House of Representatives v. Burwell and Congressional Standing to Sue

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Summary

On November 21, 2014, the House of Representatives filed a lawsuit against the Departments of Health and Human Services and the Treasury, pursuant to H.Res. 676. *House of Representatives v. Burwell* included two claims regarding the implementation of the Patient Protection and Affordable Care Act (ACA). In September 2015, the U.S. District Court for the District of Columbia Circuit issued an opinion addressing the preliminary jurisdictional and justiciability questions at issue in the case. In May 2016, the district court issued its decision on the merits, in which the House prevailed as to one of its claims. The agencies filed a notice of appeal to the U.S. Court of Appeals for the District of Columbia Circuit in July 2016.

This report discusses one preliminary 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 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. In contrast, suits by congressional plaintiffs have been rare. While the courts have grappled with several cases regarding access to information, *Burwell* is the first case to analyze the House's standing to assert an institutional injury unrelated to information access.

This report begins by examining areas in which the courts have provided relatively definitive analysis regarding congressional standing. First, it examines *Raines* and its progeny, to explain how a court analyzes assertions of institutional injuries when the plaintiff is an individual Member. Next, the report discusses 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, one can identify whether the courts have established criteria that are necessary, but not sufficient, for institutional plaintiffs to establish standing.

The report then describes and analyzes the district court's ruling on standing in *Burwell*, in which the court determined that the House had suffered an injury sufficient to establish standing on one of its two claims. Finally, it addresses unresolved questions raised by the reasoning developed in *Burwell* and how it may be applied in future cases.

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Introduction

On July 30, 2014, the House of Representatives passed H.Res. 676, which authorized 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] The resolution stated that the suit was to focus on implementation of the Patient Protection and Affordable Care Act (ACA)[2] and related statutes. The House filed the authorized lawsuit against the Department of Health and Human Services (HHS) and the Department of the Treasury (Treasury), as discussed in detail below, on November 21, 2014.

Disputes between Congress and the executive branch regarding the implementation of federal law are common, but have rarely been the subject of civil litigation. It appears that a house of Congress (or a committee acting on behalf of a house) has filed a lawsuit against the executive branch at least four other times in the past 41 years. Three of these suits—*Senate Select Committee on Presidential Campaign Activities v. Nixon*,[3] *Committee on the Judiciary v. Miers*,[4] and *Committee on Oversight and Government Reform v. Lynch*[5]—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*,[6] 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. *House of Representatives v. Burwell* represents the fifth time such a congressional institutional plaintiff has filed suit against the executive branch. The rarity with which such disputes between Congress and the executive branch are litigated suggests that these kinds of conflicts are primarily resolved outside the courts.[7]

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, one commentator argues 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.[8]

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

[4] 558 F. Supp. 2d 53 (D.D.C. 2008).

[5] 979 F. Supp. 2d 1 (D.D.C. 2013). The case was previously styled as *Committee on Oversight and Government Reform v. Holder*, prior to the confirmation of Loretta Lynch as Attorney General.

[6] 525 U.S. 316 (1999).

[7] 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 50-64 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." *Raines*, 521 U.S. 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.

[8] *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.

Another contends 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.[9] On the other hand, a third commentator notes the Constitution's grant of limited power to the judiciary, and worries 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.[10]

This report discusses one justiciability question raised in the House's lawsuit: 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 .... "[11] Such a suit may be filed in any federal court of competent jurisdiction and can seek any appropriate relief.[12] 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 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.[13]

Based on the text of the resolution, the litigation was not restricted to challenging the implementation of any specific provision of the ACA.[14] H.Res. 676 also authorized the House Office of General Counsel, at the Speaker's direction, to represent the House in any civil suit and hire outside counsel to assist in this representation. In November 2014, the House hired Jonathan Turley to serve as outside counsel.

[9] *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.

[10] *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.

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

[12] 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.*

[13] H.Res. 676.

[14] *Id.*

House of Representatives v. Burwell Claims

The House filed its suit in November 2014, entitled *U.S. House of Representatives v. Burwell*.[15] The complaint included two claims: a challenge to the appropriation of funds for cost-sharing subsidies and the delay in enforcing the employer mandate.[16]

Appropriation for Cost-Sharing Subsidies

The House's first claim alleged that the Treasury, at the direction of HHS, expended funds that were not appropriated to it by Congress, in violation of various constitutional and statutory provisions.[17]

The ACA established two kinds of subsidies—premium credits and cost-sharing subsidies. Section 1401 provides refundable tax credits to be available for certain individuals to reduce the cost of their health insurance premiums, referred to as a premium credit.[18] Certain individuals and families receiving the credits are also eligible for coverage with lower cost-sharing (i.e., out-of-pocket costs such as deductibles and copays) than otherwise required under the applicable health plan.[19] Under Section 1402, health plans must reduce the cost-sharing for these enrollees.[20] The affected insurance plans are then to be reimbursed by the Treasury in the same amount, through the provision of cost-sharing subsidies.[21]

The Section 1401 premium credits are funded through a permanent appropriation, outside the annual appropriations process, for refunds due under the Internal Revenue Code.[22] Although this permanent appropriation does not explicitly reference the cost-sharing subsidies provided under Section 1402, in January 2014, the Treasury Department began making such payments from the same permanent appropriation referenced in Section 1401.[23] Payments for the cost-sharing subsidies were estimated to be $3.978 billion for Fiscal Year 2014.[24]

In its complaint, the House argued that unlike the Section 1401 premium credits, the Section 1402 cost-sharing subsidies are subject to the annual appropriation process.[25] The House has

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[15] Complaint, U.S. House of Representatives v. Burwell, No. 1:14-cv-01967 (D.D.C. filed Nov. 21, 2014) [hereinafter *Burwell* Complaint].

[16] When H.Res. 676 was first debated and passed, discussion focused on the delay in enforcement of the employer mandate. At that time, 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." 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. However, the resulting suit did not allege a violation of the Take Care Clause.

