Article III Standing and Congressional Suits Against the Executive Branch

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Summary

On July 30, 2014, the House of Representatives passed H.Res. 676, authorizing the Speaker of the House to initiate a civil action against the President and/or executive branch officials or employees for their failure to act consistently with their duties under the Constitution or federal law in implementing the Patient Protection and Affordable Care Act (ACA). Speaker John Boehner has argued that such a suit is necessary to compel the President to follow his oath of office and comply with his constitutional responsibility to "take Care that the Laws be faithfully executed." The Speaker has announced that the suit will focus on the Obama Administration's decision to delay implementation of the ACA's employer responsibility requirements or employer mandate.

If the Speaker were to file a suit pursuant to H.Res. 676, the executive branch defendants are likely to raise questions about the justiciability of such a claim. This report will discuss one such justiciability question: whether or not an authorized house of Congress has standing to sue the executive branch regarding the manner in which it executes the law. Generally, to participate as party litigants, all plaintiffs, including congressional plaintiffs, must demonstrate that they meet the requirements of the standing doctrine, derived from Article III of the Constitution. The failure to satisfy the standing requirements is fatal to the litigation and will result in its dismissal without a decision by the court on the merits of the presented claims.

As applied to congressional plaintiffs, the doctrine of standing has generally been invoked only in cases challenging executive branch actions or acts of Congress. This case law can be broken down into two categories: (1) cases where individual Members file suit and (2) cases where congressional institutions (committees or houses of Congress) file suit. The case law regarding individual Member suits has been fairly settled following the Supreme Court's 1997 *Raines v. Byrd* decision. On the other hand, suits by congressional plaintiffs have been rare and federal courts have not determined whether a congressional institutional plaintiff would have standing to sue based on the type of injury likely to be asserted in a suit brought pursuant to H.Res. 676.

This report will begin by examining areas in which the courts have provided relatively definitive analysis regarding congressional standing. First, it will examine *Raines* and its progeny, to explain how a court analyzes assertions of institutional injuries when the plaintiff is an individual Member. Next, the report will discuss cases brought by institutional plaintiffs based on institutional injuries regarding information access, namely suits seeking to enforce a congressional subpoena. By looking at these cases, we can identify whether the courts have established criteria that are necessary, but not sufficient, for institutional plaintiffs to establish standing. Finally, the report will address questions that remain unresolved by the courts that may be relevant in determining whether the House has standing in a suit filed pursuant to H.Res. 676.

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Introduction

On July 30, 2014, the House of Representatives passed H.Res. 676, which authorizes the Speaker of the House to initiate a civil lawsuit against the President and/or officials and employees of the executive branch for a failure to act consistent with their duties under the Constitution and federal law. In his public comments prior to introduction of H.Res. 676, Speaker John Boehner stated that the purpose of the suit would be to compel the President to follow his oath of office and comply with his constitutional responsibility to "take Care that the Laws be faithfully executed."[1] Speaker Boehner has stated that the suit will focus on the Obama Administration's decision to delay implementation of the Patient Protection and Affordable Care Act's (ACA's)[2] employer responsibility requirements (employer mandate). In 2013, the Internal Revenue Service (IRS) announced that it would provide transition relief that would delay the implementation of new excise taxes on employers that do not comply with the ACA's employer mandate for one year, until 2015.[3] In announcing his intent to seek a resolution authorizing a lawsuit, the Speaker stated such a resolution

> will authorize the House to file suit over the way President Obama unilaterally changed the employer mandate. In 2013, the president changed the health care law without a vote of Congress, effectively creating his own law by literally waiving the employer mandate and the penalties for failing to comply with it.... The Constitution states that the president must faithfully execute the laws, and spells out that only the Legislative Branch has the power to legislate.... The House has an obligation to stand up for the Legislative Branch, and the Constitution, and that is exactly what we will do.

Disputes between Congress and the executive branch regarding the implementation of federal law are common, but has one house of Congress ever previously authorized the initiation of a lawsuit to challenge executive branch action in federal court? These types of suits are certainly rare, but it appears as though a house of Congress (or a committee acting on behalf of a house) has filed a lawsuit against the executive branch at least four times in the past 41 years. Three of these suits—*Senate Select Committee on Presidential Campaign Activities v. Nixon*,[4] *Committee on the Judiciary v. Miers*,[5] and *Committee on Oversight and Government Reform v. Holder*[6]—were filed by committees, with the authorization of their full houses, in an attempt to seek judicial enforcement of a congressional subpoena. The fourth suit, *Department of Commerce v. U.S. House of Representatives*,[7] was filed pursuant to a statutory provision authorizing such suit in an attempt to halt a Census Bureau plan to use statistical sampling in the 2000 census. The rarity

[1] U.S. CONST. art. II, § 3, cl. 5. For more information on the meaning of the Take Care Clause, *see* CRS Report R43708, *The Take Care Clause and Executive Discretion in the Enforcement of Law*, by Todd Garvey.

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

[3] Internal Revenue Service, "Transition Relief for 2014 Under §§ 6055 (§ 6055 Information Reporting), 6056 (§ 6056 Information Reporting) and 4980H (Employer Shared Responsibility Provisions)," Notice 2013-45, *available at* http://www.irs.gov/pub/irs-drop/n-13-45.PDF.

[4] 336 F. Supp. 51 (D.D.C. 1973).

[5] 558 F. Supp. 2d 53 (D.D.C. 2008).

[6] 979 F. Supp. 2d 1 (D.D.C. 2013).

[7] 525 U.S. 316 (1999).

with which such disputes between Congress and the executive branch are litigated suggests that these kinds of conflicts are primarily resolved outside the courts.[8]

Commentators have offered various reasons why federal courts should or should not litigate these types of cases between the political branches. On the one hand, some argue that judicial involvement is necessary to prevent the executive branch from exceeding its authority and eroding legislative branch power, thereby creating imbalance in the separation of powers.[9] They argue that the ability of one house of Congress to initiate litigation is particularly important when executive actions may not create traditional injuries, preventing private plaintiffs from challenging the action themselves.[10] On the other hand, other commentators note the Constitution's grant of limited power to the judiciary, and worry that allowing such disputes between the two political branches to be resolved by the judiciary would lead to an aggrandizement of the political power of the judiciary.[11]

If the Speaker were to file a suit pursuant to H.Res. 676, the executive branch defendants are likely to raise questions about the justiciability of such a claim. This report will discuss one such justiciability question: whether or not an authorized house of Congress has standing to sue the executive branch regarding the manner in which it executes the law.

