to support the hostilities, or to take other legislative actions related to such hostilities . . . ."<sup>26</sup>

The District of Columbia Circuit soon expressly disapproved *Mitch-*

21 See *infra* notes 158-62 and accompanying text.

22 See, e.g., *Nader v. Bork*, 366 F. Supp. 104, 105-06 (D.D.C. 1973) (congressmen held to have standing to seek judicial declaration concerning legality of the dismissal of the Watergate Special Prosecutor); *Brown v. Ruckelshaus*, 364 F. Supp. 258, 263-64 (C.D. Cal. 1973) (congressman held to lack standing to challenge allotment by Environmental Protection Agency of federal water pollution control funds); *Williams v. Phillips*, 360 F. Supp. 1363, 1365-66 (D.D.C. 1973) (senators held to have standing to challenge legality of individual serving as acting director of Office of Economic Opportunity). See also *State Highway Comm'n of Mo. v. Volpe*, 479 F.2d 1099, 1099 n.1 (8th Cir. 1973) (amicus brief submitted on behalf of congressmen in action challenging impoundment of federal highway funds).

23 *Harrington v. Schlesinger*, 528 F.2d 455 (4th Cir. 1975); *Mitchell v. Laird*, 488 F.2d 611 (D.C. Cir. 1973); *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973). See also *Drinan v. Nixon*, 364 F. Supp. 854 (D. Mass. 1973); *Gravel v. Laird*, 347 F. Supp. 7 (D.D.C. 1972).

24 *Harrington v. Schlesinger*, 528 F.2d 455, 459 (4th Cir. 1975); *Holtzman v. Schlesinger*, 484 F.2d 1307, 1315 (2d Cir. 1973).

25 *Mitchell v. Laird*, 488 F.2d 611, 613-14 (D.C. Cir. 1973).

26 488 F.2d at 614. The court of appeals nevertheless found the case to be nonjusticiable because it presented a political question. 488 F.2d at 616.

ell's broad theory of congressional standing in *Harrington v. Bush*.<sup>27</sup> Rather than *Mitchell v. Laird*,<sup>28</sup> it was the subsequent decision of the United States Court of Appeals for the District of Columbia Circuit in *Kennedy v. Sampson*<sup>29</sup> that became the seminal case on congressional standing.

### C. Kennedy v. Sampson and its progeny

While not the first judicial decision recognizing legislative standing, the 1974 decision of *Kennedy v. Sampson*<sup>30</sup> soon became the leading congressional standing case within both the District of Columbia Circuit and the other federal appellate circuits generally.<sup>31</sup> Senator Edward M. Kennedy brought the case in the United States District Court for the District of Columbia to challenge an attempted "pocket veto" by President Nixon of a bill for which Senator Kennedy had voted.<sup>32</sup> Although Senator Kennedy sued in his capacity as a citizen and taxpayer, as well as in his capacity as a senator, neither the district court nor the court of appeals considered his asserted standing as either a citizen or a taxpayer.<sup>33</sup> Instead, both courts held that Senator Kennedy had standing to sue as an individual Member of Congress.<sup>34</sup>

<sup>27</sup> 553 F.2d 190, 207-08 (D.C. Cir. 1977). In *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974), the congressional standing case decided by the D.C. Circuit one year after *Mitchell*, the court of appeals did not even cite *Mitchell*, despite the fact that both the district court and the congressional plaintiff in *Kennedy* had explicitly relied upon the earlier decision. See *Harrington v. Bush*, 553 F.2d 190, 208 (D.C. Cir. 1977); *Kennedy v. Sampson*, 364 F. Supp. 1075, 1079 (D.D.C. 1973). Moreover, both Judge Tamm, who wrote for the *Kennedy* panel, and Chief Judge Bazelon were on the appellate panel that had decided *Mitchell v. Laird*. In addition to this treatment in the District of Columbia Circuit, the two other United States courts of appeals which have considered the congressional standing rationale adopted in *Mitchell* have refused to adopt such reasoning. *Harrington v. Schlesinger*, 528 F.2d 455, 459 (4th Cir. 1975); *Holtzman v. Schlesinger*, 484 F.2d 1307, 1315 (2d Cir. 1973).

<sup>28</sup> See *supra* notes 25, 26 and accompanying text.

<sup>29</sup> 511 F.2d 430 (D.C. Cir. 1974).

<sup>30</sup> *Id.*

<sup>31</sup> While the majority of the congressional standing cases have been brought and decided in the District of Columbia Circuit, some congressional plaintiffs have brought suit in other judicial circuits. *Ameron, Inc. v. U.S. Army Corps of Eng'rs*, 787 F.2d 875, 888 (3d Cir. 1986); *Harrington v. Schlesinger*, 528 F.2d 455, 459 (4th Cir. 1975); *Holtzman v. Schlesinger*, 484 F.2d 1307, 1315 (2d Cir. 1973); *McClure v. Carter*, 513 F. Supp. 265 (D. Idaho), *aff'd sub. nom.*, *McClure v. Reagan*, 454 U.S. 1025 (1981) (mem.); *Brown v. Ruckelshaus*, 364 F. Supp. 258, 263-264 (C.D. Cal. 1973). See also *Drummond v. Bunker*, 560 F.2d 625 (5th Cir. 1977) (members of Congress intervened in action concerning Panama Canal negotiations; standing issue not reached by the court).

In addition to the above congressional actions, federal judicial circuits other than the District of Columbia Circuit have decided cases concerning the standing to sue of state legislators. *Dennis v. Luis*, 741 F.2d 628, 630-34 (3d Cir. 1984); *Korioth v. Briscoe*, 523 F.2d 1271, 1277-78 (5th Cir. 1975); *Idaho v. Freeman*, 529 F. Supp. 1107, 1116-21 (D. Idaho 1981), *vacated on other grounds sub nom.*, *NOW, Inc. v. Idaho*, 459 U.S. 809 (1982); *Dyer v. Blair*, 390 F. Supp. 1291, 1297-98 (N.D. Ill. 1975); *Trombetta v. Florida*, 353 F. Supp. 575, 576 (M.D. Fla. 1973). See also *Colorado General Assembly v. Lamm*, 700 P.2d 508, 515-16 (Colo. 1985) (en banc); *Wilt v. Beal*, 26 Pa. Commw. 298, 363 A.2d 876, 878-881 (1976).

However, even in those congressional and legislative standing cases decided outside the District of Columbia Circuit, that circuit's decision in *Kennedy v. Sampson* has been cited and followed. See, e.g., *Harrington v. Schlesinger*, 528 F.2d at 459; *Idaho v. Freeman*, 529 F. Supp. at 1118-20; *McClure v. Carter*, 513 F. Supp. at 270.

<sup>32</sup> 364 F. Supp. 1075 (D.D.C. 1973).

<sup>33</sup> 364 F. Supp. at 1077-79; 511 F.2d at 433.

<sup>34</sup> 364 F. Supp. at 1079; 511 F.2d at 433.

In affirming the district court's standing decision, the court of appeals relied upon *Coleman v. Miller*.<sup>35</sup> However, in contrast to *Coleman*, where all twenty senators who had voted against the challenged resolution brought suit, Senator Kennedy was the sole plaintiff who sued concerning the attempted pocket veto. The court of appeals explicitly noted that Senator Kennedy "ha[d] not been authorized to prosecute this suit on behalf of the Senate or the Congress."<sup>36</sup> Nevertheless, the court concluded that article III standing requirements were satisfied by Senator Kennedy's assertion that the attempted pocket veto had "nullified" his vote in favor of the legislation in question.<sup>37</sup> While recognizing that any interest of, or injury to, Senator Kennedy was merely "derivative" of that of the Congress, the court nevertheless concluded that "the office of United States Senator does confer a participation in the power of the Congress which is exercised by a Senator when he votes for or against proposed legislation."<sup>38</sup>

Three years after its decision in *Kennedy v. Sampson* the Court of Appeals for the District of Columbia Circuit again faced the issue of congressional standing in *Harrington v. Bush*.<sup>39</sup> In this lawsuit, Congressman Harrington challenged certain activities of the Central Intelligence Agency and asserted that such activities had injured him as a congressman in connection with the impeachment, appropriations, and general lawmaking powers of Congress. The Court of Appeals, however, refused to follow its earlier decision in *Mitchell v. Laird*. It instead concluded that even though the declaratory judgment sought by Congressman Harrington would "bear upon" his congressional duties, he nevertheless lacked standing to sue.<sup>40</sup>

In reaching this conclusion, the *Harrington* court asserted that "there are no special standards for determining congressional standing questions."<sup>41</sup> The court rejected the Congressman's argument that he enjoyed a "special relationship" to the legislative process that was significant for standing purposes. The court concluded that "[t]here is no doubt that, as a Congressman, appellant occupies a special relationship to the legislative process. This relationship, however, merely defines his power to act in the process, not the impact of any illegality on his Congressional status."<sup>42</sup>

35 307 U.S. 433 (1939).

36 511 F.2d at 433.

37 *Id.*

38 511 F.2d at 436. In a separate concurrence Judges Fahy and Bazelon agreed that Senator Kennedy had standing, stating that the senator "represents a sovereign state whose people have a deep interest in the Act and look to their Senators to protect that interest" and that he possessed "a legal right" to seek to protect "his own interest as a national legislator in the bill for which he voted." 511 F.2d at 446.

39 553 F.2d 190 (D.C. Cir. 1977). The year after its decision in *Kennedy* the U.S. Court of Appeals for the D.C. Circuit decided two cases in which it found the congressional plaintiffs without standing to sue. *Public Citizen, Inc. v. Sampson*, No. 74-1619 (D.C. Cir. June 16, 1975); *Stokes v. General Servs. Admin.*, No. 74-1886 (D.C. Cir. June 9, 1975). However, neither of these cases was officially reported. See *Harrington v. Bush*, 553 F.2d at 194 n.4.

40 553 F.2d at 207-210.

41 553 F.2d at 214.

42 553 F.2d at 211. The court of appeals' delimitation of any "special relationship" between a congressman and the legislative process was analogous to the rejection of congressional standing in



The court also narrowly limited its prior decision in *Kennedy v. Sampson*. Rather than recognizing congressional standing to challenge the legality of executive branch actions undertaken subsequent to the enactment of a law, the *Harrington* court interpreted the “*Kennedy* paradigm” as “rel[ying] on nullification of a specific vote as the requisite injury in fact.”<sup>43</sup> Accordingly, the court denied Congressman Harrington standing to sue because his “votes ha[d] not been nullified or diminished in force because of the [alleged] post-enactment illegality”<sup>44</sup> and because the court refused to recognize “an impairment of future unspecified votes” as sufficient injury for article III standing purposes.<sup>45</sup>

Two years after *Harrington* the United States Court of Appeals for the District of Columbia Circuit, sitting *en banc*, decided *Goldwater v. Carter*.<sup>46</sup> In the court’s *per curiam* opinion, a majority of the judges concluded that the plaintiff senators and representatives possessed standing to challenge the President’s unilateral termination of a Mutual Defense Treaty with the Republic of China.<sup>47</sup> The “crucial fact” leading the majority to find standing was “that . . . there [was] no conceivable senatorial

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*McRae v. Mathews*, 421 F. Supp. 533 (E.D.N.Y. 1976), *vacated on other grounds*, 433 U.S. 916 (1977). In *McRae*, several congressmen who had voted in favor of a statute sought to intervene in a judicial action in which the constitutionality of that statute was challenged. The district court found the congressmen without standing to sue because they had had their “vote[s] counted at [their] full legal value.” 421 F. Supp. at 540. The court explained its ruling as follows: “To grant intervention on the ground of the members’ participation in enacting the law would involve accepting as a principle that each member of the Congress has an interest to intervene in every case in which the substantive constitutionality of a provision in a federal enactment was drawn into question, or indeed, in which the interpretation of a federal statute was in question.” *Id.*

43 553 F.2d at 211. The *Harrington* court also reaffirmed the theory of “derivative injury” adopted in *Kennedy v. Sampson*. While recognizing that Representative Harrington had not been authorized to prosecute any legal action, the court of appeals concluded that indirect, or derivative, injury was sufficient to establish congressional standing. *Id.* at 199 n.41. However, the court further concluded that Congress, itself, had not been injured and that therefore Congressman Harrington could not suffer injury derivatively. *Id.* at 200 n.41.