[17] *Burwell* Complaint at 17-23 (Counts I-V).

[18] P.L. 111-148, § 1401, *codified at* 26 U.S.C. § 36B.

[19] *Id.* at § 1402, *codified at* 42 U.S.C. § 18071.

[20] *Id*.

[21] *Id*. at § 1402(c)(3).

[22] *Id*. at § 1401(a), (d)(1); 31 U.S.C. § 1324.

[23] *Burwell* Complaint at 11, ¶ 35; Answer, U.S. House of Representatives v. Burwell, No. 1:14-cv-01967, at 6, ¶ 35 (D.D.C. filed Nov. 2, 2015) [hereinafter *Burwell* Answer].

[24] *Burwell* Complaint at 11, ¶ 35 (citing Office of Management and Budget, OMB Sequestration Preview Report to the President and Congress for Fiscal Year 2014 and OMB Report to the Congress on the Joint Committee Reductions for Fiscal Year 2014, Corrected Version, at 23 (May 20, 2013), *available at* https://www.whitehouse.gov/sites/default/files/omb/assets/legislative_reports/fy14_preview_and_joint_committee_reductions_reports_05202013.pdf).

[25] *Id*. at 9-11.

maintained that Congress did not appropriate funds for the cost sharing subsidies in the Fiscal Year 2014 appropriations process, or thereafter, and that the permanent appropriation for Section 1401 premium credits is unavailable to pay for the cost-sharing subsidies.[26] Therefore, the executive branch was not authorized to make the cost sharing subsidy payments that began in January 2014. The House argued that the Treasury's actions in making such payments violate Article I, Section 9, clause 7 of the U.S. Constitution, which states that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law .... "[27] The House further alleged that these actions violated other constitutional provisions, vesting all legislative power in Congress and requiring that all bills pass the House and the Senate and be presented to the President for his signature or veto, and various statutory provisions.[28]

Employer Mandate Delay

The House's second claim concerned implementation of the so-called employer mandate, a provision of the ACA that imposes a penalty on certain employers who fail to offer full-time employees health coverage that meets certain standards of affordability and minimum value.[29] The penalties are referred to as employer shared responsibility payments. The ACA states that the section on employer shared responsibility payments "shall apply to months beginning after December 31, 2013."[30]

In July 2013, the Internal Revenue Service (IRS) announced that it would provide transition relief that would delay the implementation of employer shared responsibility payments for one year.[31] Under the announcement, penalties for non-compliance with the employer mandate would not be assessed until 2015. A February 2014 rule further delayed implementation of the shared responsibility payments for a subset of non-large employers.[32]

In addition, in 2015, large employers offering affordable coverage to at least 70%, but less than 100%, of their full-time employees would not be subject to a shared responsibility payment.[33] Thereafter, large employers would have to offer coverage to at least 95% of their full-time employees to avoid the penalty.[34]

The House argued that the IRS's use of transition relief to delay the imposition of shared responsibility payments was equivalent to the agency unilaterally rewriting the statute.[35] It noted that the ACA did not explicitly provide the agency with authority or discretion with regard to the effective date provision for the mandate. The House alleged that these actions violate several

[26] *Id.* at 9, ¶ 28.

[27] *Id.* at 17-18 (Count I).

[28] *Id.* at 18-19 (Count II); U.S. CONST. art. I, § 1; U.S. CONST. art. I, § 7, cl. 2.

[29] P.L. 111-148, § 1513, *codified at* 26 U.S.C. § 4980H.

[30] P.L. 111-148, § 1513(d).

[31] IRS, "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.

[32] IRS, "Shared Responsibility for Employers Regarding Health Coverage," 79 Fed. Reg. 8544, 8574 (Feb. 12, 2014).

[33] *Id.* at 8575.

[34] *Id.* at 8597-99.

[35] *Burwell* Complaint at 15-17.

constitutional provisions, including the granting of all legislative powers to Congress and the requirement that all bills pass both chambers and be presented to the President.[36]

Article III Standing

In general, the question of standing is a threshold procedural issue 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.[37] The law with respect to standing is a mix of both constitutional requirements and prudential considerations.[38] Article III of the Constitution specifically limits the exercise of federal judicial power to "cases" and "controversies."[39] Accordingly, the courts have "consistently declined to exercise any powers other than those which are strictly judicial in nature."[40] 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."[41] 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."[42]

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."[43] Third, the injury must be "likely to be redressed by the requested relief."[44]

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.[45] 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,"[46] but are judicially created. Unlike their constitutional counterparts, prudential standing requirements "can be modified or abrogated by Congress."[47] These prudential principles require that (1) the plaintiff

[36] U.S. CONST. art. I, § 1; U.S. CONST. art. I, § 7, cl. 2.

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

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

[39] 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).

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

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

[42] *Id.* at 819.

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

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

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

[46] *Id.*

[47] *Id.*

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."[48]

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*,[49] 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. *Burwell* is the first suit to examine congressional institutional plaintiff standing based on an injury unrelated to information access.

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

In 1997, the Supreme Court decided *Raines v. Byrd*,[50] which presented a constitutional challenge to the Line Item Veto Act of 1996 (the Act).[51] 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

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

[49] 521 U.S. 811 (1997).

[50] *Id.*

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

to other Members."[52] 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.[53]

Institutional Injuries and Vote Nullification

The Court described an institutional injury as a claim brought "solely because [the plaintiffs] are Members of Congress."[54] 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 ... "[55] 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."[56]

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"[57] the legislators' past and future votes on the challenged issue were "completely nullified."[58] In that case, *Coleman v. Miller*,[59] 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"[60] 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.[61] 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 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.[62]

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

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[52] *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 a Member asserting personal injuries that were concrete and particularized would satisfy the injury requirement in the standing analysis. *Id*.

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

[54] *Id*. at 821.

[55] *Id*.

[56] *Id*.