House Resolution 676

H.Res. 676 authorizes the Speaker to "initiate or intervene in one or more civil actions on behalf of the House of Representatives ... "[12] Such a suit may be filed in any federal court of competent jurisdiction and can seek any appropriate relief.[13] The suit may seek relief regarding

> the failure of the President, the head of any department or agency, or any other officer or employee of the executive branch, to act in a manner consistent with that official's duties under the Constitution and laws of the United States with respect to implementation of any

[8] The Supreme Court noted as much in *Raines v. Byrd*, a 1997 case regarding legislator standing. 521 U.S. 811 (1997); *see also infra* notes 32-45 and accompanying text. The Court stated, "It is evident from several episodes in our history that in analogous confrontations between one or both Houses of Congress and the Executive Branch, no suit was brought on the basis of claimed injury to official authority or power." *Id*. at 826. The Court went on to detail several high-profile conflicts between Congress and the executive branch, none of which resulted in a lawsuit brought by one branch against the other. *Id*. at 826-28.

[9] *See, e.g.*, *Authorization to Initiate Litigation for Actions by the President Inconsistent with His Duties Under the Constitutional of the United States: Hearing Before the House Comm. on Rules*, July 16, 2014, Written Statement of Jonathan Turley, Shapiro Professor of Public Interest Law George Washington Univ.

[10] *See, e.g.*, *Enforcing the President's Constitutional Duty to Faithfully Execute the Laws: Hearing Before the H. Comm. on the Judiciary*, Feb. 26, 2014, Written Statement of Elizabeth Price Foley, Professor of Law Florida International Univ. College of Law.

[11] *See, e.g.*, *Authorization to Initiate Litigation for Actions by the President Inconsistent with His Duties Under the Constitutional of the United States: Hearing Before the House Comm. on Rules*, July 16, 2014, Statement of Walter Dellinger.

[12] H.Res. 676, 113th Cong., 2d Sess (2014).

[13] An earlier discussion draft of the resolution considered by the House Rules Committee authorized the Speaker to seek relief pursuant to the Declaratory Judgment Act (28 U.S.C. §§ 2201, 2202), in addition to "appropriate ancillary relief, including injunctive relief." *See* House Rules Committee, Comparative Print Showing the Changes from the Committee Discussion Draft in the Resolution as Introduction, *available at* http://docs.house.gov/meetings/RU/RU00/20140724/102564/HMTG-113-RU00-20140724-SD001.pdf. This language was eliminated before the resolution was formally introduced in the House. *See id*.

> provision of the Patient Protection and Affordable Care Act, title I or subtitle B of title II of the Health Care and Education Reconciliation Act of 2010, including any amendment made by such provision, or any other related provision of law, including a failure to implement any such provision.[14]

Based on the text of the resolution, the litigation is not restricted to challenging the implementation of any specific provision of the ACA.[15] However, based on public comments from Speaker Boehner,[16] it appears as though the suit may focus on the decision to delay enforcement of the ACA's employer mandate, accomplished through the IRS's provision of transition relief.[17] Additionally, the suit could be filed against any executive branch officer or employee, and the resolution does not require the President to be a defendant.

H.Res. 676 also authorized the House Office of General Counsel, at the Speaker's direction, to represent the House in any civil suit. The Office may hire outside counsel to assist in this representation. On August 25, 2014, Kerry Kircher, the General Counsel, entered into a contract with BakerHostetler to serve as such outside counsel.[18] David B. Rivkin, a partner at BakerHostetler, "will be principally responsible for conducting the Litigation on behalf of the [firm and] ... personally will perform a substantial portion of the services contracted for ... "[19] Unless terminated at an earlier time, the contract terminates on the earlier date "when a final appealable judgment is rendered in a United States District Court ... " or at the expiration of the 113th Congress.[20]

At the time of publication, a lawsuit pursuant to H.Res. 676 has not yet been filed. Therefore, the details of any such suit remain unclear, including the identity of the defendants, the alleged injury, and the relief that may be sought.

Article III Standing

Generally, the doctrine of standing is a threshold procedural question that does not turn on the merits of a plaintiff's complaint, but rather on whether the particular plaintiff has a legal right to a judicial determination on the issues before the court.[21] The law with respect to standing is a mix of both constitutional requirements and prudential considerations.[22] Article III of the Constitution

[14] H.Res. 676.

[15] *Id*.

[16] Press Release, Speaker Boehner's Press Office, "Boehner: This Is About Protecting the Constitution," July 10, 2014, *available at* http://www.speaker.gov/press-release/boehner-about-protecting-constitution.

[17] Internal Revenue Service, "Transition Relief for 2014 Under §§ 6055 (§ 6055 Information Reporting), 6056 (§ 6056 Information Reporting) and 4980H (Employer Shared Responsibility Provisions)", Notice 2013-45, *available at* http://www.irs.gov/pub/irs-drop/n-13-45.PDF.

[18] Contract for Legal Services between the Office of General Counsel and BakerHostetler, approved by Candice S. Miller, Chairman, Comm. on House Administration, *available at* http://cha.house.gov/sites/republicans.cha.house.gov/files/documents/House%20Lawsuit%20Contract.pdf. Pursuant to the contract, the Office of General Counsel agreed to pay $500 per hour for attorney work on the suit and 75% of the usual and customary rates for non-attorney work. *Id.* at 1. The entire contract is capped at $350,000. *Id*. at 2.

[19] *Id*. at 4.

[20] *Id*.

