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Constitutional Law - Standing - Separation of Powers

Michael J. Cremonese

CONSTITUTIONAL LAW — STANDING — SEPARATION OF POWERS — The Supreme Court of the United States refused to rule on whether the Line Item Veto Act of 1996 violated the Constitutional separation of powers by impermissibly delegating legislative powers to the President because the Congressmen who brought the suit did not have standing to maintain the action.

Raines v. Byrd, 117 S. Ct. 2312 (1997).

The 104th Congress passed the Line Item Veto Act[1] ("LIVA") in March 1996.[2] LIVA was presented to the President as required by the United States Constitution.[3] The President duly signed the bill into law in April 1996.[4] LIVA took effect on January 1, 1997.[5] LIVA's goal was reduction of the United States' budget deficit.[6]

Generally, LIVA permitted the President to modify a bill by striking fiscal provisions that he deemed inappropriate,[7] effecting a

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1. 2 U.S.C. §691. The Line Item Veto Act provides, in part:

a) In general

Notwithstanding the provision of subchapters I and II of this chapter, and subject to the provisions of this subchapter, the President may, with respect to any bill or joint resolution that has been signed into law pursuant to Article I, section 7, of the Constitution of the United States, cancel in whole —

(1) any dollar amount of discretionary budget authority;

(2) any item of new direct spending; or

(3) any limited tax benefit;

if the President —

(A) determines that such cancellation will —

(i) reduce the Federal budget deficit;

(ii) not impair any essential Government functions; and

(iii) not harm the national interest; and

(B) notifies the Congress of such cancellation by transmitting a special message, in accordance with section 691a of this title, within five calendar days (excluding Sundays) after the enactment of the law providing the dollar amount of discretionary budget authority, item of new direct spending, or limited tax benefit that was canceled.

2 U.S.C. §691(a) (1996).

2. Raines v. Byrd, 117 S. Ct. 2314 (1997).

3. Article I, section §7, clause 2 of the Constitution provides: "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States. If he approves, he shall sign it, but if not, he shall return it, with his Objections to the house in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it." *Id.*

4. *Raines*, 117 S. Ct. at 2315.

5. *Id.*

6. Byrd v. Raines, 956 F. Supp. 25, 28 (D.D.C. 1997).

7. *Raines*, 117 S. Ct. at 2315. LIVA is not a "veto" in the ordinary sense of that term,

"cancellation" of those provisions.[8] Under LIVA, the President could cancel three types of provisions: (1) any discretionary item affecting budgetary authority;[9] (2) any item of new direct spending;[10] or (3) any limited tax benefit.[11] LIVA did impose some limits on presidential Line Item Veto power, however. Before striking an appropriation, LIVA required the President to certify that his action would: result in a reduction of the budget deficit;[12] not hinder necessary Government functions;[13] and not jeopardize national interests.[14] After certification, LIVA required the President to issue a "special message,"[15] notifying Congress of his intention to cancel an appropriated item.[16]

Six members of the 104th Congress challenged LIVA in the United States District Court for the District of Columbia,[17] contending that LIVA violated the "presentment clause" (Article I, section 7) of the United States Constitution.[18] The Congressmen

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the Act authorizes cancellation of provisions after the President signs the bill. *Id.*

8. *Id.*
9. 2 U.S.C. §691(a)(1).
10. 2 U.S.C. §691(a)(2).
11. 2 U.S.C. §691(a)(3).
12. 2 U.S.C. §691(a)(1)(A)(i).
13. 2 U.S.C. §691(a)(1)(A)(ii).
14. 2 U.S.C. §691(a)(1)(A)(iii).
15. 2 U.S.C. §691a(A). LIVA provides that the "special message" must contain:

> (A) the dollar amount of discretionary budget authority, item of new direct spending, or limited tax benefit which has been canceled, and provide a corresponding reference number for each cancellation;
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> (B) the determinations required under section 691(a) of this title, together with any supporting material;
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> (C) the reasons for the cancellation;
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> (D) to the maximum extent practicable, the estimated fiscal, economic, and budgetary effect of the cancellation;
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> (E) all facts, circumstances and considerations relating to or bearing upon the cancellation, and to the maximum extent practicable, the estimated effect of the cancellation upon the objects, purposes and programs for which the canceled authority was provided; and
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> (F) include the adjustments that will be made pursuant to section 691c of this title to the discretionary spending limits under section 665 of this title and an evaluation of the effects of those adjustments upon the sequestration procedures of section 901 of this title.

2 U.S.C. §691a(b)(1)(A)-(F).

16. 2 U.S.C. §691(a)(1)(B).
17. *Raines*, 117 S. Ct. at 2315. The six members of Congress who joined in the suit were: Sen. Robert Byrd (D-W.V.), Sen. Carl Levin (D-Mich.), Sen. Daniel Patrick Moynihan (D-N.Y.), Sen. Mark Hatfield (D-Wash.), Rep. David Skaggs D-Colo.) and Rep. Henry Waxman (D-Cal.). *Id.* All but Senator Hatfield, who retired, remain members of the 105th Congress. *Id.* at n.1. The Court found its jurisdiction under 2 U.S.C. section 692. *Id.* n.1.
18. *See supra* note 2 and accompanying text.

claimed that LIVA violated their rights as legislators under the Constitution in three separate and distinct ways.[19] First, the President's application of LIVA could transform an otherwise acceptable bill into a bill for which they would not have voted.[20] Second, LIVA impermissibly authorized the President to assume the Congressional prerogative to repeal legislation.[21] Third, LIVA upset the constitutionally mandated balance of power between Congress and the President.[22]

The United States District Court for the District of Columbia agreed with the Congressmen, ruling that LIVA was an unconstitutional violation of Article I, Section 7, Clause 2.[23] The district court decided the case on the merits after determining that the Congressmen had standing to contest LIVA,[24] their claim was ripe,[25] and any separation of powers issue between the judiciary and the legislature was expressly resolved.[26]

On the question of standing, the district court, without much explanation, ruled that LIVA lessened the effect of the Congressmen's votes, thus, injuring them in a manner sufficient to present a "case or controversy" as required by Article III of the

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19. *Raines*, 117 S. Ct. at 2316. The Congressmen claimed that the Line Item Veto Act constitutes a "direct and concrete" injury to them in their role as representatives. *Id.* (citing Plaintiffs' Complaint at ¶ 14).