[57] *Id.* at 822 (emphasis in original).

[58] *Id*. at 823.

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

[60] *Id*.

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

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

votes were given full effect. They simply lost that vote."[63] 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.[64]

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*,[65] 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.[66]

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."[67] 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.[68] 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'"[69] 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."[70]

The Supreme Court recently discussed legislative standing in *Arizona State Legislature v. Arizona Independent Redistricting Commission*,[71] a case examining the Elections Clause of the U.S. Constitution.[72] In this case, the Arizona State Legislature challenged Proposition 106, a voter referendum that removed redistricting authority from the Arizona Legislature and vested it in an independent commission. The whole legislature, pursuant to a vote of both chambers, authorized a lawsuit arguing that the voter-approved proposition violated the Elections Clause.[73] While this case is an example of a state *institutional* legislative plaintiff bringing suit, the Court discussed

[63] *Id.* at 824.

[64] *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.

[65] 203 F.3d 19 (D.C. Cir. 2000), *cert. denied*, 531 U.S. 815 (2000).

[66] *Id.* at 22.

[67] *Id.*

[68] *Id.* at 23.

[69] *Id.*

[70] *Id.*

[71] 135 S. Ct. 2652 (2015).

[72] U.S. CONST. art. I, § 4, cl. 1.

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

both *Raines* and *Coleman*, and its discussion of vote nullification is instructive. The Court concluded that the Arizona State Legislature had standing to sue because its injury fit within the *Coleman* vote nullification standard.[74] Proposition 106, and a separate state constitutional provision that prohibits the legislature from adopting any measure that supersedes an initiative unless it furthers the initiative's purpose, would "'completely nullif[y]' any vote by the Legislature, now or 'in the future,' purporting to adopt a redistricting plan."[75] The Court also reaffirmed *Raines*'s arguably narrow interpretation of *Coleman*, as discussed above.[76]

It should be noted that *Arizona State Legislature*, and other cases addressing state legislature/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.[77] The Court specifically noted this concern in *Arizona State Legislature*, when it stated that the case "does not touch or concern the question whether Congress has standing to bring a suit against the President .... [A] suit between Congress and the President would raise separation-of-powers concerns absent here."[78] Therefore, such state 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.[79]

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*.[80]

Congressional Institutions as Plaintiffs

Before *Burwell*, congressional institutions had been successful at establishing standing in a handful of cases regarding access to information.[81] Most of these information access cases sought

[74] *Id*. at 2665.

[75] *Id*.

[76] *Id*.

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

[78] *Arizona State Legislature*, 135 S. Ct. 2665, n.12.

[79] *See id*. at 1168.

[80] *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 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.

[81] 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 (continued...)

to enforce a congressional subpoena issued to an executive branch official. These cases 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*[82] and *Committee on Oversight and Government Reform v. Lynch*,[83] 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*).[84] *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.[85] 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 was subject to the subpoena.[86] 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."[87]

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."[88] 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.[89] 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*)."[90] Therefore, since the committee was authorized to sue, its Article III standing was preserved.

(...continued)

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 does not include an in-depth discussion of *Department of Commerce*.

[82] 558 F. Supp. 2d 53 (D.D.C. 2008).

[83] 979 F. Supp. 2d 1 (D.D.C. 2013).

[84] 551 F.2d 384 (D.C. Cir. 1976).

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

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

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

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

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

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

In 2013, the district court in *Lynch* 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.[91] 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.[92]

House of Representatives v. Burwell and Article III Standing

Beyond the requirement that a congressional institutional plaintiff be authorized to sue, the information access cases discussed above do not shed much light on how a court should assess a different kind of alleged institutional injury. *Burwell* is the first case to grapple with this question and provide a concrete framework to analyze. The case also leaves many questions unresolved, which are discussed in depth below.

HHS and Treasury's Arguments Against Standing

In response to the House's November 2014 complaint alleging multiple constitutional and statutory violations arising from cost-sharing subsidy payments and the delay in enforcement of the employer mandate, HHS and Treasury (the agencies) filed a motion to dismiss. The motion argued, in part, that the House lacked standing to bring such a suit.[93] A later filing, in response to the House's opposition to their motion to dismiss, expounded upon these standing arguments.[94]

The agencies essentially made three arguments against the court granting standing in the case. First, they characterized the House's assertions as a "generalized claim" that could be shared by "every member of the public at large."[95] The agencies cite Supreme Court cases for the idea that "a mere interest in the 'vindication of the rule of law'" is not a legally cognizable injury[96] and that "an asserted right to have the Government act in accordance with law" is not sufficient to establish standing.[97] They then argue that these principles apply equally in cases brought by congressional entities, since Members of Congress hold their seats as trustees for their constituents, not as a prerogative of personal power, an idea put forward in *Raines*.[98] Therefore a legislative plaintiff has no distinct "interest in the proper application of the law" from the interest held by all other citizens.[99] The agencies consistently categorized the House's claim as one of "the abstract dilution of institutional legislative powers," which the Court rejected in *Raines*.[100]

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[91] *Lynch*, 979 F. Supp. 2d at 20.

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

[93] Defendants' Memorandum in Support of Their Motion to Dismiss the Complaint, U.S. House of Representatives v. Burwell, No. 1:14-cv-01967 (D.D.C. filed Jan. 26, 2015) [hereinafter *Burwell* Motion to Dismiss].

[94] Defendants' Reply Memorandum in Support of Their Motion to Dismiss the Complaint, U.S. House of Representatives v. Burwell, No. 1:14-cv-01967 (D.D.C. filed March 31, 2015) [hereinafter *Burwell* Reply in Support of Motion to Dismiss].

[95] *Burwell* Motion to Dismiss at 9-11.

[96] *Burwell* Motion to Dismiss at 10 (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 106 (1998)).

[97] *Id.* (quoting Hollingsworth v. Perry, 133 S. Ct. 2652, 2662 (2013)).