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

[22] *See* Dep't of Commerce v. House of Representatives, 525 U.S. 316, 328-29 (1999). By law, Congress can grant a (continued...)

specifically limits the exercise of federal judicial power to "cases" and "controversies."[23] Accordingly, the courts have "consistently declined to exercise any powers other than those which are strictly judicial in nature."[24] Thus, it has been said that "the law of Article III standing is built on a single basic idea—the idea of separation of powers."[25] Given this concern for separation of powers, the "standing inquiry [is] especially rigorous when reaching the merits of [a] dispute would force [the Court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional."[26]

To satisfy the constitutional standing requirements in Article III, the Supreme Court imposes three required elements. First, the plaintiff must allege a personal injury-in-fact, which is actual or imminent, concrete, and particularized. Second, the injury must be "fairly traceable to the defendant's allegedly unlawful conduct."[27] Third, the injury must be "likely to be redressed by the requested relief."[28]

In addition to the constitutional questions posed by the doctrine of standing, federal courts also follow a well-developed set of prudential principles that are relevant to a standing inquiry.[29] Similar to the constitutional requirements, these limits are "founded in concern about the proper—and properly limited—role of the courts in a democratic society,"[30] but are judicially created. Unlike their constitutional counterparts, prudential standing requirements "can be modified or abrogated by Congress."[31] These prudential principles require that (1) the plaintiff assert his own legal rights and interests, rather than those of a third party; (2) the plaintiff's complaint fall within the "zone of interests" protected or regulated by the statute or constitutional guarantee in question; and (3) the plaintiff not assert "abstract questions of wide public significance which amount to generalized grievances pervasively shared and most appropriately addressed in the representative branches."[32]

(...continued)

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

[23] U.S. CONST. art. III, §2 (stating that "The judicial Power shall extend to all *Cases*, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made … under their Authority ... – to *Controversies* to which the United States shall be a Party;– to *Controversies* between two or more States; ... .")(emphasis added).

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

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

[26] *Id*. at 819.

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

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

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

[30] *Id.*

[31] *Id.*

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

Congressional Standing

As applied to congressional plaintiffs, the doctrine of standing has generally been invoked only in cases challenging executive branch actions or acts of Congress and has focused on the injury prong of standing. The case law with respect to congressional plaintiffs can be broken down into two categories: (1) cases where individual Members file suit and (2) cases where congressional institutions (committees or houses of Congress) file suit. Following the Supreme Court's 1997 decision in *Raines v. Byrd*,[33] the case law regarding category one, individual Member suits, has been fairly settled. However, the same cannot be said for suits under category two. Suits brought by congressional institutions have been rare, and generally involve vindicating congressional rights to access specific information from the executive branch. Therefore, the federal courts have not determined whether a congressional institutional plaintiff would have standing to sue based on the type of injury that is likely to be asserted in a suit brought pursuant to H.Res. 676 (i.e., an institutional injury unrelated to information access). While there is no precedent that directly answers this question, existing case law can serve as guidance in analyzing how a court may confront this situation. This report will begin by examining areas in which the courts have provided relatively definitive analysis regarding congressional standing. First, it will examine *Raines* and its progeny, to explain how a court analyzes assertions of institutional injuries when the plaintiff is an individual Member. Next, the report will discuss cases brought by institutional plaintiffs based on institutional injuries regarding information access, namely suits seeking to enforce a congressional subpoena. By looking at these cases, we can identify whether the courts have established criteria that are necessary, but not sufficient, for institutional plaintiffs to establish standing. Finally, the report will address questions that remain unresolved by the courts that may be relevant in determining whether the House has standing in a suit filed pursuant to H.Res. 676.

Individual Members as Plaintiffs: *Raines v. Byrd* and Its Progeny

In 1997, the Supreme Court decided *Raines v. Byrd*,[34] which presented a constitutional challenge to the Line Item Veto Act of 1996 (the Act).[35] In *Raines*, the Supreme Court confronted, for the first time, the question of whether individual Members of Congress had standing to sue the executive branch for alleged injuries to Congress's legislative power. *Raines* and several subsequent D.C. Circuit opinions lay out the framework for analyzing whether *individual* Members will have standing in these types of suits. While these cases are not directly applicable to a potential suit brought by the House as a whole (such as the suit envisioned in H.Res. 676), they serve as important guidance in understanding the Court's treatment of judicial involvement in dispute resolution between the legislative and executive branches.

In *Raines*, the Court concluded that an individual Member plaintiff *may* have standing in a suit against the executive branch in two situations. First, the plaintiff may have standing to allege a personal injury, which "deprived [the Member] of something to which they *personally* were entitled" or caused the Member to be "singled out for specially unfavorable treatment as opposed

[33] 521 U.S. 811 (1997).

[34] *Id.*

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

to other Members."[36] Second, a plaintiff may have standing if he has suffered an institutional injury that is not "abstract and widely dispersed" and amounts to vote nullification.[37]

Institutional Injuries and Vote Nullification

It appears likely that the suit envisioned in H.Res. 676 would argue that the House has suffered an institutional, rather than personal, injury. Therefore, it is important to examine the nature of an institutional injury and when it can satisfy the first prong in the standing analysis. The Court described an institutional injury as a claim brought "solely because [the plaintiffs] are Members of Congress."[38] It further characterizes an institutional injury as follows: "[i]f one of the Members were to retire tomorrow, he would no longer have a claim; the claim would be possessed by his successor instead. The claimed injury thus runs (in a sense) with the Member's seat ... "[39] In assessing the *Raines* plaintiffs' injury, the Court concluded that the alleged diminution of Congress's legislative power caused by the Line Item Veto Act could only be an institutional injury, stating that it "necessarily damages all Members of Congress and both Houses of Congress equally."[40]