44 *Id.* at 213.

45 *Id.* at 211. On the same day that it issued its opinion in *Harrington*, the court of appeals also decided another congressional standing case. *Metcalf v. National Petroleum Council*, *id.* at 176 (D.C. Cir. 1977). In this second case the court relied upon *Harrington* in finding insufficient Senator Metcalf’s injuries premised upon the alleged “nullification” of past votes and his own uncertainty as to “how best to take effective legislative action to correct the illegalities he perceive[d].” *Id.* at 185. Although Senator Metcalf tried to distinguish himself from Representative Harrington by also suing in his capacity as the chairman of a Senate subcommittee, the court found it to be insignificant that he had alleged injuries “relate[d] to his legislative responsibility in a *specific* subject area and on a *specific* committee.” *Id.* at 188. The court concluded that Senator Metcalf lacked standing to sue because “[i]t is the *injury* which must be specific, *not* merely the interest on which the injury has been inflicted.” *Id.*

46 617 F.2d 697 (D.C. Cir.) (*per curiam*) (*en banc*), *vacated*, 444 U.S. 996 (1979) (mem.). Subsequent to its decision in *Harrington*, but prior to its decision in *Goldwater*, the court of appeals decided three other cases in which congressional plaintiffs challenged actions of the executive branch. *Reuss v. Balles*, 584 F.2d 461 (D.C. Cir.), *cert. denied*, 439 U.S. 997 (1978); *Daughtrey v. Carter*, 584 F.2d 1050 (D.C. Cir. 1978); *Edwards v. Carter*, 580 F.2d 1055 (D.C. Cir.) (*per curiam*), *cert. denied*, 436 U.S. 907 (1978). In *Reuss* and *Daughtrey* the court of appeals found the congressional plaintiffs to be without standing to sue, while in *Edwards v. Carter* the court recognized the question presented concerning plaintiffs’ standing but nevertheless “proceed[ed] directly to the merits of [the] case” without addressing that issue. 580 F.2d at 1056-57.

47 617 F.2d at 701-03. In addition to the judges who joined the *per curiam* majority, in his separate dissent Judge MacKinnon also concluded that the congressional plaintiffs possessed standing to sue. *Id.* at 716.

action that could likely prevent termination of the Treaty.”<sup>48</sup> Accordingly, the majority held that the congressional plaintiffs possessed standing to sue based upon a “complete nullification or withdrawal of a voting opportunity.”<sup>49</sup>

Chief Judge Skelly Wright authored a separate concurrence in which he argued that the congressional plaintiffs lacked standing to sue.<sup>50</sup> Judge Wright asserted that, under *Kennedy v. Sampson*, an individual congressman could not establish derivative injury unless the Congress, as a whole, had been injured. Because “a majority of Congress [had not] spoken unequivocally” concerning termination of the treaty, neither Congress, nor any individual congressman, possessed standing to sue.<sup>51</sup>

While the Supreme Court vacated the court of appeals’ *Goldwater* decision,<sup>52</sup> none of the separate Supreme Court opinions in that case addressed the issue of congressional standing. Thus, two years later in the case of *Riegle v. Federal Open Market Committee*,<sup>53</sup> the District of Columbia Circuit itself attempted to reconcile its various congressional standing cases and their often divergent rationales.

#### D. *The District of Columbia Circuit’s “Equitable Discretion” Doctrine*

Concern with perceived contradictions in its congressional standing cases led the United States Court of Appeals for the District of Columbia Circuit to adopt a doctrine of “circumscribed equitable discretion” in its 1981 decision in *Riegle v. Federal Open Market Committee*.<sup>54</sup> The court found “[t]wo contradictory principles” in its earlier standing decisions:

First, no distinctions are to be made between congressional and private plaintiffs in the standing analysis. . . . Second, this court will not confer standing on a congressional plaintiff unless he is suffering an injury that his colleagues cannot redress.<sup>55</sup>

In an effort to resolve this asserted contradiction, while recognizing the separation of powers issues posed by congressional lawsuits, the *Riegle* court held that “[w]hen a congressional plaintiff brings a suit involving circumstances in which legislative redress is not available or a pri-

<sup>48</sup> *Id.* at 703.

<sup>49</sup> *Id.* at 702.

<sup>50</sup> *Id.* at 709.

<sup>51</sup> *Id.* at 712. Judge Wright also separately addressed the “prudential aspect of the standing doctrine” and suggested that this aspect of standing also cautioned against entertaining the congressmen’s lawsuit. *Id.* at 715.

<sup>52</sup> 444 U.S. 996 (1979) (mem.).

<sup>53</sup> 656 F.2d 873 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981).

<sup>54</sup> *Id.* In opinions of the U.S. Court of Appeals for the District of Columbia Circuit subsequent to *Riegle*, “the name of the new doctrine [changed] from ‘circumscribed equitable discretion’ . . . to ‘remedial discretion.’” *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375, 1381 n.5 (D.C. Cir. 1984). In fact, judges of the court of appeals have “use[d] the terms interchangeably.” *Moore v. U.S. House of Representatives*, 733 F.2d 946, 961 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 779 (1985) (Scalia, J., concurring).

<sup>55</sup> 656 F.2d at 877. In contrast to the second of these “contradictory principles” is the court of appeals’ earlier decision in *Metcalf v. National Petroleum Council*, in which the court rejected the suggestion that “merely because appellant can pursue an alternative remedy in the legislative process, he has suffered no injury.” 553 F.2d 176, 189 n.129 (D.C. Cir. 1977). However, the *Metcalf* court reasoned that the existence of “undiminished powers” to function as a senator established that the plaintiff “[had] suffered no specific, demonstrable injury in his capacity as a senator.” *Id.*

vate plaintiff would likely not qualify for standing, the court would be counseled under our standard to hear the case."<sup>56</sup> Thus, despite finding that Senator Riegle satisfied traditional standing requirements, the court of appeals nevertheless dismissed his case because of its further conclusion that "judicial action would improperly interfere with the legislative process."<sup>57</sup>

In adopting such a doctrine of equitable discretion, however, the *Riegle* court did not focus on the fact that it is difficult to imagine situations in which some form of "legislative redress" is not available to a plaintiff congressman.<sup>58</sup> Moreover, the court failed to adequately explain the significance of a *private* individual's inability to bring suit for its decision to entertain a suit brought by a congressman.<sup>59</sup>

Despite such conceptual problems with its new equitable discretion doctrine, the United States Court of Appeals for the District of Columbia Circuit continued to apply that doctrine in the increasing number of congressional standing cases presented to it.<sup>60</sup> In *Vander Jagt v. O'Neill*,<sup>61</sup> the court applied this doctrine to a suit challenging the distribution of committee assignments within the House of Representatives brought by Republican congressmen against the Democratic House leadership. The court held that the congressional plaintiffs had standing based upon their allegation "that the Democratic House leadership has successfully diluted the political power of Republican representatives, their voters, and residents of their districts."<sup>62</sup> The court, however, applied the doctrine of equitable discretion and affirmed the dismissal of the action.<sup>63</sup>

The majority opinion in *Vander Jagt* precipitated a lengthy concur-

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<sup>56</sup> 656 F.2d at 882. In adopting this standard, the court of appeals relied primarily upon a law review article by Judge Carl McGowan, in which he had suggested that subsequent to the Supreme Court's decision in *Goldwater v. Carter* the separation of powers issues posed by congressional lawsuits should not be addressed within the contours of traditional standing doctrine. See McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241 (1981).

<sup>57</sup> 656 F.2d at 882.

<sup>58</sup> For instance, in *Kennedy v. Sampson*, Senator Kennedy could have attempted to convince the Congress to pass new legislation identical to the bill which President Nixon had attempted to veto. Instead of recognizing this fact, the *Riegle* court merely attempted to distinguish *Kennedy* as involving "certain acts of the executive not subject to *direct* legislative redress." 656 F.2d at 882 (emphasis added).

<sup>59</sup> The court of appeals formulated its equitable discretion doctrine so as to avoid situations in which "non-frivolous claims of unconstitutional action would go unreviewed by a court." 656 F.2d at 882. However, this aspect of the *Riegle* doctrine is contradictory to the Supreme Court's decision in *Schlesinger v. Reservists Comm. to Stop the War*, in which the Court held that "[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." 418 U.S. 208, 227 (1974). See also *United States v. Richardson*, 418 U.S. 166, 179 (1974). Moreover, the *Riegle* court did not explain its presumption that "a private plaintiff's suit would not raise separation-of-powers concerns" regardless of the relief sought against the executive branch of the federal government. 656 F.2d at 881.

<sup>60</sup> One other federal appellate court, however, has explicitly rejected the equitable discretion doctrine. *Dennis v. Luis*, 741 F.2d 628, 633 (3rd Cir. 1984). Moreover, in its initial congressional standing decision after *Riegle v. Federal Open Mkt. Comm.*, the U.S. Court of Appeals for the District of Columbia Circuit itself did not even consider the *Riegle* doctrine. *American Fed'n of Gov't Employees v. Pierce*, 697 F.2d 303 (D.C. Cir. 1982) (per curiam). While *Riegle* was not considered in this latter case, the court not only ruled against the congressional plaintiff on the merits but issued its *per curiam* opinion one day after the case had been argued. 697 F.2d at 305-08, 303.

<sup>61</sup> 699 F.2d 1166 (D.C. Cir.), *cert. denied*, 464 U.S. 823 (1983).

<sup>62</sup> *Id.* at 1170.

<sup>63</sup> *Id.* at 1177.

rence by Judge Bork, in which he argued that the plaintiffs lacked standing to sue and that the equitable discretion doctrine should not have been employed.<sup>64</sup> Judge Bork's position was that the Supreme Court, in *Valley Forge Christian College v. Americans United for Separation of Church and State*,<sup>65</sup> had "read separation-of-powers concepts [such as those presented in congressional standing cases] back into that part of the standing requirement which rests upon a constitutional, rather than a prudential, foundation."<sup>66</sup> The judge argued that the court should only recognize congressional standing in cases such as *Kennedy v. Sampson* and that "there can be no injury in fact unless there has occurred a nullification of a legislator's vote."<sup>67</sup>

The D. C. Circuit's decision the next year in *Moore v. United States House of Representatives*<sup>68</sup> also sparked a lengthy concurrence, this time by Judge Scalia. In *Moore* the court of appeals held that the plaintiff congressmen had standing to challenge the constitutionality of a tax statute but invoked the *Riegle* doctrine to affirm the dismissal of the action.<sup>69</sup> In his separate concurrence Judge Scalia not only criticized what he referred to as "the recently devised sky-hook of equitable discretion," but also asserted that in light of subsequent Supreme Court standing decisions "*Kennedy [v. Sampson]* is no longer good law."<sup>70</sup> Accordingly, Judge Scalia found the *Moore* plaintiffs lacked standing to sue.<sup>71</sup>

Although decided shortly after *Moore*, it was not until almost one year after the *Moore* decision that the opinions were filed in the District of Columbia Circuit's next major congressional standing case: *Barnes v. Kline*.<sup>72</sup> The *Barnes* plaintiffs consisted of thirty-three individual mem-

64 *Id.*

65 454 U.S. 464 (1982).

66 699 F.2d at 1179.

67 *Id.* at 1182.