[98] *Id.* at 11; *Raines*, 521 U.S. at 821.

[99] *Burwell* Motion to Dismiss at 11 ("'Once a bill becomes law, a Congressman's interest in its enforcement is shared by, and indistinguishable from, that of any other member of the public.'") (quoting Daughtrey v. Carter, 584 F.2d 1050, (continued...)

The agencies' second argument focused on Congress's role in enacting legislation versus implementing that legislation. They argued that the House's role in creating legislation, through bicameralism, ends when the law is enacted. The Constitution provides Congress with no power, either on its own or through the Judiciary, "to manage the implementation of federal law."[101] Therefore, "[b]ecause Congress plays no direct role in the execution of federal law and has no continuing or distinct interest or stake in a bill once it becomes a law, Congress suffers no legally cognizable injury if that law (in Congress's view) is improperly administered."[102] The agencies also noted that the Article I legislative power is shared equally by the House and Senate, which is not participating in the suit.[103]

Finally, the agencies argued that the reasoning in *Raines* dictates the outcome of this suit, even though that case involved individual Member plaintiffs:

> The explication in *Raines* of the history of inter-branch conflicts, which were resolved without litigation, shows that we do not have a 'system in which Congress can hale the Executive before the courts not only to vindicate its own institutional powers to act, but to correct a perceived inadequacy in the execution of its laws.'[104]

The agencies concluded that "[t]he House's theory in this case cannot be squared with in the historical discussion in *Raines*."[105] They noted that Congress has "a wide range of non-judicial measures" it could employ to influence the executive branch's implementation of federal law, including amending the ACA and appropriations statutes or employing the Congressional Review Act to disapprove of specific rules.[106] Finally, they rejected the notion that the House's claims fit within the narrow *Coleman* exception established in *Raines* because the House did not allege the nullification of a vote. The D.C. Circuit has previously stated that *Raines* did not suggest that a vote is nullified when "the government does something Congress voted against" or when "a President allegedly acts in excess of statutory authority."[107] Rather, according to the agencies, the *Coleman* exception is very narrow and only applies "where the claim concerned the proper recording of the result of a legislative action."[108] Here, the House did not allege that their votes were not properly recorded—in other words, their votes were not nullified because the laws at issue were properly enacted. Instead, the agencies argued that the House's dispute regards the interpretation and implementation of those duly enacted laws, noting that the Court in *Raines* "did not endorse the notion that legislators could sue to dispute the proper interpretation of existing law."[109] Furthermore, separation of powers concerns were present in this case that did not exist in *Coleman*, since that suit involved state, not federal, legislators.[110]

(...continued)

1057 (D.C. Cir. 1978)).

[100] *Burwell* Reply in Support of Motion to Dismiss at 9-10.

[101] *Id*. at 12.

[102] *Id*. at 13.

[103] *Burwell* Motion to Dismiss at 14-16.

[104] *Id*. at 17-18 (quoting United States v. Windsor, 133 S. Ct. 2675, 2703 (2013) (Scalia, J., dissenting)).

[105] *Burwell* Reply in Support of Motion to Dismiss at 9.

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

[107] *Id*. at 21; *Campbell*, 203 F.3d at 22.

[108] *Burwell* Reply in Support of Motion to Dismiss at 6.

[109] *Id*. at 5.

[110] *Burwell* Motion to Dismiss at 22.

The House's Arguments in Favor of Standing

In its reply to the motion to dismiss,[111] the House first articulated its various asserted injuries and then directly responded to several arguments put forth by the agencies. The House emphasized that under the Constitution, it must approve any legislation, including appropriations measures, before they can become law.[112] If the executive branch is permitted to spend funds without the House's approval, this core Article I function essentially disappears.[113] Additionally, the ability to spend funds without an appropriation also weakens or destroys Congress's ability to wield the power of the purse as a check against the executive branch.[114] The House also linked the power of the purse to a weakening of the House's oversight authority—it could no longer use that power as leverage to gain compliance with its information requests to the executive branch.[115] It cited the subpoena cases discussed above as evidence that Congress has standing to bring suit when it is prevented from obtaining information necessary to the legislative process.[116] The House urged that the elimination of these constitutional functions was a concrete and particularized injury that was clearly caused by the executive's actions in this case.[117]

Finally, the House argued that this case could be decided based on the *Coleman* precedent, as discussed in *Raines*.[118] Under the House's theory, by ignoring the House's decision not to appropriate funds for the cost sharing subsidies, the executive branch nullified the House's votes on that appropriations bill.[119] Additionally, by unilaterally rewriting the employer mandate effective date, the executive branch nullified the House's votes on the ACA.[120] The House argued that these actions were akin to the nullification in *Coleman*, which was reiterated in *Raines* as being an injury sufficient to confer standing.

The House directly rejected several of the agencies' criticisms of their claims.[121] First, it cautioned the court that if it adopted the executive's logic on standing, there would be no limiting principle—the House would never be able to seek judicial redress regardless of how extreme the executive branch's actions were.[122] It also disputed the agencies' characterization of the case as one about statutory interpretation and a disagreement about the implementation of federal law.

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[111] Opposition of the United States House of Representatives To Defendant's Motion to Dismiss the Complaint, U.S. House of Representatives v. Burwell, No. 14-cv-01967 (D.D.C. filed Feb. 27, 2015) [hereinafter *Burwell* Opposition to Motion to Dismiss].

[112] *Id*. at 25-26; U.S. CONST. art. I, § 1; § 7, cl. 2; § 9, cl. 7.

[113] *Burwell* Opposition to Motion to Dismiss at 25-26. It should be noted that the agencies "do not in any way assert that they 'are free to pass out public funds in the absence of any constitutionally-created appropriation.'" *Burwell* Reply in Support of Motion to Dismiss at 10 (quoting *Burwell* Opposition to Motion to Dismiss at 26). Rather, the agencies characterize this dispute as a routine matter of statutory interpretation, in which the executive branch and Congress often disagree, not a disagreement on the proper role of Congress in appropriating funds. *Id.* at 10-11.