The *Raines* Court held that only certain kinds of institutional injuries could satisfy standing, namely injuries that are not "abstract and widely dispersed." The Court noted that in the only case "in which [the Supreme Court has] upheld standing for legislators (albeit *state* legislators) claiming an institutional injury"[41] the legislators' past and future votes on the challenged issue were "completely nullified."[42] In that case, *Coleman v. Miller*,[43] a group of Kansas legislators asserted that the lieutenant governor acted beyond the scope of his authority by casting a tie-breaking vote that led to a proposed constitutional amendment being deemed ratified by the state. If the legislators were correct that the lieutenant governor should not have cast a vote, "their votes not to ratify the amendment were deprived of all validity"[44] and they would have no way to reverse the ratification with future votes. Therefore, the Court determined that the legislators had a "plain, direct and adequate interest in maintaining the effectiveness of their votes," and thus, had standing to sue.[45] The *Raines* Court summarized *Coleman* by stating,

> It is obvious, then, that our holding in *Coleman* stands (at most ...) for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative

[36] *Raines*, 521 U.S. at 821 (emphasis in original). The Court used the 1969 Supreme Court case *Powell v. McCormack* as an example. 395 U.S. 486 (1969). In *Powell*, a Member alleged that he was deprived of his salary because he was unconstitutionally excluded from the House. Since the Member alleged the "loss of [a] private right," he alleged a personal injury that satisfied standing. *Raines*, 521 U.S. at 820-21. The Court noted that Member asserting personal injuries that were concrete and particularized would satisfy the injury requirement in the standing analysis. *Id*.

[37] *See Raines*, 521 U.S. at 826.

[38] *Id*. at 821.

[39] *Id*.

[40] *Id*. at 821.

[41] *Raines*, 521 U.S. at 822 (emphasis in original).

[42] *Id*. at 823.

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

[44] *Id*.

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

> act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.[46]

The Court went on to distinguish *Coleman* from the factual situation present in *Raines*. Unlike the *Coleman* plaintiffs, the *Raines* plaintiffs did not allege that their votes were given no effect or that the Act would nullify their future votes. Instead, "[i]n the vote on the Line Item Veto Act, their votes were given full effect. They simply lost that vote."[47] Additionally, Members could vote in the future to repeal the Act or exempt given appropriations bills from the Act. Because of these facts, the *Raines* plaintiffs' votes were not "completely nullified," could not meet the Court's *Coleman*-based vote nullification test, and therefore did not have standing.[48]

Subsequent D.C. Circuit opinions have further grappled with how to determine if a vote has been "completely nullified." Most relevant, in 2000 the D.C. Circuit decided *Campbell v. Clinton*,[49] a suit filed by 31 Members seeking a declaration that President Clinton violated the War Powers Clause of the Constitution and the War Powers Resolution in directing military participation in certain airstrikes. The Member plaintiffs attempted to argue that their injury fit within the Court's interpretation of *Coleman* in *Raines*, arguing that their votes defeating a War Powers Resolution and congressional declaration of war were "nullified" by the continued involvement of U.S. troops.[50]

In rejecting this argument the court stated that *Raines* did not suggest "that the President 'nullifies' a congressional vote and thus legislators have standing whenever the government does something Congress voted against, still less that congressmen would have standing anytime a President allegedly acts in excess of statutory authority."[51] Instead, it characterized the *Coleman* exception in *Raines* as "very narrow," encompassing an "unusual situation" where legislators could not use their future votes to reverse the harm they alleged.[52] In other words, a vote is completely nullified when the plaintiffs have no legislative remedy. The court concluded that the *Campbell* plaintiffs could not successfully allege an institutional injury that amounts to vote nullification. The Member plaintiffs "enjoy[ed] ample legislative power to have stopped prosecution of the 'war'"[53] including the ability to pass a law forbidding the use of U.S. forces or restrict funding for American participation in the conflict through the appropriations power. The court also stated that "there always remains the possibility of impeachment should a President act in disregard of Congress' authority on these matters."[54]

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[46] *Raines*, 521 U.S. at 823.

[47] *Id.* at 824.

[48] *Id.* at 818-20. Although the holding was based on the Court's finding that the plaintiffs did not satisfy the personal injury requirement of standing, the Court also questioned whether the plaintiffs could meet the second standing requirement, that the plaintiffs' injury be "fairly traceable" to unlawful conduct by the defendants. The plaintiffs' injury was allegedly caused not by the executive branch defendants' exercise of legislative power, but instead by "the actions of their own colleagues in Congress in passing the act." *Id*. at 830, n. 11.

[49] 203 F.3d 19 (D.C. Cir. 2000), *cert. denied*, 531 U.S. 815 (2000).

[50] *Id*. at 22.

[51] *Id*.

[52] *Id*. at 23.

[53] *Id*.

[54] *Id*.

Recently, the U.S. Court of Appeals for the Tenth Circuit has discussed both *Raines* and its interpretation of *Coleman* in a case brought by state legislators. In *Kerr v. Hickenlooper*,[55] the Tenth Circuit ruled that members of the Colorado General Assembly had standing[56] to challenge the Taxpayer's Bill of Rights (TABOR), a provision of the Colorado Constitution that requires voter approval before the legislature may implement a new tax, tax rate increase, extension of an expiring tax, or other revenue related policies.[57] The plaintiffs "contend[ed] they have been injured because they are denied the authority to legislate with respect to tax and spending increases."[58] The court concluded that the plaintiffs satisfied the vote nullification standard from *Raines* and, although the facts did not perfectly align, fell closer to the type of injury asserted in *Coleman*. It cited both cases regarding state legislator standing and congressional standing, indicating agreement with the D.C. Circuit's interpretation of *Raines* and *Coleman*.[59] The court noted that "[u]nder TABOR, a vote for a tax increase is completely ineffective because the end result of a successful legislative vote in favor of a tax increase is not a change in the law."[60] Ultimately, because of this fact, the court concluded that "TABOR denies the Colorado General Assembly the 'ability to vote' on operative tax increases, and the legislator-plaintiffs cannot undo its provisions 'pursuant to the normal legislative process'" since amending the state constitution requires voter approval or the calling of a constitutional convention.[61] Given this lack of a legislative remedy, the court held that the plaintiffs successfully alleged the type of injury present in *Coleman*, which was sufficient to satisfy the injury prong of standing.[62]