68 733 F.2d 946 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 779 (1985). Prior to its decision in *Moore* the D.C. Circuit affirmed a district court judgment that had dismissed an action brought by twenty-nine Members of Congress challenging the legality of the United States' presence in, and military assistance to, El Salvador. *Crockett v. Reagan*, 558 F. Supp. 893 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983) (*per curiam*), *cert. denied*, 467 U.S. 1251 (1984). The court of appeals' short *per curiam* opinion affirmed the dismissal of the action for the reasons set forth by the district court, one of which had been the applicability of the equitable discretion doctrine. 720 F.2d at 1357; 558 F. Supp. at 902-03.

69 733 F.2d at 950-56.

70 733 F.2d at 961. Judge Scalia's particular concern with *Kennedy v. Sampson* was that the standing doctrine adopted therein "isolate[d] it from major separation-of-powers concerns." 733 F.2d at 961. In an earlier law review essay, Judge Scalia had argued that "the judicial doctrine of standing is a crucial and inseparable element of [the] principle [of separation of powers], whose disregard will inevitably produce—as it has during the past few decades—an overjudicialization of the processes of self-governance." Scalia, *supra* note 6, at 881.

71 733 F.2d at 965. A recent law review case comment has endorsed the rationale of Judge Scalia's concurrence in *Moore*, asserting that "contrary to the *Moore* holding, denial of relief should have been the consequence of constitutional command rather than judicial discretion." Comment, *Moore v. U.S. House of Representatives: A Possible Expansion of Congressmen's Standing to Sue*, 60 NOTRE DAME L. REV. 417, 417 (1985).

72 759 F.2d 21 (D.C. Cir. 1985), *cert. granted sub nom.*, *Burke v. Barnes*, 106 S. Ct. 1258 (1986). Subsequent to its decision in *Moore*, the U.S. Court of Appeals for the District of Columbia Circuit had dismissed two other congressional lawsuits. Southern Christian Leadership Conference v. Kelley, 747 F.2d 777 (D.C. Cir. 1984) (*per curiam*); United Presbyterian Church in the U.S.A. v. Reagan, 738 F.2d 1375 (D.C. Cir. 1984). In neither of these cases did the court of appeals apply the remedial discretion doctrine. Instead, both congressional plaintiffs were found to assert generalized griev-

bers of the House of Representatives, the Speaker and bipartisan leadership of the House, and the United States Senate.<sup>73</sup> These plaintiffs sought declaratory and injunctive relief concerning a purported "pocket veto" by the President.<sup>74</sup>

The panel majority, relying upon *Kennedy v. Sampson*, held that all plaintiffs had standing to sue.<sup>75</sup> Judge McGowan, writing for the majority, also declined to apply the equitable discretion doctrine. He instead concluded that the case did not present an action "by individual congressmen whose real grievance consists of their having failed to persuade their fellow legislators of their point of view, and who seek the court's aid in overturning the results of the legislative process."<sup>76</sup> Accordingly, the majority reached the merits of the action, upholding the congressmen's claim that the act in question had become law despite the President's attempted pocket veto.<sup>77</sup>

Judge Bork filed a thirty page dissent, retreating from even his own previous concurrences in congressional standing cases.<sup>78</sup> Judge Bork now asserted: "Upon further reflection, it seems to me that not even the *Goldwater* 'nullification' test is adequate to the standing inquiry. When the interest sought to be asserted is one of governmental power, there can be no congressional standing, however confined."<sup>79</sup> Bork argued in his dissent that the notion of congressional standing was premised upon the assumption that "elected representatives have a separate private right, akin to a property interest, in the powers of their offices," but that such a "notion [is] alien to the concept of a republican form of government."<sup>80</sup>

As the United States Court of Appeals for the District of Columbia Circuit itself subsequently recognized, "The *Barnes* decision [did] not resolve all of the questions related to the exercise of remedial discretion . . . ."<sup>81</sup> Or, as a three-judge court within the D. C. Circuit even more

ances insufficient to satisfy article III standing requirements. *Southern Christian Leadership Conference*, 747 F.2d at 780; *United Presbyterian Church*, 738 F.2d at 1382.

<sup>73</sup> 759 F.2d at 23.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 26.

<sup>76</sup> *Id.* at 28. Indeed, the Senate, itself, was a plaintiff, and counsel for the defendants conceded that the Senate, as a body, possessed standing to sue. *Id.* at 28-29.

<sup>77</sup> *Id.* at 41.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 68 n.18.

<sup>80</sup> *Id.* at 50. Judge Bork also used his dissent to take issue with the *Riegle* equitable discretion doctrine, referring to it as a "lawless doctrine . . . [that] makes cases turn on nothing more than the sensitivity of a particular trio of judges." *Id.* at 61. However, at least one commentator has criticized Judge Bork's analysis of equitable discretion in *Barnes*:

The dissenting opinion of Judge Bork distorts the principles of standing in an effort to preserve the separation of powers and limit the role of federal courts. Such a distortion is unnecessary because . . . [i]f carefully defined, the doctrine of equitable discretion may be a valuable addition to the doctrines of standing, political question, and ripeness already in place to help prevent federal courts from adjudicating matters better left to the political arena.

Note, *Congressional Standing and the Constitutionality of the Pocket Veto During Intersession Adjournments*, 59 TEMP. L.Q. 151, 189 (1986) (footnotes omitted). But see Note, *The Burger Court's Unified Approach to Standing and its Impact on Congressional Plaintiffs*, 60 NOTRE DAME L. REV. 1187, 1204-08 (1985).

<sup>81</sup> *Gregg v. Barrett*, 771 F.2d 539, 545 (D.C. Cir. 1985). In *Gregg* the court of appeals invoked the remedial discretion doctrine in affirming the dismissal of the claims of congressional plaintiffs

recently has admitted, "[I]t is somewhat difficult to reconcile the various cases on congressional standing in this Circuit, and in particular to tell which denials of relief in earlier cases, seemingly for lack of standing, are now to be explained, in light of later cases, as resting upon an exercise of equitable discretion . . . ."<sup>82</sup>

Thus, at present, the doctrines of congressional standing and equitable discretion remain, at best, in a state of confusion and uncertainty within the District of Columbia Circuit.<sup>83</sup> The argument advanced in this article is that the doctrines that have spawned such confusion and uncertainty should be replaced by a standing analysis focusing upon whether congressional plaintiffs actually have suffered injury-in-fact that is sufficient for the purposes of article III.

## II. Theories of Congressional Injury and Standing to Sue

In the many congressional standing cases decided by the lower federal courts, the congressional plaintiffs have advanced three basic legal theories in support of their standing to sue: (1) standing based upon an injury derivatively suffered by a congressman due to an injury inflicted upon the Congress, (2) standing based upon the congressman's status as a representative of his or her constituents, and (3) standing based upon an injury suffered directly by the congressman.<sup>84</sup> The first two of these

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challenging the accuracy of the *Congressional Record*. The Court referred to the "doctrine of remedial discretion as the preferred method for coping with separation-of-powers concerns in suits by congressional plaintiffs where the ill in question could clearly be rectified by congressional action." *Id.* at 544.

82 *Synar v. United States*, 626 F. Supp. 1374, 1381 (D.D.C.), *aff'd sub nom.*, *Bowsher v. Synar*, 106 S. Ct. 3181 (1986). The congressional plaintiffs in *Synar* challenged the constitutionality of the Balanced Budget and Emergency Deficit Control Act of 1985, popularly known as the Gramm-Rudman-Hollings Act, Pub. L. No. 99-177, 99 Stat. 1037 (1985). The three-judge court which initially considered the action held that the congressional plaintiffs had standing to sue because they alleged that "the Act unconstitutionally gives to the Comptroller General and the President formal power to amend or repeal appropriations legislation that was lawfully passed, and thus effectively to nullify plaintiffs' votes on that earlier legislation." 626 F. Supp. at 1382. The court also found no basis for applying the remedial discretion doctrine, because the Gramm-Rudman-Hollings Act specifically provided for congressional lawsuits, "thus eliminating whatever equitable discretion might exist and leaving only the limitations of Article III." *Id.* Because a private plaintiff who satisfied traditional standing requirements later intervened in the case, the Supreme Court found it unnecessary to consider the standing of the congressional plaintiffs in *Synar*. 106 S. Ct. at 3186.

83 The contours of the equitable discretion doctrine were further confused by the decision in *Committee for Monetary Reform v. Board of Governors of the Fed. Reserve System*, 766 F.2d 538 (D.C. Cir. 1985). The private plaintiffs in this action were held to be without standing to raise the same challenge to the composition of the Federal Open Market Committee that congressional plaintiffs had attempted to assert in *Reuss v. Balles*, 584 F.2d 461 (D.C. Cir.), *cert. denied*, 439 U.S. 997 (1978), and *Riegle v. Federal Open Market Committee*, 656 F.2d 873 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981). The private plaintiffs in *Committee for Monetary Reform* argued that, were they found to be without standing to sue, the equitable discretion doctrine could not be employed to dismiss the same claim if brought by a congressman. 766 F.2d at 544 n.38. The Court refused to address this issue, and, in fact, appeared to leave open the possibility that the equitable discretion doctrine could be employed to dismiss a congressional claim even if no private plaintiffs could raise that same claim. *Id.*

However, in a subsequent decision the U.S. District Court for the District of Columbia entertained the merits of a congressional challenge to the composition of the Federal Open Market Committee. *Melcher v. Federal Open Mkt. Comm.*, No. 84-1335 (D.D.C. filed June 5, 1986). The court held that, because private parties would be without standing to bring a similar lawsuit, dismissal of the plaintiff congressman's claim under the equitable discretion doctrine would be inappropriate.

84 The congressional plaintiffs in the recent *Synar* case alleged all three of these types of injury:

theories provide an insufficient basis to support standing for the individual congressmen. However, a truly direct injury suffered by a congressman can constitute a sufficient basis upon which to premise congressional standing in at least some situations.

A. *Derivative Injury As A Basis For the Standing To Sue of Individual Congressmen*

In *Kennedy v. Sampson*, the executive branch argued that Senator Kennedy merely had been injured "derivatively" and that only the Senate or the Congress as a body had suffered "direct" injury sufficient to support standing to sue.<sup>85</sup> The court of appeals, however, rejected this argument, concluding that while the senator's "interest in the pocket veto controversy . . . is derivative, . . . it is nonetheless substantial."<sup>86</sup> The court held that Senator Kennedy possessed standing to sue because "to the extent that Congress' role in the government is thus diminished [by the challenged presidential action], so too must be the individual roles of each of its members."<sup>87</sup>

Subsequently, the United States Court of Appeals for the District of Columbia Circuit explained the derivative standing test adopted in *Kennedy*:

[I]n order for appellant successfully to employ this technique of showing indirect injury, he must show (1) there has been injury-in-fact done to the Congress, and (2) that he, as an individual legislator, has been injured-in-fact because of the harm done to the institution.<sup>88</sup>

The court of appeals quite correctly concluded in *Kennedy v. Sampson* that the mere characterization of a plaintiff's injury as "indirect" or "derivative" is insufficient to defeat standing to sue.<sup>89</sup> However, the *Kennedy* court did not explicitly consider whether an individual legislator may attempt to predicate standing upon an alleged injury to the legislative body as a whole when that institution has declined to take judicial action itself.<sup>90</sup>

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"The Representatives allege that these unconstitutional provisions injure them by (1) interfering with their constitutional duties to enact laws regarding federal spending; (2) causing automatic reductions in their salaries, staff salaries, and office expenses; and (3) causing automatic reductions in a variety of programs benefiting their constituents." 626 F. Supp. at 1378.

<sup>85</sup> 511 F.2d at 434.

<sup>86</sup> *Id.* at 436.

<sup>87</sup> *Id.*

<sup>88</sup> *Harrington v. Bush*, 553 F.2d 190, 199 n.41 (D.C. Cir. 1977).