[114] *Burwell* Opposition to Motion to Dismiss at 27-28.

[115] *Id*. at 30-31.

[116] *Id*.; *see Lynch*, 979 F. Supp. 2d at 20; *Miers*, 558 F. Supp. 2d at 71. The agencies responded by arguing that such a claim is an attempt to assert a speculative future injury to the House's oversight authority, that is the same kind of "wholly abstract" "institutional injury" that was rejected in *Raines*. *Burwell* Reply in Support of Motion to Dismiss at 14.

[117] *Burwell* Opposition to Motion to Dismiss at 26, 29, 31.

[118] *Id*. at 26-27, 31-33.

[119] *Id*. at 27.

[120] *Id*. at 32-33.

[121] *Id*. at 33-38.

[122] *See id*. at 23.

Instead, the House viewed the suit to be one about "encroachment and aggrandizement, the very dangers the separation of powers principle and an independent judiciary were created to address."[123] Finally, the House argued against the notion that the existence of other legislative remedies should affect the outcome of the court's standing analysis, reiterating its conclusion that the House had suffered an institutional injury sufficient to establish standing.[124]

The District Court's Standing Opinion

The court began its standing analysis by confirming that no existing case law dictated the outcome.[125] The question of whether an institutional plaintiff could establish standing based on the asserted institutional injuries was novel. It also rejected the notion that a straight line could be drawn from *Raines* to this case. *Raines* was entirely distinguishable because its plaintiffs were individual Members.[126] As here, where the plaintiff is the House as a whole that authorized the suit by resolution, the reasoning in *Raines* did not dictate the outcome of the standing analysis. The court moved on to assess each claim separately, giving the House the benefit of all inferences that can be drawn from the facts alleged, as is required when evaluating the government's motion to dismiss.[127]

Appropriations Cost-Sharing Subsidy Claim

The district court held that the House had standing to sue on its appropriations cost-sharing subsidy claim. However, the House was only granted standing to sue on its count alleging certain constitutional violations, and not on counts alleging statutory violations.[128]

The court's analysis appears to hinge on its characterization of the appropriations claim as a constitutional violation, and not a dispute about statutory interpretation, agreeing with the House's characterization and explicitly rejecting the agencies' arguments. The court concluded that the claim was not about the "implementation, interpretation, or execution of any federal statute"[129] but rather about "the appropriations process" itself being circumvented.[130] Therefore, the House's claim "alleges a specific, constitutional violation" of Article I, § 9, clause 7 (the Appropriations Clause)[131] "that is wholly irrespective of the ACA's implementation."[132]

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[123] *Id*. at 34.

[124] *Id*. at 35.

[125] Memorandum Opinion, U.S. House of Representatives v. Burwell, No. 1:14-cv-01967, slip op. at 22 (D.D.C. Sept. 9, 2015), *available at* https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2014cv1967-41 [hereinafter *Burwell* Standing Opinion].

[126] *Id*. at 19.

[127] *Id*. at 12 ("When reviewing a motion to dismiss for lack of jurisdiction under Rule 12(b)(1), a court must construe the complaint liberally, giving the plaintiff the benefit of all inferences that can be derived from the facts alleged.") (citing Barr v. Clinton, 370 F.3d 1196, 1199 (D.C. Cir. 2004)).

[128] *Id*. at 25, 30. Therefore, the court dismissed counts III and IV of the appropriations claim, because they were based on statutory violations. *Id*. at 30. The court also dismissed part of count V, a claim under the Administrative Procedure Act (APA), to the extent that the count may attempt to remedy statutory violations. *Id.* at 31.Finally, the court dismissed court II, a constitutional violation, because the constitutional clauses cited were too general to allege a particularized harm to the House. *Id*. at 31-32.

[129] *Id.* at 24.

[130] *Id.* at 32.

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

[132] *Burwell* Standing Opinion at 25.

With this understanding of the claim as a constitutional violation in mind, the court concluded that "the House has suffered a concrete, particularized injury that gives it standing."[133] The House, along with the Senate, is

> empowered by the Constitution to adopt laws directing monies to be spent from the U.S. Treasury .... Yet this constitutional structure would collapse, and the role of the House would be meaningless, if the Executive could circumvent the appropriations process and spend funds however it pleases.[134]

If the executive branch took such an action, in violation of the specific terms of the Appropriations Clause, the House would suffer a "grievous harm" and be "deprived of its rightful and necessary place under our Constitution."[135] Therefore, the House "as an institution has standing to sue."[136]

The court went on to explain why the reasoning in *Raines* was inapposite. First, the plaintiff in this suit is an institution, and not an individual Member. Therefore, the injury to institutional legislative power was not diluted amongst many Members, but instead was particular to the House.[137] *Raines*'s distinction between an institutional injury and a personal injury was, therefore, illogical in the context of a suit brought by an institution. The court concluded that an institution could be granted standing to remedy a sufficiently concrete institutional injury.[138]

The court also determined that the House's interest was not a generalized concern shared by every member of society, as the agencies argued, "because the House occupies a unique role in the appropriations process prescribed by the Constitution, not held by the ordinary citizen .... "[139] Thus, a "perversion of that [appropriations] process inflicts on the House a particular injury quite distinguishable from any suffered by the public generally."[140] Furthermore, since the appropriations claim amounted to an assertion that the agencies violated a constitutional provision, the House could take no legislative action to remedy such an injury. Amending a statute could not affect the constitutional provision at issue.[141] Finally, the court chose not to address whether the House had standing under *Coleman*, as it concluded that the House had a cognizable injury separate from the vote nullification theory established in *Coleman* and discussed in *Raines*.[142]

Employer Mandate Claim

While the House had standing to pursue its appropriations claims, the court concluded that it did not have standing to sue on the employer mandate claim, and dismissed these counts of the

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[133] *Id.*

[134] *Id.*

[135] *Id.* at 35.