It should be noted that *Kerr*, and other cases addressing state legislator standing, do not present the kind of separation of powers concerns present in *Raines*, which led the Court to adopt an "especially rigorous" standing analysis.[63] Therefore, such state legislator cases may be of somewhat limited value in analyzing how a court may confront a question of federal legislative standing that would require it to litigate a dispute between two coordinate branches.[64]

Given how *Raines* and its progeny interpret institutional injuries that are sufficient to confer standing, it appears that a Member would likely be precluded from establishing standing in a suit challenging an act of Congress. Legislative action, such as repeal or amendment of the act, would always be available to remedy the alleged harm caused by an act of Congress and therefore would appear to prevent a court from finding vote nullification. In suits that challenge an executive action, rather than an act of Congress, *Raines* appears to restrict but not eliminate a Member's ability to establish standing. Arguably, a Member plaintiff may still be able to satisfy standing if he alleged that an executive action nullified his vote, as was the case in *Coleman*.[65]

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[55] 744 F.3d 1156 (10th Cir. 2014).

[56] *Id*. at 1172.

[57] COLO. CONST. art. X, § 20.

[58] *Kerr*, 744 F.3d at 1168.

[59] *Id*. at 1168 ("We agree with these cases[, *Campbell*, *Chenoweth*, and *Kucinich*,] that *Raines* rested in large measure on the plaintiff's ability to correct the alleged injury through ordinary legislation, an ability the legislator-plaintiffs in this case lack.").

[60] *Id*. at 1165.

[61] *Id*. at 1166.

[62] *Id*. at 1171.

[63] *Raines*, 521 U.S. at 819.

[64] *See id*. at 1168.

[65] *See Raines*, 521 U.S. at 826. However, *Raines* specifically reserved the question of whether a plaintiff who could successfully argue an injury similar to the one in *Coleman* should still be denied standing, or have his claim found to be (continued...)

Congressional Institutions as Plaintiffs

Congressional institutions have been successful at establishing standing in a handful of cases regarding access to information.[66] Most of these information access cases seek to enforce a congressional subpoena issued to an executive branch official. It is unclear how or if the standing analysis in these cases would be applied to suits brought by institutional plaintiffs alleging different kinds of institutional injuries. However, the cases do establish what appears to be one of the known requirements for establishing standing as an institutional plaintiff: congressional authorization to sue.

Congressional Authorization Is Required to Establish Standing

Two recent cases illustrate how courts have analyzed institutional plaintiffs' standing to sue to enforce a subpoena, even after *Raines*. In *Committee on Judiciary, U.S. House of Representatives v. Miers*[67] and *Committee on Oversight and Government Reform v. Holder*,[68] two different judges for the U.S. District Court for the District of Columbia heard cases involving a House committee seeking to enforce a congressional subpoena against current or former executive branch officials through a civil suit.

In *Miers*, the Department of Justice (DOJ) argued that *Raines* could not be reconciled with the D.C. Circuit's preexisting precedent regarding standing and enforcement of congressional subpoenas by civil suit, namely *United States v. American Telephone and Telegraph Co.* (*AT&T*).[69] *AT&T* was a suit filed by the DOJ in an attempt to obtain an injunction prohibiting AT&T from complying with a congressional subpoena issued by a House committee.[70] In response, the House passed a resolution authorizing the chairman of the committee to intervene in the case, on behalf of the full House, in order to secure information in AT&T's possession that

(...continued)

otherwise non-justiciable, because of separation of powers concerns that were not present in *Coleman* since that case involved a suit by state, not federal, legislators. *See id.* at 824, n. 8.

[66] One such case, *Department of Commerce v. House of Representatives*, involved a challenge to the use of statistical sampling in the 2000 census. 11 F. Supp. 2d 76 (D.D.C. 1998)). In this case, the House alleged several concrete and particularized injuries that it would suffer personally. The standing analysis focused on two of these injuries and determined that existing precedent established these injuries as sufficient to confer standing. For example, the House alleged that it was entitled, by statute, to receive census information that complied with the Census Act, which it would not receive if statistical sampling was permitted. The court concluded, based upon a case relating to a failure to receive information regarding campaign finances that was statutorily required to be publicly disclosed, that "the inability to receive information which a person is entitled to by law is sufficiently concrete and particular to satisfy constitutional standing requirements." *Id*. at 85 (*citing* Fed. Election Comm'n v. Atkins, 524 U.S. 11 (1998). It went on to state that the injuries alleged in the case fell within the personal injury prong of *Raines*, since the House was "claiming that [it was being] deprived of something to which [it] *personally* [was] entitled." *Id.* at 89 (quoting *Raines*, 521 U.S. at 21). Additionally, the court stated its belief that this case "does [not] give rise to generalized legislative standing, by which the House or Senate could file suit whenever either alleged that the Executive Branch was acting in a manner contrary to the law or the Constitution." *Id*. at 89. Given this context, and the fact that a suit filed pursuant to H.Res. 676 is likely to assert an institutional injury that will require a court to analyze legislator standing specifically, this report will not include an in-dept discussion of *Department of Commerce*.

[67] 558 F. Supp. 2d 53 (D.D.C. 2008).

[68] 979 F. Supp. 2d 1 (D.D.C. 2013).

[69] 551 F.2d 384 (D.C. Cir. 1976).

[70] *Id*. at 385-87.

was subject to the subpoena.[71] In its brief discussion of the chairman's standing to intervene, the D.C. Circuit stated 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."[72]

The district court in *Miers* distinguished *AT&T* from *Raines* and concluded that "*Raines* and subsequent cases have not undercut either the precedential value of *AT&T* [] or the force of its reasoning."[73] It concluded that the instant case fell directly within the *AT&T* precedent because the Judiciary Committee "has been expressly authorized by the House of Representatives *as an institution*" to bring the suit by a resolution passed by the House.[74] This resolution specifically authorizing the suit was the "key factor that move[d the] case from the impermissible category of an individual plaintiff asserting an institutional injury (*Raines* ...) to the permissible category of an institutional plaintiff asserting an institutional injury (*AT&T*)."[75] Therefore, since the committee was authorized to sue, its Article III standing was preserved.