<sup>89</sup> 511 F.2d at 435-36. As the Supreme Court has held, "[T]he fact that the harm to petitioners may have resulted indirectly does not in itself preclude standing." *Warth v. Seldin*, 422 U.S. 490, 504-505 (1975). See also *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 44-45 (1976). However, the Supreme Court also has recognized that the indirectness of injury "may make it substantially more difficult to meet the minimum [standing] requirement of Art. III: to establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm." *Warth v. Seldin*, 422 U.S. at 505.

<sup>90</sup> Indeed, in other areas of the law, individuals subjected to derivative injury have not routinely been permitted to sue. For instance, claims of corporate mismanagement generally cannot be asserted by individual shareholders but must be brought as a derivative action on behalf of the corporate entity. As the U.S. Court of Appeals for the District of Columbia Circuit has held, "[C]laims of corporate mismanagement must be brought on a derivative basis because no shareholder suffers a

In fact, the courts uniformly have recognized that "members of collegial bodies do not have standing to perfect an appeal the body itself has declined to take."<sup>91</sup> Thus, in *Bender v. Williamsport Area School District*, the Supreme Court ordered the dismissal of an appeal taken by a single school board member in an action brought against all the board members in their official capacities.<sup>92</sup>

The United States Court of Appeals for the District of Columbia Circuit reached a similar result in *Smuck v. Hobson*.<sup>93</sup> The court analyzed the problem as follows: "Mr. Smuck has no appealable interest as a member of the Board of Education. . . . Appellant Smuck had a fair opportunity to participate in [the Board of Education's] defense, and in the decision not to appeal. Having done so, he has no separate interest as an individual in the litigation."<sup>94</sup> Numerous state courts also have dismissed appeals brought by individual members of public bodies rather than by the public body as an institution.<sup>95</sup>

Moreover, serious questions concerning adequacy of representation may arise if congressmen are permitted to individually file suit based not upon direct injury to themselves but upon merely derivative injury. In fact, there often will be situations in which other Members of Congress may disagree with the position taken in litigation by an individual congressman. For instance, in *Immigration and Naturalization Service v. Chadha*, nine members of the House of Representatives filed an amicus curiae brief in the Supreme Court in which they disagreed with the position taken in the briefs filed by the Senate and House of Representatives.<sup>96</sup>

The courts thus should require the Houses of Congress to speak as institutions, rather than permit each of the individual 535 senators and

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harm independent of that visited upon the corporation and the other shareholders." *Corwin v. Bresler*, 741 F.2d 410, 414 (D.C. Cir. 1984). See also *Lewis v. Chiles*, 719 F.2d 1044, 1049 (9th Cir. 1983); *Stevens v. Lowder*, 643 F.2d 1078, 1080 (5th Cir. 1981).

Furthermore, even while a corporate shareholder in some situations may maintain a derivative action premised upon alleged injury to the corporation, "various restrictions [have been] placed upon [such actions] by statutes, rules of practice, and increased judicial recognition of the plaintiff-shareholder as guardian ad litem or fiduciary for the corporation." H. HENN & J. ALEXANDER, *LAW OF CORPORATIONS*, § 358, at 1036 (3d ed. 1983). For instance, Rule 23.1 of the Federal Rules of Civil Procedure requires, *inter alia*, not only that the shareholder plaintiff "fairly and adequately" represent the interests of other shareholders, but that the judicial complaint "allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors . . . and the reasons for his failure to obtain the action or for not making the effort." Thus, mere derivative injury, without more, is not a sufficient basis upon which to premise a corporate derivative action.

91 *Bender v. Williamsport Area School Dist.*, 106 S. Ct. 1326, 1333 (1986).

92 *Id.*

93 408 F.2d 175 (D.C. Cir. 1969).

94 *Id.* at 177-78.

95 *Ray v. Trapp*, 609 S.W.2d 508 (Tenn. 1980) (individual members of election commission and county court held to lack standing to appeal judgment against those bodies); *Elterich v. Arndt*, 175 Wash. 562, 27 P.2d 1102 (1933) (individual member of board of county commissioners held to lack standing to appeal judgment against the board); *State ex rel. Erb. v. Sweaas*, 98 Minn. 17, 107 N.W. 404 (1906) (same). See also *In re Appointment of Special State's Attorneys*, 42 Ill. App. 3d 176, 356 N.E.2d 195 (1976) (chairman of county board of supervisors was properly denied leave to intervene in action relating to county budget and had no standing to individually appeal trial court's determination); *Buchele v. Woods*, 528 S.W.2d 95 (Tex. Civ. App. 1975) (per curiam) (three members of seven member school board were without standing to appeal action brought by taxpayers against all board members in their official capacities).

96 462 U.S. 919, 929 n.4 (1983).



representatives to separately invoke the judicial process on the basis of derivative injury. As the Supreme Court has noted in another context, "The two houses of Congress are legislative bodies representing larger constituencies. Power is not vested in any one individual, but in the aggregate of the members who compose the body, and its action is not the action of any separate member or number of members, but the action of the body as a whole . . . ."97

It is not unrealistic to expect the Congress or one of its houses to authorize a legal action premised upon alleged institutional injury in an appropriate case.<sup>98</sup> In fact, whatever problems are presented by suits brought by individual congressmen, the courts have entertained actions "where a majority of Congress approves a lawsuit by expressly authorizing a member or a committee to represent it in the courts."<sup>99</sup>

Thus, in *United States v. American Telephone and Telegraph Company*, the United States Court of Appeals for the District of Columbia Circuit upheld the standing to sue of the chairman of a subcommittee of the House of Representatives.<sup>100</sup> The lawsuit involved the validity of a subcommittee subpoena, and the subcommittee chairman intervened in the action pursuant to a House resolution authorizing such intervention on behalf of the House committee and the House itself. The court of appeals rejected a challenge to the congressman's standing, concluding that "[i]t 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."<sup>101</sup> The court of appeals' decision thus was analogous to its earlier decision in *Senate Select Committee on Presidential Campaign Activities v. Nixon*, in which the court entertained an action brought by a Senate Select Committee pursuant to a Senate resolution.<sup>102</sup>

97 *United States v. Ballin*, 144 U.S. 1, 7 (1892).

98 Indeed, Congress has established an Office of Senate Legal Counsel, which, when directed by Senate resolution, is to "intervene or appear as *amicus curiae* . . . in any legal action or proceeding . . . in which the powers and responsibilities of Congress under the Constitution of the United States are placed in issue." 2 U.S.C. § 288e(a) (1982). While there is no comparable office of House Legal Counsel, the House of Representatives and individual representatives have been represented in judicial proceedings by attorneys within the Office of the Clerk of the House. *See, e.g., Bowsher v. Synar*, 106 S.Ct. 3181, 3184 (1986); *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 922, 928 (1983); *National Wildlife Fed'n v. Watt*, 571 F. Supp. 1145, 1146-47 (D.D.C. 1983).

99 *Goldwater v. Carter*, 617 F.2d 697, 712 n.6 (D.C. Cir.) (per curiam) (en banc), *vacated*, 444 U.S. 996 (1979) (mem.).

100 551 F.2d 384, 391 (D.C. Cir. 1976).

101 *Id.* at 391.

102 498 F.2d 725, 727 (D.C. Cir. 1974). However, the standing to sue of the committee was not addressed by the court, which refused to enforce the subpoena at issue in the case. *See also Ameron, Inc. v. U.S. Army Corps of Engineers*, 787 F.2d 875, 888 (3d Cir. 1986) (Senate and leadership of House of Representatives have standing to intervene to defend constitutionality of statute that executive branch has declined to defend, but have no standing to obtain an injunction requiring compliance with that statute). *But see Reed v. Commissioners of Delaware County, Pennsylvania*, 277 U.S. 376 (1928), in which the Court affirmed the dismissal of an action brought by senators to obtain materials relevant to a committee investigation. The Court based its decision upon a finding "that the Senate did not intend to authorize the committee, or anticipate that there might be need, to invoke the power of the Judicial Department." *Id.* at 389.

While Congress can authorize a lawsuit to be brought on its behalf in some circumstances, it cannot confer standing upon individual congressmen in contravention of the requirements of article III of the Constitution. *Muskrat v. United States*, 219 U.S. 346 (1911). *See also McClure v. Carter*, 513 F. Supp. 265 (D. Idaho) (three-judge court), *aff'd sub nom.*, *McClure v. Reagan*, 454 U.S. 1025

Moreover, both the special powers of congressmen and the separation of powers issues raised by congressional lawsuits also caution against judicial resolution of suits brought by individual congressmen. Forums other than the federal courts are generally available to congressmen for challenging executive branch actions. As Judge Skelly Wright has noted, “[C]ourts could logically afford legislators even *less* consideration on standing than they afford other citizens, since the legislator’s position gives him special access to the political process through which general constitutional grievances should find redress.”<sup>103</sup> Justice Rehnquist also noted the special powers possessed by Congress in his characterization of *Goldwater v. Carter* as “a dispute between coequal branches of our government, each of which has resources available to protect and assert its interests, resources not available to private litigants outside the judicial forum.”<sup>104</sup>

In addition to the redress available to congressmen outside the courts, congressional actions also pose difficult separation of powers problems. As Justice Powell stated in his concurrence in *United States v. Richardson*:

[R]epeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either. The public confidence essential to the former and the vitality crucial to the latter may well erode if we do not exercise self-restraint in the utilization of our power to negate the actions of other branches.<sup>105</sup>

The growing numbers of judicial actions brought by individual congressmen represent precisely the “repeated and essentially head-on confrontations between the life-tenured branch and the representative branches” that Justice Powell cautioned against in *Richardson*. Therefore, the courts should not recognize the standing of individual congressmen based upon derivative injury. As Justice Powell argued in *Goldwater v. Carter*, “[T]he Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse. Otherwise, we would encourage small groups or even individual Members of Congress to seek judicial resolution of issues before the normal political process has the

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(1981) (mem.). Senator McClure lacked standing to challenge a federal judicial appointment despite a specific statute authorizing such a suit. The district court concluded that “[t]o allow members of Congress to change hats, as it were, to plead the unconstitutionality of their own acts before this court on the basis of an argument already debated in the Senate but lost there by vote would, we suggest, set a dangerous precedent.” *McClure*, 513 F. Supp. at 271.

103 *Goldwater v. Carter*, 617 F.2d 697, 710 (D.C. Cir.) (per curiam) (en banc) (Wright, C.J., concurring) (emphasis added), *vacated*, 444 U.S. 996 (1979) (mem.). As one commentator has noted:

Rather than justifying a grant of standing, one may argue that the official role of a legislator involves sufficient power within the legislature so that no expansion of that power through the courts would be appropriate; in Alexander Bickel’s phrase, the courts should not be a forum for a replaying of the political game.

Note, *Standing To Sue For Members of Congress*, 83 YALE L.J. 1665, 1678 (1974) (citing A. BICKEL, POLITICS AND THE WARREN COURT 134 (1965)).

104 *Goldwater*, 444 U.S. at 1004 (Rehnquist, J., concurring).

105 418 U.S. 166, 188 (1974) (Powell, J., concurring).

opportunity to resolve the conflict.”<sup>106</sup> Or, as one commentator has asserted, “[A]llowing individual legislators to base standing on injuries suffered by Congress as an institution makes it possible for a legislator to initiate a court battle with the executive when a political solution to the dispute is still being pursued or has already been reached through legislative acquiescence.”<sup>107</sup>

For precisely these reasons, the courts should not employ the doctrine of “derivative injury” as a basis for congressional standing to sue.