[136] *Id.*

[137] The court also addressed the argument that the alleged injury would be shared equally by the House and the Senate. It concluded that even though the Senate might arguably be injured, the injury is "sufficient concentrated on the House to give it independent standing to sue." *Id.* at 26. Additionally, it noted that "[a]n injury in fact must be inflicted particularly, but not exclusively, on the plaintiff." *Id.*

[138] *Id.* at 27.

[139] *Id.* at 28.

[140] *Id.*

[141] *Id.* at 29.

[142] *Id.* at 30.

House's complaint.[143] Again, the court's characterization of the claim is essential to understanding its analysis. The court determined that "[d]espite its formulation as a constitutional claim, the Employer-Mandate Theory is fundamentally a statutory argument."[144]

The court found the House's references to Article I, § 1 (the vesting of all legislative power in Congress) and Article I, § 7, clause 2 (describing the requirements of bicameralism and presentment) to be insufficient to persuade it that the harm caused by the delay of the employer mandate was a constitutional violation, rather than a violation of the ACA itself.[145] If the House's argument were adopted, every time the executive branch exceeded its statutory authority, a constitutional violation sufficient for the House to establish standing would occur. This reality would lead to the exact kind of "general legislative standing" that courts have studiously guarded against.[146] The court was unwilling to go this far.

Since the court determined that the referenced constitutional provisions were too general to establish a concrete, particularized harm to the House, the claim had to be understood as a violation of the ACA. Therefore, this claim "falls within the sphere of cases to which [the agencies'] precedent does apply: those that concern the implementation, interpretation, or execution of federal statutory law."[147] Under this precedent, as the court earlier "conceded," the House's interest in enforcing the law "is shared by, and indistinguishable from, that of any other member of the public."[148] This kind of generalized claim would not be sufficient to establish standing.[149]

Takeaways

The court attempted to draw a strict line between assertions of constitutional violations, which might be sufficient to establish standing, and statutory violations, which did not create a cognizable injury to the House. Based on this reasoning, in order to establish standing, a congressional institutional plaintiff would have to allege that the executive branch's actions violated a specific provision of the Constitution in a manner that inflicts a concrete "institutional injury." Thus far, the court has only identified the Appropriations Clause as satisfying these criteria. It has made clear that alleged violations of general Article I legislative powers are not sufficient.[150]

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[143] *Id*. at 35.

[144] *Id.* at 32.

[145] *Id*. at 33-34.

[146] *Id.* at 33.

[147] *Id.* at 30.

[148] *Id.* at 28.

[149] The court also distinguished the two claims on their redressability, the third standing prong, based on the relief requested by the House. *Id*. at 33-34. Under the employer mandate claim, the House only requested declaratory relief—a judgment striking down parts of the agency's rule as unconstitutional. *Burwell* Complaint at 26. However, under the court's reasoning, such relief would not redress the asserted injury caused by the delayed enforcement of the mandate. *Burwell* Standing Opinion at 34.With only declaratory, and not injunctive, relief, the agency is free to continue delaying enforcement of the mandate while simply not communicating that policy to the public through a rule. *Id.* Therefore, since the allegedly injurious action could continue even after a favorable court ruling, the redressability prong of standing was not satisfied. *Id*. ("Thus, a ruling for the House may offer nothing but the 'psychic satisfaction' of knowing 'that the Nation's laws are faithfully enforced,' which is 'not an acceptable Article III remedy because it does not redress a cognizable Article III injury.'") (citing Steel Co. v. Citizens for Better Env't, 523 U.S. 83, 107 (1998)).

[150] *Burwell* Standing Opinion at 33.

In drawing these distinctions, the court sought to rule in a narrow fashion and avoid opening the "floodgates" to new congressional lawsuits.[151] The court viewed its own opinion as "inherently limited by the extraordinary facts of which it was born," suggesting that the court did not view its decision as creating future opportunities for litigation between Congress and the executive branch.

Unresolved Questions

While the district court's opinion does not have any binding precedential value, it is the first opinion to directly address the question of whether a congressional institutional plaintiff has standing to bring a claim alleging an institutional injury unrelated to information access. As such, analysis of its reasoning is instructive to assess how it could, if adopted by future federal courts, be applied to different types of claims brought by congressional institutional plaintiffs.

Could the Court's Reasoning Open Up the "Floodgates" for Congressional Suits?

Since the court released its opinion, the agencies have argued and outside commentators have discussed whether its reasoning would open federal courts to a flood of congressional institutional suits not previously contemplated.[152] It is clear that this outcome was not the district court's intent.[153] However, this criticism flows from the way in which the court described the appropriations claim and attempted to distinguish it from the employer mandate claim. Concerns about this reasoning being used to justify new litigation break down into two important questions: (1) can essentially statutory claims be "recast"[154] as violations of the Appropriations Clause similar to the cost sharing subsidy claim in *Burwell*; and (2) could this reasoning be extended to constitutional provisions other than the Appropriations Clause?

What Other Kinds of Claims Could Be Characterized as Violations of the Appropriations Clause Sufficient to Confer Standing?

The district court determined that the House's cost-sharing subsidy claim did not concern the implementation of a federal law because its complaint was "that the Executive has drawn funds from the Treasury without a congressional appropriation."[155] However, it is not always clear when

[151] *See id.* at 42 ("The rarity of these circumstances itself militates against dismissing the case as non-justiciable." *Id*.).