In 2013, the district court in *Holder* adopted this same reasoning, declaring that the case fell "squarely under *AT&T*" and that *Raines* and other suits brought by individual Members did not mandate dismissal of the case on standing grounds.[76] Exactly as in *Miers*, since the committee asserted a concrete and particular injury to its investigatory power and was authorized to sue, it satisfied the Article III standing injury requirement.[77]

Unresolved Questions

This section of the report will examine some of the unresolved questions that may become relevant in the standing analysis for a suit filed pursuant to H.Res. 676.

Does the reasoning in *Raines* apply directly to a case brought by an authorized congressional institution as plaintiff?

Raines concluded that individual Members could have standing to assert either a personal injury or an institutional injury that amounted to vote nullification, as illustrated by *Coleman*. However, *Raines* did not directly speak to how the standing of an *institutional* plaintiff should be analyzed. The case leaves unclear whether an institutional plaintiff, by virtue of representing a whole house, could establish standing based on institutional injuries that would be insufficient if brought by individual Members. The Court hinted that institutional plaintiffs might be treated somewhat differently when it noted that it "attach[ed] some importance to the fact that [the Member plaintiffs were not] authorized to represent their respective House of Congress in this action ... "[78] However, it never concluded that the *Raines* plaintiffs would have had standing if they had been

[71] H.Res. 1420, 94th Cong., 2d Sess. (1976).

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

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

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

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

[76] *Holder*, 979 F. Supp. 2d at 20.

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

[78] *Raines*, 521 U.S. at 829.

authorized. Therefore, it remains unclear if or how the standing analysis as applied to authorized institutional plaintiffs may differ from the analysis in *Raines*.

The subpoena enforcement cases provide little guidance on this issue for several reasons. First, the ability of congressional institutions to participate in suits relating to congressional subpoenas has a long history in the D.C. Circuit unrelated to the specific issue of legislative standing.[79] Therefore, the standing analysis in those cases primarily interprets pre-*Raines* case law and does not specifically address whether the *Raines* vote nullification limitation applies when institutional plaintiffs assert institutional injuries.[80] Second, it is possible that the courts would not have discussed the vote nullification limit even if it does apply. One could argue that such a limit would not prevent an institutional plaintiff from establishing standing in this situation as there does not appear to be a direct mechanism for enforcement of a congressional subpoena. In the absence of a legislative remedy, such plaintiffs appear to satisfy the standing analysis, including the vote nullification limit as interpreted by *Raines* and its progeny.

While the courts have not decided any congressional institutional plaintiff cases on the basis of institutional injuries outside the subpoena enforcement context, the Supreme Court has at least once, in dissenting opinions, discussed *Raines* and its application to institutional plaintiffs. In *United States v. Windsor*,[81] two dissenting opinions present dueling interpretations of how *Raines* should apply to a whole house of Congress seeking to establish standing on the basis of an institutional injury. In *Windsor*, the Supreme Court considered a constitutional challenge to Section 3 of the Defense of Marriage Act (DOMA).[82] While the district court case was pending, DOJ announced that it would no longer defend the constitutionality of Section 3.[83] In response, the House's Bipartisan Legal Advisory Group (BLAG)[84] was permitted to intervene as an interested party in the litigation to defend the constitutionality of Section 3.[85] When the Supreme Court granted certiorari to hear the *Windsor* appeal, it requested that the parties address the question of whether BLAG had standing to appeal the case.[86]

The majority opinion, authored by Justice Kennedy and joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan, specifically declined to determine if the House, through BLAG, had standing to participate in the litigation. It concluded that Edith Windsor, the original plaintiff, and the DOJ satisfied the Article III and prudential standing requirements "and, as a consequence, the Court need not decide whether BLAG would have standing to challenge the District Court's

[79] *See, e.g.*, Ashland Oil v. Fed. Trade Comm'n, 548 F.2d 977 (D.C. Cir. 1976); *AT&T*, 551 F.2d 384; *Holder*, 979 F. Supp. 2d 1; *Miers*, 558 F. Supp. 2d 53.

[80] *See Miers*, 558 F. Supp. 2d at 68 ("*Raines* and subsequent cases have not undercut either the precedential value of *AT&T* [] or the force of its reasoning.").

[81] 133 S.Ct. 2675 (2013).

[82] P.L. 104-199, 110 Stat. 2419 (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C).

[83] *Windsor*, 133 S.Ct. at 2683.

[84] BLAG is established in Rule II(8) of the House Rules and is comprised of five Members: the Speaker of the House, the Majority Leader, the Majority Whip, the Minority Leader, and the Minority Whip. *See* Brief on the Merits for Respondent The Bipartisan Legal Advisory Group for the U.S. House of Representatives at ii, *Windsor*, 133 S.Ct. 2675.

[85] *Windsor*, 133 S.Ct. at 2684. The House later authorized BLAG to continue representing its interests in DOMA-related litigation. H.Res. 5, 113th Cong., 1st Sess., § 4(a)(1)(B) (2013) ("[BLAG] continues to speak for, and articulates the institutional position of the House in all litigation matters in which it appears, including in Windsor v. United States").

[86] United States v. Windsor, 133 S. Ct. 786 (2012) (granting writ of certiorari).

ruling and its affirmance in the Court of Appeals on BLAG's own authority."[87] However, two dissents did tackle the issue of BLAG's standing.