20. *Id.*

21. *Id.*

22. *Id.*

23. Byrd v. Raines, 956 F. Supp. 25, 35, (D.D.C., 1997). The Court stated, "The President's cancellation of an item unilaterally effects a repeal of statutory law such that the bill he signed is not the law that will govern the Nation. That is precisely what the Presentment Clause was designed to prevent." *Id.*

24. *Byrd*, 956 F. Supp. at 30-31. "Standing" is defined as having a "sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." BLACK'S LAW DICTIONARY 1405-06 (6th ed. 1990).

The court applied the following standard, "Plaintiffs must allege . . . (1) an injury personal to them, (2) that has actually been inflicted by defendants or is certainly impending, and (3) that is redressable by judicial decree." *Byrd*, 956 F. Supp. at 30-31 (citing Valley Forge Christian College v. Americans for Separation of Church and State, 454 U.S. 464, 472 (1982); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)).

25. *Byrd*, 956 F. Supp. at 31-33. A claim is "ripe" if it is the subject of "an actual, present controversy." BLACK'S LAW DICTIONARY 1328 (6th ed. 1991). The district court held: "Because plaintiffs now find themselves in a position of unanticipated and unwelcome subservience to the President before and after they vote on appropriations bills, Article III is satisfied, and this Court may accede to Congress' directive to address the constitutional cloud over the act as swiftly as possible." *Byrd*, 956 F. Supp. at 31-33.

26. *Id.* at 33. The defendants claimed that the district court should "exercise [its] equitable discretion to dismiss the complaint because of separation of powers concerns." *Id.* However, Congress provided for expedited review in 2 U.S.C. §692. The district court determined that this settled the matter. *Id.*

Constitution.[27] The district court cited precedent of the United States Court of Appeals for the D.C. Circuit in its decision.[28]

The Supreme Court of the United States disagreed,[29] holding that the Congressmen lacked standing.[30] The Court vacated the decision of the district court and remanded for dismissal of the complaint.[31] Writing for the majority, Chief Justice Rehnquist quoted *Allen v. Wright's*[32] test for Article III standing, which requires the plaintiff to "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief"[33] and *Lujan v. Defenders of Wildlife's* requirement that plaintiffs have a "personal stake" in the action.[34] The Court explained that *Lujan* also requires the alleged legal wrong be "particular" to the plaintiff.[35] Finally, Chief Justice Rehnquist quoted *Flast v. Cohen's*[36] holding that a claim is judicially cognizable only if it is capable of judicial settlement.[37]

Under Article III, standing requirements are stringent,[38] but the Court found that this standard rises even higher when a dispute between the legislative and executive branches of the federal government is presented to the courts.[39] The Chief Justice cautioned the judiciary to resist the "natural urge" to decide a case on its merits when the challenging party has failed to show that it has met the threshold requirements of standing.[40]

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27. U.S. CONST. Art. III, §2.

28. *Byrd*, 956 F. Supp. at 30. The court pointed to precedent established by the D.C. Circuit regarding standing for members of Congress. *See Michel v. Anderson*, 14 F.3d 623, 625 (D.C. Cir. 1994); *Moore v. United States House of Representatives*, 733 F.2d 946, 950-53 (D.C. Cir. 1984) *cert. denied*, 469 U.S. 1106 (1985); *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1168-71 (D.C. Cir.) *cert. denied*, 464 U.S. 823 (1983). *Id.*

29. *Raines*, 117 S. Ct. at 2316. The Court stated that it did not approved of the D.C. Circuit's cases permitting legislative standing. *Id.*

30. *Id.*

31. *Id.*

32. Allen v. Wright, 468 U.S. 737 (1984).

33. *Raines*, 117 S. Ct. at 2317 (quoting Allen v. Wright, 468 U.S. 737, 751 (1984)).

34. *Id.* (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)). The "personal stake" language in *Lujan* was taken from *Baker v. Carr*, 369 U.S. 186, 204 (1962).

35. *Id.*

36. Flast v. Cohen, 392 U.S. 83 (1968).

37. *Raines*, 117 S. Ct. at 2317. A "judicially cognizable action" is one "traditionally thought to be capable of resolution through the judicial process." *Id.* (quoting Flast v. Cohen, 392 U.S. 83, 97 (1968)).

38. *Id.* at 2317-18.

39. *Id.*

40. *Id.* at 2318. The Court's task is to stay within its constitutional boundaries, often requiring the Court to refuse to decide a case on the merits because the party seeking relief is not properly before it. *See supra* note 24 and accompanying text for a discussion of the

The issue before the Court was whether an alleged reduction of political power is sufficient to confer standing on Congressmen to contest the constitutionality of an act.[41] Answering this question in the negative, Chief Justice Rehnquist distinguished the alleged injury, "loss of political power," from cases involving Congressmen who lost a "private right" through some act of Congress.[42]

Furthermore, the Court distinguished the instant case from *Coleman v. Miller*,[43] which found that legislators had standing.[44] In *Coleman*, the Supreme Court ruled that twenty Kansas state legislators may have had their votes rendered completely invalid by a tie-breaking vote cast by the Lieutenant Governor.[45] The Court distinguished *Coleman*, finding that the *Raines* Congressmen merely suffered a potentially diminished vote.[46]

The Chief Justice reviewed historical incidents to show that a potential action is not one that has traditionally conferred Article III standing.[47] However, most of these incidents did not result in judicial challenges by the potentially injured officials.[48]

Following the Court's finding that the Congressmen lacked

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minimum requirements of standing.

41. *Id.* Chief Justice Rehnquist declared this a question of first impression, stating, "We have never had occasion to rule on the question of legislative standing presented here." *Id.*

42. *Raines*, 117 S. Ct. at 2318. Chief Justice Rehnquist discussed *Powell v. McCormick*, 395 U.S. 486 (1969), stating, "In [*Powell*], we held that a Member of Congress' constitutional challenge to his exclusion from the House of Representatives (and his consequent loss of salary) presented an Article III case or controversy." *Id.*

43. Coleman v. Miller, 307 U.S. 433 (1939).

44. *Raines*, 117 S. Ct. at 2318-20.