### B. *Representational Standing As A Basis For The Standing To Sue of Individual Congressmen*

Although not as commonly asserted in support of congressional standing as derivative injury, several recent congressional lawsuits have proceeded on a theory of representational standing to sue.<sup>108</sup> In these suits, the plaintiff congressmen have attempted to predicate their standing not only upon injury they allegedly have suffered directly but they also have “allege[d] . . . that they have standing in a representative capacity” to assert claims on behalf of their constituents.<sup>109</sup> Because of the general inability of congressional plaintiffs to satisfy the requirements for representational standing,<sup>110</sup> and the difficulties posed by representative lawsuits brought by congressmen,<sup>111</sup> the courts should not permit congressmen to sue in a representative capacity on behalf of their constituents.<sup>112</sup>

106 444 U.S. at 997 (Powell, J., concurring). In this concurrence, Justice Powell found *Goldwater* to be nonjusticiable based upon ripeness, rather than standing, grounds. In the court of appeals, Chief Judge Wright had argued that the absence of a “constitutional impasse” rendered the plaintiff congressmen without standing to sue: “[A congressman] cannot suffer injury in fact unless Congress has suffered injury in fact. Congress suffers no injury unless the Executive has thwarted its will; and there is no such will to thwart unless a majority of Congress has spoken unequivocally.” *Goldwater v. Carter*, 617 F.2d 697, 712 (D.C. Cir.) (Wright, C.J., concurring), *vacated*, 444 U.S. 996 (1979).

107 Note, *Should Congress Defend Its Own Interests Before The Courts?*, 33 STAN. L. REV. 715, 721 (1981).

108 *E.g.*, *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1167 (D.C. Cir.), *cert. denied*, 464 U.S. 823 (1983); *Synar v. United States*, 626 F. Supp. 1374, 1378 (D.D.C.) (three-judge court), *aff'd sub nom.*, *Bowsher v. Synar*, 106 S. Ct. 3181 (1986); *McKinney v. United States Department of the Treasury*, 614 F. Supp. 1226, 1240 (Ct. Int'l Trade 1985), *aff'd*, 779 F.2d 1544 (Fed. Cir. 1986).

109 *McKinney v. United States Dep't of the Treasury*, 614 F. Supp. at 1240.

110 See *infra* notes 119-26 and accompanying text.

111 See *infra* notes 127-30 and accompanying text.

112 Representational, or associational, standing must be distinguished from third party, or *jus tertii*, standing. While parties have been permitted to raise the claims of third parties not before the court in certain limited circumstances, “the Supreme Court appears never to have heard a case where the litigant's *only* claim is the vindication of a third party's rights.” L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-26, at 203 n.2 (1978). See also *Warth v. Seldin*, 422 U.S. 490, 499 (1975); Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423, 429-30 (1974).

Moreover, it is difficult to conceive of situations in which congressmen could satisfy the prerequisites for third party standing. Justice Blackmun has summarized these requirements as follows:

[T]he court has looked primarily to two factual elements to determine whether the rule [against third-party standing] should apply in a particular case. The first is the relationship of the litigant to the person whose right he seeks to assert. . . .

The other factual element to which the Court has looked is the ability of the third party to assert his own right.

*Singleton v. Wulff*, 428 U.S. 106, 114-16 (1976) (Blackmun, J., plurality opinion).

The relationship between a congressman and his hundreds of thousands of constituents is simply not such “that the former is fully, or very nearly, as effective a proponent of the right as the

Perhaps because of the acceptance of derivative congressional standing in *Kennedy v. Sampson*, few congressional plaintiffs have attempted to sue as a representative of their constituents.<sup>113</sup> *Vander Jagt v. O'Neill*<sup>114</sup> is one of the few cases in which congressmen have attempted to rely upon a theory of representational standing. The plaintiff congressmen in this action alleged the underrepresentation of Republicans on committees of the House of Representatives and sued not only on their own behalf but "as representatives . . . of all voters in congressional districts represented by Republican members."<sup>115</sup> In concluding that the congressmen possessed standing to sue, the court of appeals considered the assertion of representational standing: "[W]e are not only dealing here with legislators suing as legislators, but also with legislators suing as voters and as representatives of the classes of all voters represented by Republicans. In that sense, appellants would seem to have strengthened their argument for judicial review by including 'private plaintiffs' in their suit."<sup>116</sup>

In contrast to *Vander Jagt*, the United States Court of International Trade rather summarily rejected an attempt by congressional plaintiffs to sue as representatives of their constituents in *McKinney v. United States Department of the Treasury*.<sup>117</sup> After finding that the congressmen did not satisfy the traditional "vote nullification" test for congressional standing, the court rejected their assertion of representational standing to sue: "Plaintiffs cannot predicate their own standing upon injuries incurred by their constituents. Generally, plaintiffs must assert their rights and not those of third parties."<sup>118</sup>

Indeed, it is difficult to conceive of situations in which congressmen could satisfy the traditional tests for representational, or associational,

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latter." *Singleton v. Wulff*, 428 U.S. at 115. Instead, this relationship is significantly more attenuated than that between doctor and patient or between employer and employee, in which situations the Supreme Court has recognized *jus tertii* standing. *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Truax v. Raich*, 239 U.S. 33 (1915). In addition, there generally is no obstacle to the assertion of their rights by a congressman's constituents directly, and constituents have joined with their congressmen as plaintiffs in some civil actions. *E.g.*, *Powell v. McCormack*, 395 U.S. 486, 493 (1969); *Bond v. Floyd*, 385 U.S. 116, 137 n.14 (1966).

113 In addition to congressional suits, however, state and local legislators have attempted to invoke the doctrine of representational standing. Thus, in *Gewertz v. Jackman*, 467 F. Supp. 1047 (D.N.J. 1979), the plaintiff-state legislator challenged his removal from a legislative committee. The district court refused to recognize any representational standing: "We need not reach the issue of the equal protection rights of plaintiff's constituents, since none is a plaintiff in this action [and] [p]laintiff himself has no standing to assert their rights." 467 F. Supp. at 1060 (citations omitted). Similarly, in *Board of Supervisors of Fairfax County, Virginia v. United States*, 408 F. Supp. 556 (E.D. Va. 1976), *appeal dismissed*, 551 F.2d 305 (4th Cir. 1977) (mem.), the court held that the County Board of Supervisors could not bring suit to seek redress for alleged constitutional torts inflicted upon county residents. The court reasoned that the Board "does not have a sufficient stake in this aspect of the suit to insure the requisite adversity in presenting this action" and "is not authorized to redress injuries of a personal nature inflicted upon its residents." 408 F. Supp. at 565, 566.

114 699 F.2d 1166 (D.C. Cir.), *cert. denied*, 464 U.S. 823 (1983).

115 *Id.* at 1167 n.1.

116 *Id.* at 1169 n.4. Despite holding that the plaintiff congressmen had standing to sue, the court of appeals nevertheless dismissed *Vander Jagt* under the equitable discretion doctrine. *Id.* at 1175-77.

117 614 F. Supp. 1226 (Ct. Int'l Trade 1985), *aff'd*, 799 F.2d 1544 (Fed. Cir. 1986).

118 614 F. Supp. at 1240. In addition to *Vander Jagt* and *McKinney*, the congressional plaintiffs in *Synar* also attempted to assert representational standing predicated upon alleged "reductions in a variety of programs benefiting their constituents." 626 F. Supp. at 1378. However, the three-judge court that considered the issue upheld the congressmen's standing to sue without considering their theory of representational standing. 626 F. Supp. at 1381.

standing. In *Hunt v. Washington State Apple Advertising Commission*, the Supreme Court set forth the following three requirements for such standing:

[W]e have recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.<sup>119</sup>

It would be difficult, at best, for congressional plaintiffs to satisfy all three of these tests.<sup>120</sup> Initially, in most cases it is unlikely that a congressman's constituents "would otherwise have standing to sue in their own right." To the extent that a congressman attempts to assert claims as the representative of his or her constituents, such claims "would likely be of the type 'held in common by all members of the public' and thus insufficient as a basis for standing."<sup>121</sup> Accordingly, congressional plaintiffs generally will be unable to satisfy the first test for representational standing.<sup>122</sup>

Nor is it clear whether "the interests [sought] to be protect[ed] [by a congressional plaintiff] are germane to the purpose" of the congressman-constituent relationship so as to satisfy the second *Hunt* representational standing test. The Constitution provides for the election of

119 432 U.S. 333, 343 (1977), *reaffirmed in* *UAW v. Brock*, 106 S. Ct. 2523, 2532-33 (1986). *See also* *Warth v. Seldin*, 422 U.S. 490, 511 (1975).

120 Indeed, an initial question arises as to whether representational standing is even available to congressional plaintiffs because they are not membership organizations. In *Hunt* the plaintiff organization was not a voluntary membership organization, but a state agency created to promote the Washington apple industry. 432 U.S. at 344. The Supreme Court nevertheless upheld the representational standing of the agency, recognizing what one commentator has referred to as "equitable membership" for representational standing purposes. Burnham, *Aspirational and Existential Interests of Social Reform Organizations: A New Role for the Ideological Plaintiff*, 20 HARV. C.R.-C.L. L. REV. 153, 165 n.49 (1985). The Court noted that "while the apple growers and dealers are not 'members' of the Commission in the traditional trade association sense, they possess all of the indicia of membership in an organization." 432 U.S. at 344. The Court further noted that the growers and dealers "elect the members of the Commission" and that "the Commission represents the State's growers and dealers and provides the means by which they express their collective views and protect their collective interests." 432 U.S. at 344, 345.

Any attempt by congressional plaintiffs to satisfy the *Hunt* representational standing test thus would focus on the fact that citizens attempt to "express their collective views and protect their collective interests" through their elected representatives. However, courts can be expected to be reluctant to stretch the boundaries of *Hunt* to encompass the congressman-constituent relationship. As Professor Burnham has observed, "courts are particularly reluctant to 'create' a membership since the only article III injury that will exist in a derivative standing case will be injury to members." Burnham, *supra*, at 165 n.49. *See also* cases collected in Burnham, *supra*, at 165 n.49.

121 *Metcalf v. National Petroleum Council*, 553 F.2d 176, 187 (D.C. Cir. 1977) (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220 (1974)). *See also* *United States v. Richardson*, 418 U.S. 166, 176-80 (1974).

122 However, a legislator's constituents might not possess a claim "held in common by all members of the public" if the legislator had been excluded from the legislature. *E.g.*, *Powell v. McCormack*, 395 U.S. 486 (1969); *Bond v. Floyd*, 385 U.S. 116 (1966); *Kucinich v. Forbes*, 432 F. Supp. 1101 (N.D. Ohio 1977); *Ammond v. McGahn*, 390 F. Supp. 655 (D.N.J. 1975), *rev'd*, 532 F.2d 325 (3d Cir. 1976). In these cases, though, representational standing has not been considered because not only had constituents joined the lawsuits as plaintiffs but the legislator had suffered a direct, personal injury from the legislative exclusion. *Powell v. McCormack*, 395 U.S. at 493, 498-500; *Bond v. Floyd*, 385 U.S. at 128 n.4, 137 n.14; *Kucinich v. Forbes*, 432 F. Supp. at 1103 n.1, 1107; *Ammond v. McGahn*, 390 F. Supp. at 657.

congressmen to represent the residents of their districts in the Congress, rather than in the courts.<sup>123</sup> The congressman-constituent relationship must be read very broadly, indeed, to encompass an expectation that congressmen will attempt to represent their constituents even outside the legislative arena.