[152] *See, e.g.*, Defendant's Motion for Certification of this Court's Order of September 9, 2015, for Interlocutory Appeal, U.S. House of Representatives v. Burwell, No. 14-cv-01967, at 13 (filed Sept. 21, 2015) ("[T]his Court's holding with respect to the Appropriations Clause would invite litigation over countless disputes between the political Branches, fundamentally altering the role of the Judiciary under the Constitution.") [hereinafter *Burwell* Motion for Interlocutory Appeal]; Nicholas Bagley, *Oh boy. Here we go again.*, THE INCIDENTAL ECONOMIST (Sept. 9, 2015, 9:34PM), http://theincidentaleconomist.com/wordpress/oh-boy-here-we-go-again/; Michael S. Greve, *House v. Burwell*, Library of Law and Liberty (Sept. 15, 2015), http://www.libertylawsite.org/2015/09/15/house-v-burwell/; Michael Stern, *Congressional Standing to Protect the Power of the Purse*, POINT OF ORDER (Sept. 16, 2015, 8:37AM), http://www.pointoforder.com/2015/09/16/congressional-standing-to-protect-the-power-of-the-purse/.

[153] *Burwell* Standing Opinion at 42.

[154] *Burwell* Motion for Interlocutory Appeal at 14 ("Where, as is often the case, an appropriation is tied to a particular statute or program, any claim that an Executive Branch agency has erroneously interpreted the governing substantive statute could easily be recast as a violation of the Appropriations Clause, on the theory that the applicable appropriations law did not permit expenditure of funds for an assuredly unlawful purpose.").

[155] *Burwell* Standing Opinion at 24.

a claim is truly about statutory interpretation, like the *Burwell* employer mandate claim, versus a violation of the Appropriations Clause.

For example, Congress and the executive branch often disagree about the scope of an agency's statutory authority to take a certain action, such as issuing a specific rule. The executive branch would likely characterize such a dispute as a matter of statutory interpretation—should the agency's statutory authority be interpreted to permit the challenged action? Alternatively, taking cues from *Burwell*, a congressional institutional plaintiff like the House might allege that the executive's action—such as issuing a rule it argues is not within the agency's authority—is a violation of the Appropriations Clause. Such an argument could be crafted in this way. First, Congress only appropriates funds to the agencies to conduct activities that are permitted under federal law. Second, if the House believed the agency's action to be beyond its statutory authority, it could argue that Congress did not appropriate funds to carry out that activity. Third, therefore, the House could argue, just as in *Burwell*, that by issuing the rule, the Executive had drawn funds from the Treasury without a congressional appropriation. This same pattern could also be applied to an instance in which the House believes an agency is acting in contravention of an appropriations rider, which prohibits the expenditure of funds for a particular purpose.

These hypotheticals raise concerns that despite the *Burwell* court's nod to the "extraordinary" facts before it,[156] its reasoning could be coopted to grant standing to congressional institutional plaintiffs in potentially numerous cases. Given that almost all executive actions require the expenditure of funds,[157] it appears as though many disagreements about statutory interpretation could be repackaged in this way as violations of the Appropriations Clause. The arguably blurred lines between the categories of "constitutional" and "statutory" claims, which the district court attempted to strictly divide, were evidenced in the fact that the majority of the merits phase of the "constitutional" cost-sharing subsidy claim in *Burwell* was spent on interpreting the ACA.[158]

It is unclear how the *Burwell* court would have reacted to these kinds of arguably statutory claims recast in Appropriations Clause terms. However, at the very least, in order to avoid the specter of general legislative standing, which the *Burwell* court warns against,[159] future courts may need to install some limiting principle to prevent routine allegations that an agency acted in excess of its statutory authority from being repackaged into cognizable violations of the Appropriations Clause.

Could Violations of Constitutional Provisions Other Than the Appropriations Clause, Create a Cognizable Injury to a Congressional Institution?

Could other constitutional provisions form the basis of standing for a congressional institutional plaintiff under the *Burwell* court's reasoning or is the Appropriations Clause unique? The court described the Clause as a "specific constitutional prohibition" that was "meant to safeguard" the House's particular role in the appropriations process and keep the political branches properly

[156] *Id.* at 42.

[157] One could argue that some limited executive actions, such as an unannounced decision not to enforce a particular law, would not require the expenditure of funds.

[158] *See, e.g.*, Plaintiff United States House of Representatives' Motion for Summary Judgment, U.S. House of Representatives v. Burwell, No. 14-cv-01967 (D.D.C. filed Dec. 2, 2015); Defendants' Memorandum in Support of their Motion for Summary Judgment, U.S. House of Representatives v. Burwell, No. 14-cv-01967 (D.D.C. filed Dec. 2, 2015).

[159] *Burwell* Standing Opinion at 33.

balanced.[160] This description can be contrasted to the court's treatment of Article I, § 1 and Article I, § 7, clause 2. These provisions granting legislative authority to Congress were deemed to be too general to establish a cognizable injury if violated.[161]

Arguably other constitutional provisions hew closely to the characteristics of the Appropriations Clause identified by the court as specific enough to create a cognizable injury. For example, the Appointments Clause establishes a limitation on the executive's ability to appoint certain officers of the United States.[162] Such appointments must receive the "advice and consent" of the Senate, thereby establishing a specific role for the Senate in the appointments process.[163] Furthermore, the Appointments Clause is recognized as an important structural protection of the separation of powers, designed to balance power between Congress and the executive branch.[164] Similar arguments can be forwarded about the Constitution's requirement that the Senate provide advice and consent on treaties.[165] This provision both creates a unique role for the Senate in the treaty process and balances power between Congress and the executive branch.

Based on these similarities to the Appropriations Clause, one could argue that the *Burwell* court's reasoning could be extended to violations of the Appointments or Treaty Clauses. If this argument were adopted, the Senate would suffer a cognizable injury if it alleged that the President appointed an officer without the advice and consent of the Senate and in contravention of the Appointments Clause or that the President entered into a treaty without the advice and consent of the Senate.