45. *Id.* at 2319.

46. *Id.* at 2320. Under LIVA, if the President cancels a provision of an appropriations bills, Congress can then pass the canceled provision in a separate bill. *Id.*

47. *Id.* at 2321-22. Chief Justice Rehnquist further determined that the weight of precedent opposed the Congressmen in this case. *Id.* Similar cases were not challenged, presumably because it was understood by the potential challengers that standing did not exist. *Id.*

For instance, the Tenure in Office Act was not challenged by any President who was subject to it (*e.g.*., Andrew Johnson, Ulysses S. Grant, or Grover Cleveland). *Raines*, 117 S. Ct. at 2321. After the Tenure in Office Act was substantially repealed by Congress, the remainder became the subject of a suit and was ruled unconstitutional. *Id.* However, this suit was not brought by a President. *Id.* Similarly, President Gerald Ford did not file a suit to challenge certain provisions of the Federal Election Campaign Act that were ultimately ruled unconstitutional in *Buckley v. Valeo*, 424 U.S. 1 (1976). *Id.* at 2322.

In the same vein, Congressmen did not challenge the Pocket Veto during President Coolidge's tenure. *Id.* The Chief Justice also explained that if the Congressmen were found to have standing in this case, the ruling would contradict the Court's holding in *INS v. Chadha*, 462 U.S. 919 (1983). *Chadha* held that the Attorney General had standing to challenge the one-House veto provision because it rendered his authority provisional rather than final. *Chadha*, 462 U.S. at 932.

48. *Raines*, 117 S. Ct. at 2321-22.

standing, the Court identified two ways in which the Congressmen could avoid the alleged effects of LIVA:[49] (1) by Congressional action (repealing LIVA or by including a provision that expressly excludes a bill from presidential action under LIVA);[50] or (2) private action by an individual alleging injury because of a presidentially canceled provision.[51]

Justice Souter, joined by Justice Ginsberg, wrote an opinion concurring in the judgment, finding that the Court would have an opportunity to pass judgment on the Line Item Veto Act in a suit brought by a private plaintiff.[52] Justice Souter added that a private suit by a plaintiff directly deprived of some benefit by the President's cancellation of an appropriation would meet the standing requirements.[53]

Justice Stevens and Justice Breyer wrote separate dissenting opinions. Justice Stevens reasoned that the Line Item Veto Act, as passed, could result in the enactment of a law that Congress never approved,[54] denying the legislature the opportunity to vote on appropriations bills altered by the President.[55] If this occurred, legislators would suffer a concrete and particularized injury.[56] Justice Stevens would have held that LIVA is unconstitutional.[57]

Justice Breyer did not discuss the merits of the case but simply expressed his belief that the Congressmen presented a real dispute that the Court should have decided on its merits.[58] He noted that nothing in the Constitution differentiates between "personal harm" and "official harm."[59] Finally, Justice Breyer stated his belief that, in the instant case, the Court could have redressed the alleged harm,

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49. *Id.* at 2322. The Court ruled, "Our conclusion neither deprives Members of Congress an adequate remedy . . . nor forecloses the Act from constitutional challenge." *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 2323-25 (Souter, J., concurring). Justice Souter reasoned, "The virtue of waiting for a private suit is only confirmed by the certainty that another suit can come to us." *Id.* at 2325 (Souter, J., concurring).

53. *Raines*, 117 S. Ct. at 2325 (Souter, J., concurring).

54. *Id.* at 2325-27 (Stevens, J., dissenting). Justice Stevens found, "The Line Item Veto Act establishes a mechanism by which bills passed by both Houses of Congress will eventually produce laws that have not passed either House of Congress and that have not been voted on by any other Senator or Representative." *Id.* at 2326.

55. *Id.* at 2326 (Stevens, J., dissenting).

56. *Id.* Justice Stevens analogized the legislators' alleged diluted votes in this case to *Baker v. Carr's* holding that an individual whose vote was found to be diluted had an interest sufficient to confer standing. *Id.* (citing Baker v. Carr, 369 U.S. 186, 204-08 (1962)).

57. *Id.* at 2327 (Stevens, J., dissenting).

58. *Raines*, 117 S. Ct. at 2327-29 (Breyer, J., dissenting).

59. *Id.* at 2328 (Breyer, J., dissenting).

whereas in *Coleman v. Miller*, the issue was effectively moot because ratification of the Child Labor Amendment by Kansas had no real effect.[60] Standing is a doctrine of judicial restraint that arises under Article III of the Constitution.[61] The doctrine recognizes the judiciary's limitations under the Constitution, a necessary restraint in a democracy.[62] However, no exact criteria are set forth under the Constitution to determine whether a particular party has standing.[63] Commentators have observed that the Supreme Court invokes standing when it wishes to avoid deciding difficult cases on the merits.[64]

The Supreme Court defined "standing" in *Lujan v. Defenders of Wildlife*.[65] Under this three-part test, a plaintiff must allege an injury that is: "concrete and particularized"; "actual and imminent"; and causally connected to the alleged wrongful conduct.[66] In addition, the injury must be one for which a court can provide a remedy.[67]

In *Lujan*, the Defenders of Wildlife[68] challenged the Secretary of the Interior's interpretation of the Endangered Species Act ("ESA").[69] The ESA sought to protect endangered species by restricting federal funds for projects that negatively affected the endangered wildlife.[70] The Secretary of the Interior interpreted the ESA to apply only to projects "in the United States or on the high seas."[71] However, a prior regulation interpreted the ESA to apply to projects receiving federal funding, no matter where the project was located.[72]

Two such projects were at issue in *Lujan*: in Egypt and Sri Lanka.[73] The Defenders of Wildlife claimed that Congress had earmarked federal funds for the projects that would negatively

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60. *Id.* Twenty-six states had already rejected the Amendment, thus it had no chance for ratification. *Id.*

61. Allen v. Wright, 468 U.S. 737, 751 (1984).

62. *Id.* at 750 (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)).

63. *Id.* at 751.