On the one hand, Justice Alito, writing in dissent for himself, concluded that BLAG had suffered an injury in fact and therefore had standing to appeal the case.[88] He argued that the appeals court decision ruling Section 3 unconstitutional "impairs Congress' legislative power by striking down an Act of Congress."[89] Justice Alito specifically argued that *Raines* was "inapposite" to this case because BLAG was authorized to represent the House, as compared to a group of unauthorized Members.[90] He concluded that "in the narrow category of cases in which a court strikes down an Act of Congress and the Executive declines to defend the Act, Congress both has standing to defend the undefended statute and is a proper party to do so."[91] To Justice Alito, BLAG's injury was tantamount to the injury suffered in *Coleman*—the House's votes were necessary for DOMA to be enacted and striking down Section 3 as unconstitutional acted to nullify those votes.[92]

On the other hand, Justice Scalia, joined by Chief Justice Roberts and Justice Thomas, came to the opposite conclusion. He stated that "Justice Alito's dissent is correct that *Raines* did not formally decide this issue, but its reasoning does."[93] He noted that the President's asserted failure in executing the law, by refusing to defend the statute, could only be challenged in court "by someone whose concrete interests were harmed by that alleged failure."[94] Justice Scalia referenced back to an extended passage in *Raines* that discussed "famous, decades-long disputes between the President and Congress ... that would surely have been promptly resolved by a Congress-vs.-the-President lawsuit, if the impairment of a branch's power alone conferred standing to commence litigation. But it does not, and never has ... "[95] Justice Scalia went on to point out that Congress, "if majorities in both Houses of Congress care enough about the matter ... [has] available innumerable ways to compel executive action without a lawsuit ... "[96] Based on this dissent, it appears that these three Justices believe the reasoning in *Raines* applies to institutional plaintiffs and that BLAG did not allege an injury that was sufficient to confer standing, in part because the alleged "impairment of [Congress's] power" could be remedied through legislative action.[97]

It is clear that at least at the Supreme Court level the Justices are divided on how to apply *Raines* to institutional plaintiffs and how to characterize institutional injuries. If the reasoning in *Raines* does apply to congressional institutional plaintiffs, the ability of the House to establish standing in a suit brought pursuant to H.Res. 676 may then turn on whether there is a legislative remedy to the asserted injury.

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[87] *Windsor*, 133 S.Ct. at 2688.

[88] *Windsor*, 133 S.Ct. at 2712 (Alito, J., dissenting).

[89] *Id*. at 2713.

[90] *Id*.

[91] *Id*. at 2714.

[92] *Id*.

[93] *Windsor*, 133 S.Ct. at 2704 (Scalia, J., dissenting).

[94] *Id*. at 2703.

[95] *Id*. at 2704.

[96] *Id*. at 2704-05.

[97] *See id*. at 2703-05.

If the existence of a legislative remedy forecloses the ability of a congressional institutional plaintiff to establish standing, what qualifies as a "legislative remedy"?

While *Raines* and its progeny have not defined *all* of the potential congressional actions that could qualify as legislative remedies to an institutional injury, the cases do provide guidance on what types of actions have been considered sufficient to prevent a finding of vote nullification. It is also important to note that the cases suggest that a legislative remedy exists even if it is clear that such action has not, and may never, garner enough support in Congress to be successfully implemented. For example, in *Kucinich v. Obama*,[98] the court concluded that the Member plaintiffs did not have standing to sue since they failed to successfully show vote nullification because they retained legislative remedies. One of the remedies cited by the court was a proposed bill, which would provide the plaintiffs with the outcome they sought in the court proceeding, that had already been rejected twice in the House.[99] Nevertheless, the court concluded that Congress's ability to pass such a law, even if unlikely to be successful, served as a legislative remedy sufficient to prevent the plaintiffs from establishing standing under *Raines*.[100]

Based on the cases, it appears clear that Congress will always have a legislative avenue to remedy an injury caused by an allegedly unconstitutional statute. This situation was confronted in *Raines*—the plaintiffs could directly remedy their injury by repealing the Line Item Veto Act or exempting certain appropriations bills from its force.[101] In short, Congress can always repeal a statute that causes it injury.

Additionally, there may be legislative remedies that can combat institutional injuries caused by executive action. *Campbell*, in which Members challenged the President's commitment of U.S. military forces to participate in NATO airstrikes, suggests that the following actions *could* serve as legislative remedies to the injury: passing "a law forbidding the use of U.S. forces in the Yugoslav campaign"; using appropriations authority to "cut off funds for the American role in the conflict"; and "the possibility of impeachment should a President act in disregard of Congress' authority on these matters."[102]

Guided by this case law but cognizant of the fact that *Raines* and its progeny have not specifically defined what constitutes a legislative remedy, it could be argued that the following actions could

[98] 821 F. Supp. 2d 110 (D.D.C. 2011)

[99] *Id*. at 120 ("Second, not only do the plaintiffs retain legislative remedies, the plaintiffs 'and their colleagues continue to debate these legislative options and have already voted on numerous bills that would impact operations in Libya... [; however] the House has at least twice rejected proposals (including one sponsored by plaintiff Kucinich) to defund [U.S.] military operations in Libya and has voted down a resolution sponsored by plaintiff Kucinich directing immediate withdrawal of [U.S.] armed forces pursuant to the War Powers Resolution.' It therefore appears that the House of Representatives has voted on essentially what the plaintiffs now ask this Court to award (i.e., an order requiring the President to cease all U.S. military action in Libya). Thus, the plaintiffs' 'votes were given full effect. They simply lost that vote.'" (internal citations omitted)).

[100] *Id*.

[101] *Raines*, 521 U.S. at 829.

[102] *Campbell*, 203 F.3d at 23. The 2011 suit, *Kucinich v. Obama*, challenging the conduct of military operations in Libya based upon violations of the War Powers Clause of the Constitution and the War Powers Resolution came to similar conclusions about the existence of legislative remedies. *Kucinich*, 821 F. Supp. 2d 110, 120 (finding that "the plaintiffs retain legislative remedies... and continue to debate these legislative options and have already voted on numerous bills that would impact operations in Libya ... " (internal citations omitted)).

serve as potential remedies to certain executive actions: the repeal or disapproval of executive branch regulations or guidance documents establishing the challenged policies; employing the power of the purse to restrict the use of funds to administer objectionable programs or policies; or legislation eliminating, limiting, or clarifying the scope of agency discretion with regard to the implementation of existing laws.

Determining if these actions could be legislative remedies in a specific case, such as a suit brought pursuant to H.Res. 676, would require a case-by-case analysis of each challenged action and asserted injury. Given the breadth of H.Res. 676 and the fact that no suit has yet been filed, the uncertainty regarding specific claims that could be brought in a suit makes such an analysis unfeasible at this time.