Even more problematic for any attempt to fit congressional standing within the traditional representational standing mold is the final *Hunt* requirement that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."<sup>124</sup> Perhaps the most troubling aspect of legislative attempts to invoke representational standing stems from the fact that there presumably is a wide difference of opinion among a legislator's constituents on any given issue. Thus it generally will be impossible for a legislator to represent one part of his or her constituency in the courts without taking a position that another part of that constituency opposes.<sup>125</sup> Because of such conflicts of interest, representational standing should not be afforded congressmen seeking to assert the rights of their constituents.<sup>126</sup>

Even if congressmen could satisfy the traditional test for representational standing, serious separation of powers problems would be presented by congressional attempts to sue the executive branch of the federal government on behalf of their constituents. Perhaps an analo-

123 U.S. Const. art. I, § 2, cl. 1 (House of Representatives); U.S. Const. amend. XVII (Senate). As one commentator has remarked, "[T]he fact that a legislator is elected to represent his constituents in the political sense in the legislature does not mean that he may represent his constituents in the legal sense in the courts on the same basis." Note, *Standing To Sue For Members of Congress*, 83 YALE L.J. 1665, 1677-78 (1974). See also Note, *Congress Versus the Executive: The Role of the Courts*, 11 HARV. J. ON LEGIS. 352, 369 (1974) ("Congressmen should resist the temptation to become public interest law firms for their states or districts."). But see the concurrence of Judge Fahy in *Kennedy v. Sampson*, in which Senator Kennedy was found to have standing because, *inter alia*, "[a]s a United States Senator he represents a sovereign State whose people have a deep interest in the Act [that the President had attempted to veto] and look to their Senators to protect that interest." 511 F.2d at 446.

124 432 U.S. at 343. See also *Warth v. Seldin*, 422 U.S. 490, 515 (1975).

125 One aspect of this problem was highlighted in the case of *Dauids v. Akers*, 549 F.2d 120 (9th Cir. 1977). In *Dauids* the plaintiff Democratic state legislators challenged the refusal of the Republican Speaker of the Arizona House of Representatives to appoint them to legislative committees. The plaintiffs asserted that the Speaker's actions denied not just them, but those who had voted for them, the equal protection of the laws. 549 F.2d at 124.

The court of appeals rejected not only the equal protection challenge, but also the implicit premise of the legislators that they represented only those citizens who had voted for them:

[E]ach candidate elected represents all of the people of his district—those who voted for him, those who voted against him, those who chose not to vote, those who were not eligible to vote. He does not represent just or only the voters who voted for him, or those who are members of his political party.

549 F.2d at 124.

Thus, because the rights and interests of a legislator's constituency are not monolithic, those rights and interests should not be determined without the participation of the members of that constituency.

126 See *Associated General Contractors v. Otter Tail Power Co.*, 611 F.2d 684, 691 (8th Cir. 1979) (trade association held to be without representational standing to challenge labor agreement because, *inter alia*, the "status and interests [of association members] are too diverse and the possibilities of conflict too obvious to make the association an appropriate vehicle to litigate the claims of its members"). See also *Calvin v. Conlisk*, 520 F.2d 1, 10-11 (7th Cir. 1975), *cert. denied*, 424 U.S. 912 (1976).

Conflicts of interest between a party plaintiff and a third party also can preclude the successful invocation of *jus tertii* standing. See L. TRIBE, *supra* note 112, at § 3-29, 113 n.2; Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1744 n.360 (1975).

gous area of the law is that presented by a state's attempt to represent its citizens in a judicial action as *parens patriae*. "A State [does not] have standing as the parent of its citizens to invoke . . . constitutional provisions against the Federal Government, the ultimate *parens patriae* of every American citizen."<sup>127</sup> The Supreme Court explained in *Massachusetts v. Mellon*:

While the State, under some circumstances, may sue in that capacity [of *parens patriae*] for the protection of its citizens, it is no part of its duty or power to enforce their rights in respect of their relations with the federal government. In that field it is the United States, and not the State, which represents them as *parens patriae*, when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status.<sup>128</sup>

Because of the separation of powers problems posed by individual congressional lawsuits challenging actions of the executive branch,<sup>129</sup> congressmen should not be permitted to bring such actions in a representative capacity. Instead, as in the area of attempted *parens patriae* actions by states, individual citizens should be required to bring any judicial challenges on their own behalf. If this is done it will be unnecessary to attempt to stretch current representational standing doctrine to encompass congressional lawsuits, while access to the federal courts will be preserved for citizens whose claims satisfy traditional standing requirements.<sup>130</sup>

Accordingly, the courts should not recognize representational standing as a basis for the standing to sue of individual congressmen.

### C. "Direct" Injury to Congressmen as a Basis for the Standing to Sue of Individual Congressmen

While neither derivative injury nor representational theories of standing are a sufficient basis for the standing to sue of individual congressmen, the Supreme Court has entertained congressional challenges premised upon injuries directly sustained by individual congressmen.<sup>131</sup> However, in recent congressional standing cases, the lower federal

<sup>127</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966). See also *Alfred L. Snapp & Sons, Inc. v. Puerto Rico*, 458 U.S. 592, 610 n.16 (1982).

<sup>128</sup> 262 U.S. 447, 485-86 (1923) (citation omitted). See also *Florida v. Mellon*, 273 U.S. 12, 18 (1927).

<sup>129</sup> See *supra* notes 105-07 and accompanying text.

<sup>130</sup> In fact, individual constituents should be readily available to join with congressmen as plaintiffs. *E.g.*, *Powell v. McCormack*, 395 U.S. 486, 498 (1969) (Adam Clayton Powell and thirteen of his constituents challenged Powell's exclusion from U.S. House of Representatives); *Bond v. Floyd*, 385 U.S. 116, 137 n.14 (1966) (Julian Bond and two of his constituents challenged Bond's exclusion from Georgia House of Representatives). Cf. Chayes, *Foreward: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 23 (1982) ("[I]n the vast majority of public law cases, it has been possible to turn up a plaintiff who has suffered the requisite injury in fact."). Indeed, congressmen themselves may attempt to sue in their capacities as voters or citizens rather than in (or in addition to) their capacity as congressmen. See, *e.g.*, *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1167 n.1 (D.C. Cir.), *cert. denied*, 464 U.S. 823 (1983) (congressmen brought suit not only as Members of Congress but also as individual voters).

<sup>131</sup> See *infra* cases discussed in text accompanying notes 133-40.

courts have presumed injuries to congressmen due to the deprivation or infringement of "their" votes in the Congress.<sup>132</sup> This section of this article demonstrates that such a presumption is based upon a mistaken understanding of our system of representative democracy. Accordingly, while congressional standing should be recognized where a congressman suffers a direct, personal injury, alleged injuries premised upon the denial of an official vote are not a sufficient predicate for congressional standing.

While a congressman may not possess any personal interest in his own vote, the Supreme Court has entertained actions brought by individuals who have been denied the pay and other emoluments of public office. In *Powell v. McCormack*, the Supreme Court considered Adam Clayton Powell's lawsuit challenging the refusal of the House of Representatives to seat him as a Member of the 90th Congress.<sup>133</sup> While the Supreme Court considered the justiciability of the action,<sup>134</sup> it did not specifically address Powell's standing to maintain the action. However, the record in the case clearly established that Powell had suffered a direct, personal injury due to the defendants' refusal to seat him as a representative or to pay him his congressional salary.<sup>135</sup>

The Supreme Court also has entertained actions brought by United States Senators challenging federal election campaign statutes<sup>136</sup> and a state election recount.<sup>137</sup> In neither of these cases did the Court explicitly consider the standing to sue of the plaintiff senators.<sup>138</sup> However, in both cases the plaintiffs, as candidates for reelection to the United States Senate, were directly affected, and injured, by the campaign finance statutes and the state election recount challenged.<sup>139</sup>

Thus a Member of Congress may suffer direct, personal injury arising from his or her official position in numerous situations.<sup>140</sup> The Supreme Court quite properly has entertained actions brought by con-

132 See, e.g., *Riegle v. Federal Open Mkt. Comm.*, 656 F.2d 873, 877-78 (D.C. Cir.), cert. denied, 454 U.S. 1082 (1981); *Kennedy v. Sampson*, 511 F.2d 430, 436 (D.C. Cir. 1974); *Synar v. United States*, 626 F. Supp. 1374, 1381 (D.D.C.) (three-judge court), *aff'd sub nom.*, *Bowsher v. Synar*, 106 S. Ct. 3181 (1986).

133 395 U.S. 486 (1969).

134 *Id.* at 516-49.

135 *Id.* at 493. In its earlier decision in *Bond v. Floyd*, 385 U.S. 116 (1966), the Supreme Court had not questioned the standing of Julian Bond to bring an action challenging his exclusion from the Georgia House of Representatives and his consequent denial of salary as a state representative.

136 *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

137 *Roudebush v. Hartke*, 405 U.S. 15 (1972).

138 *But see Buckley v. Valeo*, 424 U.S. at 12 ("[A]t least some of the appellants [including various organizations and individuals in addition to the plaintiff senator] have a sufficient 'personal stake' in a determination of the constitutional validity of each of the challenged provisions to present [an article III case or controversy].").

139 While the congressmen's standing to sue was not directly considered by the Supreme Court in the above cases, in *Board of Educ. v. Allen*, 392 U.S. 236 (1968), the Court found that the school board appellants had standing to challenge a state law requiring local school boards to loan textbooks to students in parochial schools. The Supreme Court concluded that the school board members "are in the position of having to choose between violating their oath and taking a step—refusal to comply with [the state law challenged]—that would be likely to bring their expulsion from office and also a reduction in state funds for their school districts. There can be no doubt that appellants thus have a 'personal stake in the outcome' of this litigation." *Id.* at 241 n.5 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

140 See *supra* cases cited in notes 133-139. See also *Gravel v. United States*, 408 U.S. 606 (1972), in



gressional plaintiffs in such circumstances, rather than dismiss the actions on standing grounds.

This is not to say, however, that individual congressmen suffer any article III injury-in-fact merely due to an alleged deprivation or nullification of a congressional vote. The lower federal courts, though, have entertained congressional claims upon the assumption that a congressman possesses a personal interest in his or her vote. Thus, in *Kennedy v. Sampson*, the court of appeals concluded:

[T]he office of United States Senator does confer a participation in the power of the Congress which is exercised by a Senator when he votes for or against proposed legislation. In the present case, appellee has alleged that conduct by officials of the executive branch amounted to an illegal nullification not only of Congress' exercise of its power, but also of appellee's exercise of his power.<sup>141</sup>

Similarly, in framing the issue in *Riegle v. Federal Open Market Committee*, the court of appeals stated: "We assume, therefore, that the procedure for constituting the FOMC contained in 12 U.S.C. § 263(a) of the Act results in a deprivation of Senator Riegle's constitutional right to advise and consent regarding the appointment of the defendant officers of the executive branch."<sup>142</sup> Subsequently, a three-judge court sitting in the United States District Court for the District of Columbia noted: "[T]he law of this Circuit . . . recognizes a personal interest by Members of Congress in the exercise of their governmental powers . . . ."<sup>143</sup>

In contrast to the above cases, several legislative standing decisions have noted the fallacy of recognizing a congressman's personal right in the governmental process. In *Coleman v. Miller*, itself, Justice Frankfurter took issue with the concept that legislators possess a personal interest in their votes. Concerning the "procedures for voting in legislative assemblies," the Justice concluded: "In no sense are they matters of 'private damage.' They pertain to legislators not as individuals but as political representatives executing the legislative process."<sup>144</sup>

More recently, Judge Scalia used his separate concurrence in *Moore v. United States House of Representatives* to make a similar point: "In my view no officers of the United States, of whatever branch, exercise their governmental powers as personal prerogatives in which they have a judicially cognizable private interest. They wield those powers not as private citizens but only through the public office which they hold."<sup>145</sup> Judge Bork even more recently echoed this conclusion in his dissent in *Barnes v.*

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which Senator Gravel was permitted to intervene and file a motion to quash a grand jury subpoena directed to his legislative assistant concerning a Senate subcommittee investigation.

141 511 F.2d 430, 436 (D.C. Cir. 1974).

142 656 F.2d 873, 877 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981) (emphasis added). *See also Riegle*, 656 F.2d at 878 (referring to "Riegle's inability to exercise his right under the Appointments Clause of the Constitution") (emphasis added).

143 *Synar v. United States*, 626 F. Supp. 1374, 1381 (D.D.C.) (three-judge court), *aff'd sub nom.*, *Bowsher v. Synar*, 106 S. Ct. 3181 (1986).