64. JOHN E. NOWAK AND RONALD D. ROTUNDA, CONSTITUTIONAL LAW 84 (5th ed. 1995).

65. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

66. *Id.*

67. *Id.*

68. *Id.* at 559. The "Defenders of Wildlife" were a group of organizations that sought to protect both wildlife and the environment. *Id.*

69. *Id.* at 557-58. The ESA is codified at 16 U.S.C. §§ 1531-44. *Id.* at 558.

70. *Id.* at 558 (quoting 16 U.S.C. § 1536(a)(2)).

71. *Lujan*, 504 U.S. at 558-59.

72. *Id.* at 558.

73. *Id.*

impact the natural habitats of certain endangered species.[74] The plaintiffs alleged that this caused an injury to those persons who wished to view the wildlife in its natural habitat.[75] However, none of the Defenders of Wildlife had ever witnessed the endangered species in its natural habitats at the sites of the respective projects.[76] Nor did the plaintiffs have any immediate plans to travel to the sites where the endangered animals were located.[77]

Justice Scalia, writing for the Court, determined that the alleged injury was not imminent, since the plaintiffs had no definite plans to view the wildlife at the respective sites.[78] In addition, the Defenders of Wildlife failed to present a claim that the Court could remedy.[79] Justice Scalia pointed out two factors weighing against judicial redressibility. First, the Secretary of the Interior's regulations might not be binding.[80] Second, the plaintiffs did not allege that the Department of the Interior would abandon the projects if federal funds were not appropriated.[81]

The Court also rejected the idea of "citizen standing,"[82] which Congress apparently authorized under the ESA.[83] Justice Scalia held that it is not the Court's role to redress general harms to society,[84] but only includes disputes concerning harm to individuals.[85] He found that the legislative and the executive branches of government should redress general complaints about society's ills.[86]

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74. *Id.* at 563.

75. *Id.* An affidavit by Defender of Wildlife, Joyce Kelly, alleged that she hoped to visit Egypt where she hoped to see the Nile crocodile in its natural habitat. *Id.* In addition, Defender of Wildlife, Amy Skilbred, hoped to travel to Sri Lanka where she hoped to see certain endangered species in their natural habitat. *Id.*

76. *Lujan*, 504 U.S. at 563.

77. *Id.*

78. *Id.* at 564.

79. *Id.* at 568-70.

80. *Id.* at 570.

81. *Lujan*, 504 U.S. at 571. Justice Scalia stated, "Respondents have produced nothing to indicate that the projects they have named will either be suspended, or do less harm to listed species, if [federal funds are] eliminated." *Id.*

82. *Id.* at 576 (citing Whitmore v. Arkansas, 495 U.S. 149, 160 (1990)).

83. *Id.* at 576-77. The ESA granted citizen standing to: "[A]ny person may commence a civil suit on his own behalf (A) to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter." *Id.* at 571-72 (quoting 16 U.S.C. § 1540(g)).

84. *Id.* at 576.

85. *Id.* Justice Scalia quoted *Marbury v. Madison's* admonition to future Courts: "The province of the Court is, solely, to decide on the rights of individuals." *Id.* (quoting Marbury v. Madison, 5 U.S. (1 Cranch.) 137, 170 (1803)).

86. *Lujan*, 504 U.S. at 576. Justice Scalia reasoned that "[v]indicating the public interest . . . is the function of Congress and the Chief Executive." *Id.*

Prior to its decision in *Lujan*, the Supreme Court held in *Allen v. Wright* that the federal tax-exempt status of private schools does not interfere with the right of black children to attend racially integrated schools.[87] Although the plaintiffs claimed that the exemptions had hindered racial desegregation,[88] the exemptions did not deny the complaining parties private school enrollment.[89] Thus, the Court held that the plaintiff-parents and their children did not suffer a personal injury that was causally connected to the alleged wrongful conduct by the government.[90]

Underlying the *Allen* decision was the interpretation of "separation of powers."[91] The Court ruled that the plight of the black parents and schoolchildren was best left to elected officials.[92] Article III of the Constitution authorizes the federal courts to decide "cases or controversies."[93] Thus, courts must restrain themselves from overreaching and have done so by developing doctrines such as standing.[94] Judge Bork found that the Framers included these Article III doctrines to impose limits upon the unelected branch of the federal government.[95]

In reading the *Lujan* and *Allen* cases, one gains a good overview of the principles underlying the doctrine of standing. Only with this overview in mind, can one understand the Court's rationale in *Raines v. Byrd*, which presented the interesting issue of whether the Supreme Court should recognize the concept of legislator standing.[96] In the wake of *Raines*, this question remains unresolved.[97]

In *Raines*, the Congressmen challenging LIVA relied heavily on

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87. *Allen*, 486 U.S. at 739-740. Private schools were awarded tax-exempt status if they practiced a policy of non-discrimination. *Id.* at 740 (citing 26 U.S.C. §§501(a), 501(c)(5), 170(a)(1) and 170(c)(2)).

88. *Id.* at 745.

89. *Id.* at 746.

90. *Id.* at 766.

91. *Id.* at 750-52.

92. *Allen*, 486 U.S. at 761.

93. *Id.* at 750.

94. *Id.*

95. *Id.* at 750 (quoting Vander Jagt v. O'Neill, 699 F.2d 1166, 1178-79 (D.C. Cir. 1983) (Bork, J., concurring)). Judge Bork reasoned, "All of the doctrines that cluster about Article III-not only standing but mootness, ripeness, political questions, and the like — relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government." *Id.*

96. Harrington v. Bush, 553 F.2d 190, 205 (D.C. Circuit 1976).

97. *See supra* notes 50-52 and accompanying text.

the Supreme Court's rationale in *Coleman v. Miller*,[98] in which the Court hypothesized that a bloc of legislators whose votes were nullified would have a sufficient interest to confer standing.[99] However, a majority of the Court did not adopt this statement and, therefore, the *Coleman* hypothesis is mere *dictum* with no precedential value.[100]

The Supreme Court has given no express guidance on legislator standing, but the concept has had a turbulent history in the United States Court of Appeals for the District of Columbia.[101] In *Kennedy v. Sampson*, the D.C. Circuit recognized legislator standing.[102] However, it is unclear what conditions must be satisfied for a legislator to establish that he has standing to sue.[103]

In *Kennedy*, Senator Edward Kennedy challenged the validity of a presidential pocket veto.[104] The bill that the President did not veto, but refused to sign, was presented to him eight days prior to Congress' Christmas recess.[105] During the brief recess, the President informed the Senate, by memorandum, of his decision not to execute the bill.[106] Thus, by virtue of Article I, Section 7, the bill failed to become law, and was not subject to Congressional override.[107]

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98. Coleman v. Miller, 307 U.S. 433 (1939).