Does a private plaintiff's ability to establish standing to challenge the executive action affect a congressional institution's ability to establish standing?

Some commentators have suggested that in a suit brought by the House pursuant to H.Res. 676, a court would be more likely to find the House has standing if no traditional private plaintiffs would be able to establish standing to challenge the executive action.[103] In *Raines*, after finding that the Member plaintiffs had not suffered an injury that could establish standing, the Court also noted that refusing to grant standing to Members did not "forclose[] the [Line Item Veto] Act from constitutional challenge (by someone who suffers judicially cognizable injury as a result of the Act)."[104] However, the Court specifically declined to speculate on "[w]hether the case would be different" if this circumstance, the existence of a traditional plaintiff, were different.[105]

While *Raines* did not provide a definitive discussion, other courts have confronted the argument that the standing analysis should take into account the possibility that no traditional plaintiff could ever establish standing. The U.S. District Court for the Eastern District of Wisconsin recently commented on this issue in a case brought by an individual Member of Congress. In *Johnson v. Office of Personnel Management*, Senator Ron Johnson challenged an Office of Personnel Management (OPM) rule that provides Members and congressional staff with a federal contribution toward health insurance premiums for plans purchased on the D.C. Small Business Health Options Program (SHOP) Exchange, which was created by the ACA.[106] The district court dismissed the case, finding that Senator Johnson had not suffered an injury sufficient to establish standing.[107] After conducting the standing analysis, Judge William Griesbach responded directly to *amici* who argued in favor of granting plaintiffs standing by noting that if the plaintiffs did not have standing, there would be no recourse to stop the executive branch from exceeding its

[103] *Enforcing the President's Constitutional Duty to Faithfully Execute the Laws: Hearing Before the H. Comm. on the Judiciary*, Feb. 26, 2014, Written Statement of Elizabeth Price Foley, Professor of Law Florida International Univ. College of Law at 25 ("Provided the legislator-plaintiffs in such a case can convince the court that the institution has suffered an injury-in-fact—i.e., that the benevolent suspension is tantamount to a 'nullification' of a law that they have written... the lack of a private plaintiff should strongly counsel the court to allow standing.").

[104] *Raines*, 521 U.S. at 829. Indeed, the Line Item Veto Act was held to be unconstitutional in such a suit, decided by the Supreme Court the year after *Raines*. Clinton v. City of New York, 524 U.S. 417 (1998).

[105] *Raines*, 521 U.S. at 829-30.

[106] Johnson v. U.S. Office of Pers. Mgmt., No. 14-C-009, slip. op. at *1 (E.D. Wisc. July 21, 2014).

[107] *Id*. at *20.

authority.[108] He rejected this argument, stating that the Constitution does not stipulate that "all wrongs must have remedies, much less that the remedy must lie in federal court."[109] He went on to cite Supreme Court precedent that emphasizes the Constitution's limited grant of judicial authority.[110] For example, in *Schlesinger v. Reservists Committee to Stop the War*,[111] the Court stated that "[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing."[112] Judge Griesbach concluded that "the fact that the allegations advanced in this action might be difficult or even impossible to pursue in federal court for any other plaintiffs does not mean that *these* Plaintiffs have suffered the kind of injury that could give rise to standing."[113]

Considering this case law, it does not appear that the existence of a private plaintiff that may be able to litigate the case would impact the question of whether a congressional plaintiff has suffered an injury-in-fact sufficient to satisfy Article III standing. Whether the existence of such a plaintiff would influence a court's consideration of prudential standing elements, if it had already found that the congressional plaintiff satisfied Article III standing, remains unclear.[114] However, it is clear that in some circumstances, courts have not been opposed to the idea that some wrongs cannot be remedied in federal court.[115]

Conclusion

At this point, no federal court has spoken on what circumstances must be satisfied for an institutional congressional plaintiff, asserting the type of institutional injury likely to be argued in a suit filed pursuant to H.Res. 676, to establish standing. *Raines* and its progeny provide guidance on how courts have treated individual Members of Congress who seek to challenge executive action in federal court. However, it is unclear if the analysis in *Raines*, particularly its

[108] *Id*. at *16-17.

[109] *Id*. at *17.

[110] *Id*. at *17-18.

[111] 418 U.S. 208 (1974).

[112] *Id*. at 227 (citing United States v. Richardson, 418 U.S. 166, 179 (1974) ("It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process. Any other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts. The Constitution created a *representative* Government... that the Constitution does not afford a judicial remedy does not, of course, completely disable the citizen who is not satisfied with the 'ground rules' established by the Congress... Lack of standing within the narrow confines of Art. III jurisdiction does not impair the right to assert his views in the political forum or at the polls. Slow, cumbersome, and unresponsive though the traditional electoral process may be thought at times, our system provides for changing members of the political branches when dissatisfied citizens convince a sufficient number of their fellow electors that elected representatives are delinquent in performing duties committed to them.").

[113] *Johnson*, slip op. at *19.

[114] *Raines* did not address this question, since it held that the Member plaintiffs did not satisfy Article III standing. The only post-*Raines* cases that have found that congressional plaintiffs satisfy the Article III requirements, subpoena enforcement cases *Miers* and *Holder*, did not address the question of private plaintiffs. Similar to the vote nullification requirement discussed above, it is possible the *Miers* and *Holder* courts did not discuss private plaintiffs because it does not appear that a private plaintiff would be injured by non-compliance with a congressional subpoena. *See supra* note 35-48 and accompanying text.

[115] *See Richardson*, 418 U.S. at 179; *Johnson*, slip op. at *19.

requirement that an institutional injury amount to vote nullification in order to satisfy the injury-in-fact requirement, would apply directly to an authorized institutional plaintiff. If it does, the existence of a legislative remedy to cure the alleged injury could prove fatal to an attempt to establish standing. Ultimately, if a suit is filed pursuant to H.Res. 676, a court will have to determine how to apply *Raines*, if at all, to the yet-unknown specific allegations made in the suit with regard to implementation of the ACA.

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