144 307 U.S. 433, 470 (1939) (Frankfurter, J., concurring).

145 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia, J., concurring), *cert. denied*, 105 S. Ct. 779 (1985).

*Kline*.<sup>146</sup> In this dissent Bork argued that congressional standing doctrine is premised upon the notion that "elected representatives have a separate private right, akin to a property interest, in the powers of their office."<sup>147</sup> Judge Bork, however, took issue with such an assumption: "[T]hat is a notion alien to the concept of a republican form of government. It has always been the theory, and it is more than a metaphor, that a democratic representative holds his office in trust, that he is nothing more nor less than a fiduciary of the people."<sup>148</sup>

In fact, the Founding Fathers viewed the role of congressional representatives in just such republican terms. As James Madison stated in *The Federalist*: "It is evident that no other form [of government than one which is "strictly republican"] would be reconcilable with the genius of the people of America; with the fundamental principles of the Revolution; or with that honorable determination which animates every votary of freedom to rest all our political experiments on the capacity of mankind for self-government."<sup>149</sup> The authors of *The Federalist* also cautioned, "It is a misfortune incident to republican government, though in a less degree than to other governments, that those who administer it may forget their obligations to their constituents and prove unfaithful to their important trust."<sup>150</sup>

Accordingly, an entire *Federalist Paper* was devoted to rebutting the "charge against the House of Representatives . . . that it will be taken from that class of citizens which will have the least sympathy with the mass of the people, and be most likely to aim at an ambitious sacrifice of the many to the aggrandizement of the few."<sup>151</sup> In order to preserve the "dependence on the people" of the House of Representatives, the Constitution provided for frequent elections, an extension of electoral suffrage that was quite liberal for that time period, and limitations upon the number of constituents that any representative would represent.<sup>152</sup>

146 759 F.2d 21, 41 (D.C. Cir. 1985) (Bork, J., dissenting), cert. granted sub nom., *Burke v. Barnes*, 106 S. Ct. 1258 (1986).

147 759 F.2d at 50.

148 *Id.*

149 THE FEDERALIST NO. 39, at 240 (J. Madison) (C. Rossiter ed. 1961). While the Federalists stressed the manner in which the Constitution would ensure popular governance, the anti-Federalists criticized the Constitution because it did not go far enough in establishing a direct democracy.

Whereas *The Federalist* argued that representatives must be able to rise above devotion to limited local interests, the anti-Federalists were firmly convinced of the opposite. They insisted that representatives should represent local sentiments and speak for local interests; that they should mirror as precisely as possible the sentiments of their constituents.

J. LEWIS, ANTI-FEDERALISTS VERSUS FEDERALISTS 20 (1967).

150 THE FEDERALIST NO. 62, at 378 (J. Madison) (C. Rossiter ed. 1961).

151 THE FEDERALIST NO. 57, at 350 (J. Madison) (C. Rossiter ed. 1961).

152 *Id.* In addition, the requirement that representatives live within the state from which they were elected, as well as the limited number of electors any one representative could represent, were perceived as creating a more representative legislative body than the British House of Commons. THE FEDERALIST NO. 56, at 349-50 (J. Madison) (C. Rossiter ed. 1961).

Such constitutional provisions would necessarily operate to counteract legislative independence such as that advocated by Edmund Burke in his Speech to the Electors of Bristol: "[A]uthoritative instructions, mandates issued, which the member is bound blindly and implicitly to obey, to vote, and to argue for . . .—these are things utterly unknown to the laws of this land, and which arise from a fundamental mistake of the whole order and tenor of our Constitution . . . You choose a member indeed; but when you have chosen him, he is not a member of Bristol, but he is a member of Parlia-

The democratic aspects of the political structure of the United States have greatly broadened since the adoption of the Constitution. The electoral franchise has been expanded radically by constitutional amendments prohibiting the denial of the right to vote on the basis of race<sup>153</sup> and sex,<sup>154</sup> extending the right to vote to citizens eighteen years of age or older,<sup>155</sup> and abolishing the poll tax.<sup>156</sup> In addition, by the seventeenth amendment to the Constitution, United States Senators now are elected directly by the people in the same manner as are members of the House of Representatives. To recognize any personal interest of a congressman in his or her official votes would be contrary to these democratic and republican features of our national government, under which a congressman indeed does hold office as a public trust.<sup>157</sup>

Accordingly, congressmen suffering truly personal injury, stemming from the denial of the pay or other emoluments of office, should be granted standing to sue to redress the injury. The courts, however, should not accept allegations of injury premised upon the denial of a congressman's vote as sufficient for article III standing purposes. Instead, such congressmen should be found to be without standing to sue.

### III. Congress As A Party Plaintiff

Prior sections of this article have focused on the injuries asserted by individual congressional plaintiffs. Generally, such plaintiffs cannot satisfy the article III standing requirement of injury-in-fact. In situations where Congress suffers an institutional injury, however, a suit brought by Congress would not pose the same practical problems as do actions by individual Members of Congress. Accordingly, in appropriate circumstances the courts should recognize the standing to sue of the Congress.

Judge Arlin Adams of the United States Court of Appeals for the Third Circuit has summarized the essence of legislative standing doctrine as follows: "[T]he essential point of these [legislative standing] doctrines is to encourage political solutions to political problems."<sup>158</sup> Recognizing

ment." E. BURKE, EDMUND BURKE: ON GOVERNMENT, POLITICS AND SOCIETY 157-58 (B. Hill ed. 1976).

153 U.S. Const. amend. XV.

154 U.S. Const. amend. XIX.

155 U.S. Const. amend. XXVI.

156 U.S. Const. amend. XXIV.

157 Apart from doctrines of political philosophy and theory is the question of the extent to which congressmen actually function as a conduit for the interests of their constituents. One recent study has concluded that "when 'constituent interest' is given a more appropriate empirical characterization than it has had up to now, it plays a far larger, even dominant, role in congressional voting, and party and ideology correspondingly smaller roles, than heretofore believed. . . . The tendency for legislators to shirk serving their constituents' interests in favor of their own preferences (ideology) seems more apparent than real." Peltzman, *Constituent Interest and Congressional Voting*, 27 J.L. & ECON. 181, 183, 210 (1984). Nevertheless, "[i]t . . . seems clear that neither pole of [the] dichotomy [between the delegate and trustee models of representation] is adequate to explain democratic representation in the modern Anglo-American tradition . . . [T]he proper role of a political representative today is generally believed to fall somewhere between these poles. . . ." J. PENNOCK & J. CHAPMAN, REPRESENTATION 14-15, 16 (1968).

In any event, neither representational theory nor practice supports the premise that an elected representative has a personal interest in his or her official votes.

158 *Dennis v. Luis*, 741 F.2d 628, 639 (3d Cir. 1984) (Adams, J., concurring, in part, and dissenting, in part).

the standing to sue of individual congressmen runs directly contrary to this overriding concern for political, and thus non-judicial, resolution of disputes between the Congress and the Executive. As Judge Adams has cautioned, “[C]ourts should not cut short the political process by awarding a judicial victory to a legislator who has lost, or has not attempted to prevail, in the political sphere.”<sup>159</sup>

An attempt by individual congressmen to invoke the judicial process is significantly different from the resort to the courts by Congress. This is so “because the court is being asked to resolve the dispute irrespective of the existence of political remedies, and without the collective judgment of Congress behind the request. . . . While the congressional suit is an institutional decision, the individual suit preempts institutional action, stifling debate.”<sup>160</sup> Another commentator has cautioned that, “[t]o the extent Congressmen substitute a judicial forum for the hearing room or House or Senate floor as a means of reviewing executive administration, they will drastically alter the character of the legislative process by decreasing the necessity for hard political decisions and for interaction with the political branch.”<sup>161</sup>

Accordingly, absent direct, personal injury to a congressman, individual congressional claims should be rejected. The courts should refuse to entertain such claims not only due to the absence of article III injury-in-fact, but also because of the institutional concerns expressed above. Rather than entertain the claims of individual congressmen, “institutional challenges to the executive should not be permitted without an institutional commitment to assert the challenge.”<sup>162</sup>

This is not to say, however, that the courts should not entertain actions brought by Congress, itself, if it has suffered injury as an institution.<sup>163</sup> In his dissent in *Barnes v. Kline*, Judge Bork argued forcefully that the federal courts have jurisdiction to entertain neither actions brought

<sup>159</sup> *Id.* at 638.

<sup>160</sup> Note, *Congressional Access to the Federal Courts*, 90 HARV. L. REV. 1632, 1648-49 (1977). This note suggests that lawsuits brought by individual congressmen should be dismissed either as political questions or due to a withholding of equitable relief. However, the note proceeds on the assumption that individual congressional plaintiffs satisfy the article III standing prerequisite of injury-in-fact. *Id.* at 1650.

<sup>161</sup> Note, *Congress Versus the Executive: The Role of the Courts*, 11 HARV. J. ON LEGIS. 352, 368 (1974).

<sup>162</sup> *Id.* at 366. An institutional commitment to assert a judicial challenge on behalf of the Senate presumably would be asserted by the Office of Senate Legal Counsel. See 2 U.S.C. §§ 288-288n (1982). One law review note has urged that the absence of representation by this office (or authorization for official representation by the House of Representatives) should be considered by the courts in congressional standing cases. Note, *Executive Discretion and the Congressional Defense of Statutes*, 92 YALE L.J. 970, 997 n.94 (1983) (“The Senate’s failure to authorize the Senate Legal Counsel to appear makes absolutely clear that such a suit is brought by a senator in an individual capacity and not as a representative of the Senate.”). See also Note, *supra* note 107, at 716 (“[O]nce Congress has established procedures manifesting its willingness to confront the executive in the courts, legislative inaction necessarily gives rise to the inference that political remedies are still being pursued or that a political solution has been reached through acquiescence.”).

<sup>163</sup> In addition to lawsuits brought by the Congress, itself, there also may be cases in which either the Senate or the House of Representatives have suffered an injury that can be asserted by that body without the participation of the full Congress. See, e.g., *Goldwater v. Carter*, 444 U.S. 996 (1979) (mem.) (challenge to presidential termination of treaty without ratification by Senate); *Moore v. U.S. House of Representatives*, 733 F.2d 946 (D.C. Cir. 1984), cert. denied, 105 S. Ct. 779 (1985) (challenge to federal tax statute because it did not originate in the House of Representatives). See also *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 194 (1972) (per curiam) (Minnesota

by individual congressmen nor by the Congress itself.<sup>164</sup> However, in situations in which the Congress, as an institution, actually has suffered injury-in-fact, it should be afforded standing to sue.

In his dissent in *Barnes v. Kline*, Judge Bork contended that the majority's consideration of that case constituted a "rearrange[ment of] fundamental constitutional structures."<sup>165</sup> However, at least since *Marbury v. Madison*,<sup>166</sup> the federal courts have reviewed the actions of the legislative and executive branches of the federal government, and, in a limited number of cases, have entertained actions brought on behalf of these branches of government.<sup>167</sup> Chief Justice John Marshall, himself, wrote in *Cohens v. Virginia* that "[i]t is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. . . . We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."<sup>168</sup> More recently, Professor Herbert Wechsler argued that "[t]he courts have both the title and the duty when a case is properly before them to review the actions of the other branches in light of constitutional provisions . . . ."<sup>169</sup>

Indeed, the federal courts have entertained lawsuits brought either by, or on behalf of, the United States Senate and the House of Representatives.<sup>170</sup> The United States Courts of Appeals for both the Third Circuit and the District of Columbia Circuit recently have recognized the

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Senate had standing to bring action without the concurrence of Minnesota House of Representatives).