99. *Id.* at 438.

100. *Id.* at 460 (Frankfurter, J., concurring). In *Coleman*, four Justices concurred in the judgment but believed that the state legislators lacked standing. *Id.* Justice Butler and Justice McReynolds dissented. Justice Butler stated, "The point that the question . . . is not justifiable. . . was not raised by the parties or by the United States appearing as amicus curiae." *Id.* at 470-74 (Butler, J., dissenting).

101. *See* Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974); Harrington v. Bush, 553 F.2d 190 (D.C. Cir. 1976); Goldwater v. Carter, 617 F.2d 697 (D.C. Cir. 1979), *vacated on other grounds*, 444 U.S. 996 (1979); Riegle v. Federal Open Mkt. Comm., 656 F.2d 873 (D.C. Cir. 1981); Vander Jagt v. O'Neill, 699 F.2d 1166 (D.C. Cir. 1983); Moore v. U.S. House of Representatives, 733 F.2d 946 (D.C. Cir. 1984); Melcher v. Federal Open Mkt. Comm., 836 F.2d 561 (D.C. Cir. 1987); Michel v. Anderson, 14 F.3d 623 (D.C. Cir. 1994); Skaggs v. Carle, 110 F.3d 831 (1997).

102. *Kennedy*, 511 F.2d at 433.

103. The D.C. Circuit recognized legislator standing in *Kennedy*, *Goldwater*, *Riegle*, *Vander Jagt*, and *Moore*. However, legislator standing not found in *Harrington* and *Skaggs*.

104. *Kennedy*, 511 F.2d at 432. A "pocket veto" results when Congress recesses after sending a bill to the President, but before time expires for the President to take action by either executing or vetoing the bill. BLACK'S LAW DICTIONARY, 1155 (6th ed. 1991).

105. *Kennedy*, 511 F.2d at 432.

106. *Id.*

107. *Id.* Article I, section 7 provides, in relevant part: "If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return in which case it shall not be a law." U.S. CONST. Art. I, §7.

Senator Kennedy claimed that this pocket veto rendered his vote ineffective.[108] The circuit court agreed and concluded that the pocket veto was invalid.[109] A necessary part of this decision was the court's ruling that Senator Kennedy had standing to sue.[110]

The circuit court relied on the Supreme Court's decision in *Coleman v. Miller*.[111] After reviewing *Coleman*, the *Kennedy* court determined that the ability of legislators to seek judicial relief was not limited to situations in which legislators sued as a bloc.[112] Therefore, a single member of Congress can seek relief from the judiciary if he or she shows a sufficient "personal stake" in the dispute.[113] The court held that the primary interest of a legislator is the effectiveness of his vote.[114] Protecting this interest is sufficient to confer standing on an individual legislator.[115]

The court rejected the claim that Senator Kennedy, as an individual member of Congress, had only an "indirect or derivative" interest in the outcome of his suit.[116] The court reasoned that the pocket veto hindered the role of Congress and, in turn, adversely affected individual members of Congress.[117] Therefore, the circuit court ruled that Senator Kennedy had standing because the pocket veto nullified his vote.[118]

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108. *Kennedy*, 511 F.2d at 434. The court quoted Senator Kennedy's allegations: "The acts of the defendants have injured the plaintiff as a United States Senator by denying him the effectiveness of his vote as a member of the United States Senate. The plaintiff . . . was among 64 Senators voting in favor of S. 3418. . . ." *Id.*

109. *Id.* at 442.

110. *Id.* at 435. The court cited *Baker v. Carr's* test for standing. *Id.* (citing Baker v. Carr, 369 U.S. 186, 204 (1962)). In *Baker*, the Supreme Court asked, "Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for the illumination of difficult constitutional questions? This is the gist of the question of standing." *Id.* (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)). "A person's stake can be satisfied if the plaintiff is merely 'among the injured.' " *Id.* at 435 (quoting Sierra Club v. Morton, 405 U.S. 727, 734 (1972)).

111. *Id.* at 434-35. The court quoted *Coleman v. Miller*: "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." *Id.* (quoting Coleman v. Miller, 307 U.S. 433, 438 (1939).

112. *Id.* at 435.

113. *Kennedy*, 511 F.2d at 435 (citing Baker v. Carr, 369 U.S. 186, 204 (1962)).

114. *Id.* at 436.

115. *Id.*

116. *Id.* at 435. The defense argued that legislators could not assert standing in their official capacity. *Id.*

117. *Id.* at 436.

118. *Kennedy*, 511 F.2d at 436.

Two years after *Kennedy*, the D.C. Circuit held that Representative Michael J. Harrington did not have standing to sue the Central Intelligence Agency ("CIA").[119] Representative Harrington claimed that the CIA was involved in illegal activities.[120] He asked the court to declare certain CIA activities illegal.[121] In addition, he sought a court order requiring the CIA to cease using appropriated funds to conduct such activities.[122] Representative Harrington asserted that he had standing in separate causes of action based on different grounds.[123]

In his first cause of action Harrington sought to have certain CIA actions declared illegal, He asserted three potential interests to support his claim of standing to sue.[124] First, he alleged that the defendants faced possible impeachment charges if the CIA actions were illegal.[125] In response, the court noted that the Harrington did not allege that impeachment proceedings were certain to take place if he were correct.[126] Second, he claimed that his ability to vote on appropriations was hindered.[127] Finally, he asserted that the court's declaration would help him to determine what legislative action he should take, if any.[128] Concerning the last two proffered interests, the court noted that Representative Harrington did not definitely assert that he would take any action if he obtained a favorable ruling.[129]

In his second cause of action, Harrington contended that he had standing because the secret appropriations to the CIA prevented

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119. Harrington v. Bush, 553 F.2d 190, 193 (D.C. Cir. 1977).

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 196. In seeking to have certain CIA activities declared illegal, Representative Harrington relied on *Mitchell v. Laird*, 488 F.2d 611 (D.C. Cir. 1973). *Id.* In seeking an injunction against using appropriated funds for illegal activities, Representative Harrington relied on *Kennedy*. *Id.*

124. *Harrington*, 553 F.2d at 197-200.

125. *Id.* at 198.

126. *Id.* The court found, "There is no allegation that a declaration of illegality would force the Congress or appellant to commence impeachment proceedings, nor does it appear that such a declaration as to past Agency activities would provide appellant with more basic information than he already possesses." *Id.*

127. *Id.* at 199.

128. *Id.*

129. *Harrington*, 553 F.2d at 199. The court found, "Appellant does not claim that a declaration of illegality would cause him to take any legislative action whatsoever; rather, such a declaration would guide him in making decisions relating to potential legislative action." *Id.*

him from casting an informed vote.[130] The court responded that Harrington did not claim loss of his power to vote.[131] Harrington also claimed standing because the CIA did not allow him to review CIA accounting statements which "injured" his ability to debate the matter with his colleagues.[132] The court noted that Harrington received CIA reports.[133] Finally, Harrington asserted that the CIA's "illegal" actions, made possible by public funding, "injured" him to the extent that he voted in favor of the appropriations.[134] In response to these assertions, the court noted that illegal conduct by a government agency does not injure a lawmaker[135] and that he did not plead the "injury" resulting from his past votes with specificity.[136] The court stated that "there are no special standards for determining Congressional standing questions."[137] The court distinguished legislator votes already cast from votes yet to be cast — the former confers standing, the latter does not.[138]

Two years later, the D.C. Circuit again faced the issue of standing when it ruled that Senator Barry Goldwater and two other Congressmen had standing to challenge President Carter's decision to terminate a treaty with the Republic of China.[139] Goldwater's challenge rested on two grounds.[140] First, that the United States Constitution does not authorize the President to terminate treaties.[141] Second, the treaty language authorized "the United States," not "the President of the United States," to terminate the treaty.[142]

In finding that the Congressmen had standing to challenge President' Carter's action, the court cited *Warth v. Seldin*[143] for the premise that, in determining a party's standing, a court must accept

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130. *Id.* at 202. CIA funds were diverted from the monies appropriated to several other projects. *Id.* at 195.

131. *Id.*

132. *Id.* at 202-03. The court viewed this as an injury to the legislature, not the legislator. *Id.* at 203.

133. *Id.* Representative Harrington thought that these reports were inadequate. *Id.*

134. *Harrington*, 553 F.2d at 203.

135. *Id.*

136. *Id.* at 204.

137. *Id.*

138. *Id.* at 211.

139. Goldwater v. Carter, 617 F.2d 697 (D.C. Cir. 1979), *vacated on other grounds*, 444 U.S. 996 (1979).

140. *Id.* at 701.

141. *Id.*

142. *Id.* at 701.

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

all allegations as true.[144] The court found that by accepting all allegations as true, the President's action injured the Congressmen because they lost their opportunity to vote on the termination of the treaty.[145] In essence, the Congressmen did not have their vote nullified; Presidential action circumvented their opportunity to vote. This court differentiated between instances in which Congressional votes are circumvented by presidential action[146] (no opportunity to cast a vote),[147] from instances where Congressmen believe that their votes are ineffective.[148] The former instance confers standing, but the latter does not.[149]

During the period 1981-1984, the D.C. Circuit heard several cases that addressed legislator standing.[150] In these cases, the court found that the challenging legislators had standing to bring suit to redress alleged harms.[151] However, in each case, the court dismissed the claims under the doctrine of "equitable discretion."[152]

The first of the cases invoking the doctrine of "equitable discretion" was *Riegle v. Federal Open Mkt. Comm.* In *Riegle*, the D.C. Circuit determined that Senator Donald Riegle had standing to bring a suit challenging the Federal Reserve Act.[153] Senator Riegle claimed that the act was unconstitutional because it allowed appointment of members of the Federal Open Market Committee ("FOMC") without Senate confirmation.[154] The court acknowledged that its prior decisions on the question of legislative standing were confusing.[155]

The court found that traditional standing analysis was insufficient

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144. *Goldwater*, 617 F.2d at 701-02 (citing Warth v. Seldin, 422 U.S. 490, 501 (1975).

145. *Id.* at 701.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Goldwater*, 617 F.2d at 701.

150. *See supra* note 103.

151. *See generally* Riegle v. Federal Open Mkt. Comm., 656 F.2d 873 (D.C. Cir. 1981); Vander Jagt v. O'Neill, 699 F.2d 1166 (D.C. Cir. 1982); Moore v. United States House of Representatives, 733 F.2d 946 (D.C. Cir. 1984).

152. "Equitable discretion" is a doctrine espoused by The Honorable Carl McGowan. *See* Carl McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241 (1981).

153. *Riegle*, 656 F.2d at 879.

154. *Id.* at 877. Senator Riegle sought an injunction which would bar the five FOMC members, who were not confirmed by the Senate, from voting on FOMC issues. *Id.* at 876.

155. *Id.* The court stated, "Two contradictory principles pervade the opinions of this court concerning the standing of Congressional plaintiffs. First, no distinctions are to be made between congressional and private plaintiffs in the standing analysis. . . [And], [s]econd, this court will not confer standing on a congressional plaintiff unless he is suffering an injury his colleagues cannot redress." *Id.* at 877.

when a challenge by a legislator inferred a separation of powers question.[156] The court invoked its equitable discretion in dismissing Senator Riegle's case because he had an adequate remedy within the legislature.[157] The court explained that equitable discretion requires dismissal of cases involving a legislator plaintiff if the plaintiff lacked individual standing or could attempt to convince his colleagues that they should act to redress his grievance.[158] On the other hand, equitable discretion holds the courts open to valid claims by legislators in cases where private citizens lack standing to sue and no adequate opportunity exists for the grievance to be redressed by the legislature.[159]

The court followed the equitable discretion doctrine it espoused in *Riegle* in *Vander Jagt v. O'Neill*[160] and *Moore v. United States House of Representatives*.[161] In each of these cases, the majority rationale was strongly criticized in concurring opinions.[162] In each case, the concurring justices would have held that the plaintiffs lacked standing to sue.[163]

In *Vander Jagt*, Republican representatives sued the Democratic leadership of the House of Representatives, claiming that assignment of committee seats in disproportion to the make-up of the House diluted the importance of Republican votes.[164] The court determined that the allegations of vote dilution, First Amendment violations, and tampering with House qualification standards were sufficient to confer standing.[165] The court concluded that it could grant relief to the challenging legislators, but the better course would be to exercise equitable discretion and refuse to hear the case.[166]

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156. *Id.* at 878 n.5 (citing McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241, 244-45 (1981)).