Indeed, there well may be situations in which a "controlling block" of legislators, not constituting an absolute majority of the legislature, may be able to establish an injury sufficient for article III purposes. *See, e.g.,* *Coleman v. Miller*, 307 U.S. 433 (1939) (lieutenant governor's tie-breaking vote on constitutional amendment challenged by, *inter alia*, twenty state senators who voted against the amendment); *Dennis v. Luis*, 741 F.2d 628, 640 (3d Cir. 1984) (Adams, J., concurring, in part, and dissenting, in part) (to establish standing to sue, "legislators may show . . . that as an aggregate they constitute a controlling bloc of the legislative branch.").

164 759 F.2d 21, 41 (D.C. Cir. 1985) (Bork, J., dissenting), *cert. granted sub nom.*, *Burke v. Barnes*, 106 S. Ct. 1258 (1986).

165 *Id.* at 71.

166 5 U.S. (1 Cranch) 137 (1803).

167 *See* the Supreme Court cases collected in *Barnes v. Kline*, 759 F.2d at 27. *See also* *Ameron, Inc. v. U.S. Army Corps of Engineers*, 787 F.2d 875, 888 (3d Cir. 1986) (Senate and leadership of House of Representatives have standing to intervene in action to defend statute concerning legislative delegation of congressional powers); *Duplantier v. United States*, 606 F.2d 654, 665 n.23 (5th Cir. 1979), *cert. denied*, 449 U.S. 1076 (1981) (plaintiff federal judges have standing to sue Attorney General seeking injunction against enforcement of judicial reporting provisions of Ethics in Government Act of 1978); *Clark v. Valeo*, 559 F.2d 642, 654 n.1 (D.C. Cir.) (Bazelon, C.J., and Tamm & Skelly Wright, J.J., concurring), *aff'd sub nom.*, *Clark v. Kimmitt*, 431 U.S. 950 (1977) (mem.) ("The President may have standing to challenge a statute which allegedly infringes his constitutional authority to veto legislation.").

168 19 U.S. (6 Wheat) 264, 404 (1821).

169 Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959). *But cf.* Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985) (arguing for the exercise of a reasoned discretion by the federal courts).

170 Moreover, both federal and state courts have entertained disputes between state legislatures and the executive branches of state government. *Thirteenth Guam Legislature v. Bordallo*, 588 F.2d 265 (9th Cir. 1978) (per curiam); *Government of the Virgin Islands v. Eleventh Legislature of the Virgin Islands*, 536 F.2d 34, 36 (3d Cir. 1976); *Colorado General Assembly v. Lamm*, 700 P.2d 508, 515-16 (Colo. 1985) (en banc); *Legislature of the State of Cal. v. Deukmejian*, 34 Cal. 3d 658, 669 P.2d 17, 194 Cal. Rptr. 781 (1983) (per curiam). *See also* *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 193-94 (1972) (per curiam); *Coleman v. Miller*, 307 U.S. 433 (1939).

standing to sue of the United States Senate.<sup>171</sup> In addition, the Supreme Court at least tacitly approved the intervention of both the Senate and the House of Representatives in *Immigration and Naturalization Service v. Chadha*.<sup>172</sup> Moreover, in *Barnes v. Kline* the executive branch, through the Department of Justice, conceded in the court of appeals that a single House of Congress had standing to litigate the constitutional question at issue in that case.<sup>173</sup>

As Justice Powell concluded in *Goldwater v. Carter*, "The specter of the Federal Government brought to a halt because of the mutual intransigence of the President and the Congress would require this court to provide a resolution pursuant to our duty 'to say what the law is.'" <sup>174</sup> Accordingly, because a lawsuit by Congress or one of its Houses would not present the many problems posed by the resort to the court by individual congressmen,<sup>175</sup> standing to sue should be afforded these institutions if they have suffered injury-in-fact.<sup>176</sup>

Nor does it appear likely that Congress would resort to the federal courts with undue frequency. One study has found that, despite the existence of the Office of Senate Legal Counsel, "the Senate has taken no action in at least six cases following notification from the Attorney General of his determination not to defend . . . [congressional] statutes

171 *Ameron, Inc. v. U.S. Army Corps of Engineers*, 787 F.2d 875, 888 (3d Cir. 1986); *Barnes v. Kline*, 759 F.2d 21, 26 (D.C. Cir. 1985), *cert. granted sub nom.*, *Burke v. Barnes*, 1906 S. Ct. 1258 (1986). The U.S. Court of Appeals for the District of Columbia Circuit also has upheld the standing to sue of the chairman of a subcommittee of the House of Representatives and of a Senate committee, both having been authorized to bring suit by the House of Congress in question. *United States v. American Telephone and Telegraph Co.*, 551 F.2d 384, 391 (D.C. Cir. 1976); *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 727 (D.C. Cir. 1974).

172 462 U.S. 919, 930 n.5, 939 (1983).

173 759 F.2d at 29 n.16. The Department of Justice also had conceded in *Kennedy v. Sampson* that, because they had sustained a direct injury, the Senate or the Congress might have standing to sue. 511 F.2d 430, 434 (D.C. Cir. 1974).

174 444 U.S. 996, 1001 (1979) (Powell, J., concurring) (quoting *United States v. Nixon*, 418 U.S. 683, 703 (1974) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803))).

175 See *supra* text accompanying notes 105-07 and 158-162. One commentator has argued:

[I]f Congress as an institution decides that it can best vindicate its interest in the courts rather than through conventional political means, the courts should defer to the congressional choice among available remedies. First, the court need not fear that judicial action will result in untoward intervention into the political process, since the legislature itself has initiated the request for assistance. Second, the fact that Congress as an institution has resolved to seek judicial relief means that the majority has been convinced of the wisdom of the course of action—the political process has not been circumvented or shut off prematurely. Third, to require Congress to use its political power in every case is to ignore the fact that "the legislative route is arduous and time-consuming," and that consequently the right asserted may prove to be unenforceable as a practical matter.

Note, *supra* note 160, at 1647-48 (footnotes omitted). See also Note, *Executive Discretion and the Congressional Defense of Statutes*, 92 YALE L.J. 970, 986-88 (1983). But see Henkin, *Litigating the President's Power to Terminate Treaties*, 73 AM. J. INT'L L. 647, 648 (1979).

176 In order to establish standing to sue, Congress still would need to "allege a distinct and palpable injury to [itself]." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Thus, in *Ameron, Inc. v. United States Army Corps of Engineers*, 787 F.2d 875, 888 (3d Cir. 1986), the court held that the Senate and leadership of the House of Representatives had standing to intervene in an action in which the executive branch had declined to defend a statute because of its conclusion that the statute unconstitutionally delegated executive powers to the Comptroller General. However, the court found these same plaintiffs to be without standing to obtain an injunction requiring compliance with the law because "[n]othing in the *Ameron* controversy gives Congress a direct 'stake' in the enforcement of [the statute challenged]." *Id.*

...”<sup>177</sup> Not only have there been very few instances in which the Congress has attempted to resort to the federal courts, but there may well be a hesitancy on the part of Congress to institute and actively pursue litigation in the federal courts. As Judge (and former Congressman) Abner Mikva has observed, “Both institutionally and politically, Congress is designed to pass over the constitutional questions, leaving the hard decisions to the courts” (presumably in lawsuits brought by private parties).<sup>178</sup>

Under our federal constitutional system, the “hard decisions” must, in appropriate circumstances, be made by all three branches of government. While individual congressmen are generally without standing to bring such issues before the federal courts, the courts should recognize the standing to sue of the Congress, itself, when it can satisfy the article III standing prerequisites.<sup>179</sup>

#### IV. Conclusion

The federal courts should not entertain actions brought by individual Members of Congress unless the congressmen have been injured directly. Theories of derivative and representational, or third-party, standing are insufficient for article III purposes. Moreover, the courts should not presume a personal injury to a congressman due to the deprivation or impairment of an official vote.

The focus in analyzing congressional standing cases should be upon the article III requirement of injury-in-fact,<sup>180</sup> rather than upon variants

<sup>177</sup> Note, *Equitable Discretion and the Congressional Defense of Statutes*, 92 YALE L. J. 970, 984 (1983). In addition, no action was taken on the recommendation of the Senate Legal Counsel that the Senate intervene before the U.S. Court of Appeals for the District of Columbia Circuit in *Goldwater v. Carter*. *Id.* at 984 n.44.

<sup>178</sup> Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C.L. REV. 587, 609 (1983). See also McGowan, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119, 1128-29 (1977) (referring to broad congressional delegations of authority to administrative agencies “for reasons of internal political maneuver or as an escape from having to stand up and be counted”). But see the rejoinder to Judge Mikva in Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C.L. REV. 707 (1985).

<sup>179</sup> Merely because Congress may have standing to sue would not, necessarily, require a court to entertain the merits of an action that it might bring. “Because courts should interpose themselves in disputes between the other two branches of government only when absolutely necessary, a legislative decision to sue should not preclude a judicial determination of either mootness or ripeness. Rather, the courts should view the fact that Congress has sought a judicial remedy only as evidence that a suit is justiciable.” Note, *supra* note 107, at 734. The Congress also may be found to have standing to sue, yet a decision on the merits may be precluded by the political question doctrine. *E.g.*, *Goldwater v. Carter*, 444 U.S. 996, 1002 (1979) (Rehnquist, J., concurring) (case brought by individual Members of Congress challenging presidential treaty termination found nonjusticiable because it presented a political question); *Cranston v. Reagan*, 611 F. Supp. 247 (D.D.C. 1985) (standing issue not reached because challenge by congressional plaintiffs to international nuclear fuel agreements dismissed as a political question).

<sup>180</sup> By focusing upon injury-in-fact, it is unnecessary to attempt to resolve the recent debate concerning the extent to which separation of powers concerns should be reflected in standing doctrine. Compare *Barnes v. Kline*, 759 F.2d 21, 26-30 (D.C. Cir. 1985), *cert. granted sub nom.*, *Burke v. Barnes*, 106 S. Ct. 1258 (1986), with *Barnes v. Kline*, 759 F.2d at 51-54 (Bork, J., dissenting). Compare also *Scalia*, *supra* note 6, with McGowan, *supra* note 56.

The premise of this article is that, by focusing upon the injury asserted, traditional standing doctrine provides an adequate basis to analyze congressional lawsuits. Neither the reinvigoration of the separation of powers doctrine as the primary concern of standing analysis (as advocated by Judge Bork and Justice Scalia) nor the adoption of a doctrine of “equitable discretion” (as advanced by

of traditional standing theory or the equitable discretion doctrine. If the injuries asserted by a congressional plaintiff are construed consistently with the system of congressional representation established by the Constitution, most of those injuries simply do not constitute the “distinct and palpable injury to [the congressman] himself” that article III requires.<sup>181</sup> Accordingly, the courts should not generally entertain the claims of individual congressmen, but should only confront the issues raised by such claims if they are properly asserted by the Congress itself or by a private individual who has suffered article III injury-in-fact.

As Judge Abner Mikva has observed, “[C]onfrontation with the policy-makers puts the delicate nature of the separation of powers to great stress. An independent judiciary can remain that way only if the other branches accept the importance of its independence.”<sup>182</sup> Or, as former Attorney General Edward Levi has noted:

Resolution of such disputes [between Congress and the Executive] provides a kind of certainty. But this is an area of great difficulty, requiring caution. . . . We are sometimes said to be a litigious people, but the Constitution, while it establishes a rule of law, was not intended to create a government by litigation. A government by representation through different branches, and with interaction and discussion, would be much nearer the mark.<sup>183</sup>

When considering the standing to sue of either individual congressmen or the Congress itself, the courts should attempt to preserve and foster just such a “government by representation through different branches.”

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Judge McGowan and other judges of the U.S. Court of Appeals for the District of Columbia Circuit) is necessitated by such actions.

181 Warth v. Seldin, 422 U.S. 490, 501 (1975).

182 Mikva, *supra* note 178, at 610.

183 Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371, 387 (1976).