157. *Id.* at 881-882. Apparently, the court used equitable discretion as an alternative to standing since, in its view, the Supreme Court recognized that Senator Goldwater had standing as a legislator in *Goldwater v. Carter*. *Id.* at 880 (citing Goldwater v. Carter, 444 U.S. 996 (1979)).

158. *Id.* at 882.

159. *Id.*

160. Vander Jagt v. O'Neill, 699 F.2d 1166 (D.C. Cir. 1982).

161. Moore v. United States House of Representatives, 733 F.2d 946 (D.C. Cir. 1984).

162. In *Vander Jagt*, Judge Bork concurred in the dismissal of the case on the grounds that the plaintiff lacked standing. *Vander Jagt*, 699 F.2d at 1185 (Bork, J., concurring). In *Moore*, Judge Scalia concurred in the dismissal of the case but criticized the D.C. Circuit's reliance on equitable discretion. *Moore*, 733 F.2d at 960 (Scalia, J., concurring).

163. *Vander Jagt*, 699 F.2d at 1185.

164. *Id.* at 1167.

165. *Id.* at 1168.

166. *Id.* at 1176. The court found that although a remedy was within its power, the

Judge Bork concurred in the dismissal of the case.[167] Using a different rationale than the majority, Judge Bork would have dismissed the case because the challenging Representatives lacked standing.[168] Judge Bork was concerned that conferring standing upon legislator plaintiffs would expand the judiciary's role[169] beyond the limitations imposed by Article III and other judicial restraint doctrines.[170] Judge Bork rejected the majority's premise that "there must be judicial power in all cases."[171]

In *Moore*, members of the House of Representatives sued members of the Senate, claiming that the Senators violated Article I, Section 7 of the Constitution when they originated the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA")[172] The Representatives alleged that they had been injured by the Senators' infringement on the legislative power of the House of Representatives to originate bills on fiscal matters.[173] The Constitution expressly provides that revenue bills must originate in the House of Representatives.[174] The court found that circumvention of the constitutionally prescribed procedure created an injury that conferred standing upon the plaintiffs.[175] Although the court held that it could redress the Representatives' grievances,[176] the court refused to provide a remedy because the dispute was between members of Congress.[177]

Again, the court dismissed the action through the exercise of equitable discretion,[178] although Judge Scalia's concurring opinion sharply criticized the majority's rationale. Judge Scalia, like Judge

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separation of powers doctrine counseled against granting such a remedy. *Id.*

167. *Id.* at 1177 (Bork, J., concurring).

168. *Vander Jagt*, 699 F.2d at 1177 (Bork, J., concurring).

169. *Id.* at 1178-79 (Bork, J., concurring).

170. *Id.*

171. *Id.* at 1184 (Bork, J., concurring). Judge Bork stated, "My colleagues' disinclination to rest this case upon a jurisdictional ground — whether that of standing or political question — rests squarely upon the erroneous notion, expressed in *Riegle* and reiterated today, that there must be judicial power in all cases and that doctrines must not be adopted which might frustrate that power." *Id.*

172. *Moore*, 733 F.2d at 948. Article I, section 7 requires that revenue raising bills arise in the House of Representatives. *Id.*

173. *Id.* at 949.

174. *See supra* note 140.

175. *Moore*, 733 F.2d at 951.

176. *Id.* at 954.

177. *Id.* at 956 (Scalia, J., concurring).

178. *Id.* at 955 The court stated, "In the instant case, the appellants' dispute over the origination of TEFRA is primarily a controversy with other members of Congress . . . [T]his factor counsels restraint in the exercise of our remedial powers." *Id.*

Bork in *Vander Jagt*, would have held that the legislators lacked standing.[179] He criticized his colleagues on the D.C. Circuit for their repeated exercise of equitable discretion as a substitute for the time-tested doctrines of judicial restraint.[180] Furthermore, Judge Scalia pointed out that the role of the court stops at determining individuals' rights.[181] Thus, he reasoned that although congressmen can never have standing to sue in their official capacities because harm is not done to them individually, the harm flows through them to their constituents.[182]

Despite these criticisms, the D.C. Circuit ruled that legislators had standing, but invoked its equitable discretion to dismiss the case. However, just two months prior to the Supreme Court's decision in *Raines v. Byrd*, the D.C. Circuit ruled in *Skaggs v. Carle*[183] that twenty-seven Congressmen (among other plaintiffs)[184] did not have standing to challenge House Rules requiring a three-fifths majority vote to increase federal tax rates.[185] The Representatives alleged injury because of vote dilution.[186]

The court proclaimed that congressmen must establish standing by using the three-part test of *Lujan*.[187] The court recognized that vote dilution is an injury sufficient to confer standing.[188] Thus, the court determined that the alleged vote dilution by the House Rules was not real, but merely hypothetical,[189] because the Congressmen

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179. *Id.* at 956 (Scalia, J., concurring).

180. *Moore*, 733 F.2d at 956. Justice Scalia stated, "The chancellor's foot has never been considered a particularly satisfactory unit of measure, even for matters of relatively small public consequence. It is regrettable to see it applied, now for the fourth time in a panel opinion of this court, as a substitute for the doctrine of standing in marking off the separation of powers." *Id.*

181. *Id.* at 959 (Scalia, J., concurring) (citing Marbury v. Madison, 5 U.S. (1 Cranch.) 137, 170 (1803)).

182. *Id.*

183. Skaggs v. Carle, 110 F.3d 831 (D.C. Cir. 1997).

184. *Id.* at 832-33. The other plaintiffs were six of the Congressmen's constituents and the National League of Women Voters. *Id.*

185. *Id.* at 833.

186. *Id.*

187. *Id.* at 834. *See also supra* notes 65-86 and accompanying text.

188. *Skaggs*, 110 F.3d at 834.

189. *Id.* at 834-36. The court held:

> The appellants claim that they face imminent injury because a simple majority of the House of Representatives cannot commit the House to raising income tax rates. We are unpersuaded, however, that Rule XXI(5)(c) prevents a simple majority from doing just that. At most the appellants have shown that Rule XXI(5)(c) could, under conceivable circumstances, help to keep a majority from having its way — perhaps, for example, because a simple majority in favor of an income tax increase might not be prepared, for its own political reasons, to override the preference of the House

offered no evidence that a bill supported by a simple majority, but not three-fifths majority, would fail to pass[190] and that a simple majority could change House Rules.[191] Therefore, the three-fifths majority provision was no more than a façade.[192]

In his dissent, Chief Judge Edwards would have held that vote dilution is an injury sufficient to confer standing[193] and that the House Rules represented a form of vote dilution.[194] He asserted that the existence of alternatives to judicial redress would not defeat standing.[195] In addition, the Chief Judge questioned whether the doctrine of equitable discretion was constitutional.[196]

After *Skaggs*, it appears that the D.C. Circuit may have abandoned the doctrine of equitable discretion in legislator standing cases. Furthermore, in *Raines*, the Supreme Court did not address the district court's discussion of equitable discretion. Thus, the current state of the law dictates that a legislator seeking judicial redress will likely have a problem asserting standing.

Under the *Lujan* test, the Court correctly decided *Raines*. The injury in alleged in *Raines* was Congressional passage of an unconstitutional bill that the President executed into law.[197] However, at the time the Court decided *Raines*, the President had not exercised his new power. Therefore, the Court held that the injury was not "concrete and particularized" nor was it "actual or imminent."[198]

The *Raines* Court left the doors of federal courts open to legislators who have a grievance. It is doubtful that the Supreme Court will ever expressly close the door, as Justice (then Judge) Scalia would have done in *Moore*.[199] Nevertheless, postulating a

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leadership against suspending or waiving the Rule in a particular instance. But that prospect appears to be, if not purely hypothetical, neither actual or imminent.

Id.

190. *Id.*

191. *Id.* at 835.

192. *Skaggs*, 110 F.3d at 835. There may be political reasons not to change the rule. *Id.*

193. *Id.* at 838 (Edwards, C.J., dissenting). Chief Judge Edwards reasoned, "[U]nder the precedent of this circuit, [the standing] requirements are satisfied by dilution of appellants' votes." *Id.*

194. *Id.* at 839 (Edwards, C.J., dissenting).

195. *Id.* Chief Judge Edwards reasoned that the "possibility of alternative remedies" rationale applied by the court arose under the court's equitable discretion (a doctrine that he found unpersuasive) and should never be considered in a standing analysis. *Id.*

196. *Id.* at 840 (Edwards, C.J., dissenting). The majority did not explicitly discuss the doctrine of equitable discretion.

197. Raines v. Byrd, 117 S. Ct. 2312, 2316 (1997).

198. *Id.* at 2322-23.

199. *Moore*, 733 F.2d at 959 (Scalia, J., concurring). Justice (then Judge) Scalia stated,

situation in which a legislator will suffer an injury that is sufficiently is difficult "concrete and particularized" and "actual or imminent," and has a sufficient "causal connection" to the alleged wrong that can be redressed by a court that remains conscious of the separation of powers doctrine.

Vote nullification may be the only injury for which a legislator can obtain federal judicial relief.[200] However, in alleged nullification cases, the complaining legislator must prove that legislative redress is not an option.[201] Legislative redress is nearly always possible, except perhaps when an action causes an "institutional injury."[202] Therefore, if a legislator sues claiming an injury resulting from his voting "yea" on an appropriation bill because a certain provision was canceled by the President, he probably cannot assert standing successfully unless a majority of his colleagues also voted in the same way.[203]

Reading *Raines* and LIVA together, it appears that no future legislator will be able to claim standing to overturn the enactment of LIVA.[204] This leaves the Constitutional challenge to be pursued by private citizens. However, standing has never been found based on mere "citizenship."[205] In an apparent attempt to calm fears associated with this reality, Chief Justice Rehnquist analyzed historical instances, in which no law was challenged, to show that a future complainant may be able to challenge this Act.[206]

This Line Item Veto Act violates Article I, section 7, clause 2 of the Constitution.[207] However, a Line Item Veto Act can be

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"In my view no officers of the United States, or 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." *Id.*

200. *See* Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974).

201. The vote nullification in *Kennedy v. Sampson* could have been redressed by the legislature by revoting on the bill. *Kennedy*, 511 F.2d at 438.

202. *Raines*, 117 S. Ct. at 2318-21. *See generally Coleman v. Miller* (plurality decision concerning the standing issue).

203. LIVA provides for legislative redress in these situations.

204. Logically, Judge Scalia was correct in *Moore* when he found that legislators could not asert standing in their official capacities because they acting not for themselves, but for their constituents. *Moore*, 733 F.2d at 958. If his constituents would fail to satisfy the requirements for standing, the representative's claim would also fail. *Id.*

205. *See supra* note 84.

206. *Raines*, 117 S. Ct. at 2321-22. LIVA will automatically lapse in 2005 without other action. 2 U.S.C. §§ 691-92

207. *See* Byrd v. Raines, 956 F. Supp. 25 (D. D.C. 1997). *See also Raines*, 117 S. Ct. at 2327 (Stevens, J., dissenting).

implemented constitutionally.[208] By enacting this Line Item Veto Act, Congress and the President have failed the people, but the Court should not join in their failure by permitting legislators to challenge laws in federal court.

The Supreme Court should not be criticized for refusing to decide this case. To the contrary, the Court should be praised for exercising the restraint mandated by Article III of the United States Constitution.

Michael J. Cremonese

208. If not within the letter, at least within the spirit of the Constitution.