At least one commentator has questioned whether alleged violations of the Take Care Clause, which states that the President "shall take Care that the Laws be faithfully executed,"[166] might be cognizable under the *Burwell* reasoning.[167] This Clause could be readily distinguished from the Appropriations Clause, as discussed in *Burwell*, and the Appointments and Treaty Clause, as discussed above. The Take Care Clause concerns the duties of the President by requiring that he *faithfully* execute the laws.[168] The Clause in no way references a specific role for Congress or congressional authority, as contrasted to the Appropriations, Appointments, and Treaty Clauses, which establish specific congressional powers. This distinction may play an important role in

[160] *Id.* at 31.

[161] *Id.* ("Put simply, the allegation in Count II is that the House is part of Congress, and the Secretaries are not. That is insufficient to allege a particularized harm to the House.").

[162] U.S. CONST. art. II, § 2, cl. 2.

[163] *Id.* (" ... [the President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Councils, Judges of the supreme Court, and all other Officers of the United States .... ").

[164] *See* Edmond v. United States, 520 U.S. 651, 659 (1997) ("As we recognized in *Buckley v. Valeo*, the Appointments Clause of Article II is more than a matter of 'etiquette or protocol'; it is among the significant structural safeguards of the constitutional scheme." (internal citations omitted); *id.* at 659-60 ("The President's power to select principal officers of the United States was not left unguarded, however, as Article II further requires the 'Advice and Consent of the Senate.' This serves both to curb executive abuses of the appointment power ... and 'to promote a judicious choice of [persons] for filling the offices of the union .... " (citing The Federalist No. 76, at 386-387) (M. Beloff ed. 1987) (internal citations omitted)).

[165] U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senator present concur .... ").

[166] U.S. CONST. art II, § 3.

[167] Nicholas Bagley, *Oh boy. Here we go again.*, THE INCIDENTAL ECONOMIST (Sept. 9, 2015, 9:34PM), http://theincidentaleconomist.com/wordpress/oh-boy-here-we-go-again/.

[168] U.S. CONST. art. II, § 3.

evaluating whether an alleged violation of the Take Care Clause constituted a cognizable injury employing the reasoning in *Burwell*.

How Will *Burwell* Be Resolved?

Following the court's ruling granting standing to the House on one of its claims, the agencies filed a motion seeking interlocutory appeal of the court's order.[169] The agencies argued that *Burwell* met the standards for granting such an appeal: (1) the order involved a controlling question of law (whether the plaintiff had standing to sue); (2) "there is a 'substantial ground for differences of opinion' on those questions"; and (3) an immediate appeal would "materially advance the ultimate termination of the litigation, because a reversal on the grant of standing by the appeals court would end the case.[170] In their motion, the agencies continued to argue that moving forward with the case would cause the kind of harm envisioned in *Raines*—that the courts would be engaged in a "general supervision of the operations of government."[171]

The district court denied the motion.[172] It determined that the motion failed on the third prong: granting an interlocutory appeal would not *materially* advance the case. Unlike in a typical civil case, this case was likely to be resolved on a motion for summary judgment, with no lengthy discovery process and no facts in dispute. Therefore, the court determined that "[d]ispositive motions can be briefed and decided in a matter of months—likely before an interlocutory appeal could even be decided."[173]

The court issued its opinion on the merits in May 2016, in which the House prevailed on its cost sharing subsidy claim.[174] The agencies filed a notice of appeal to the D.C. Circuit in July 2016, appealing both the standing and merits decisions.[175] In the event that the standing issue is eventually appealed to the Supreme Court, arguably one of the likely votes against granting standing to the House would have come from the late Justice Antonin Scalia, an outspoken critic of legislative standing. The agencies quoted heavily from Justice Scalia's dissent in *United States v. Windsor*[176] in arguing to the district court that the House had not suffered a cognizable injury. Justice Scalia continued his opposition to legislative standing in *Arizona State Legislature*, in which he dissented, ruling that the authorized legislature did not have standing to sue.[177] He went on to question the validity of *Coleman* as a precedential ruling.[178]

In *Windsor*, the Court examined whether the House Bipartisan Legal Advisory Group (BLAG) had standing to defend the constitutionality of a federal law that DOJ had refused to defend. Justice Scalia, in an opinion joined by Chief Justice John Roberts and Justice Clarence Thomas,

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[169] *See Burwell* Motion for Interlocutory Appeal.

[170] *Id*. at 6.

[171] *Id*. at 10 (quoting *Raines*, 521 U.S. at 828).

[172] Order [on Motion for Certification for Interlocutory Appeal], U.S. House of Representatives v. Burwell, No. 14-cv-01967 (D.D.C. Oct. 19, 2015).

[173] *Id*. at 3.

[174] Opinion [on Motion for Summary Judgment], U.S. House of Representatives v. Burwell, No. 14-cv-01967 (D.D.C. May 12, 2016).

[175] Notice of Appeal, U.S. House of Representatives v. Burwell, No. 14-cv-01967 (D.D.C. filed July 6, 2016).

[176] 133 S. Ct. 2675 (2013).

[177] *Arizona State Legislature*, 135 S. Ct. at 2694 (Scalia, J., dissenting). Justice Clarence Thomas also signed on to this dissent.

[178] *Id*. at 2696 (Scalia, J., dissenting).

concluded that although "*Raines* did not formally decide this issue ... its reasoning does."[179] He 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 .... "[180] He went on to note 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,"[181] in an apparent nod to the *Raines* legislative remedy thinking. Based on this dissent, it appears that at least these three Justices believed the reasoning in *Raines* applied to an institutional plaintiff that had been authorized to sue. It is unclear how Chief Justice Roberts and Justice Thomas would apply this concept to the facts at hand in *Burwell*.

In *Windsor*, Justice Alito was much more open to the concept of legislative standing. He determined that *Raines* was inapposite to a case brought by an authorized institutional plaintiff.[182] In the narrow instance in which a court strikes down a law and the executive branch refuses to defend it, Congress has standing to defend the statute.[183] Alito concluded that the House's injury in that instance was tantamount to the injury suffered in *Coleman* and qualified as vote nullification.[184] The remaining Justices in the *Windsor* majority avoided grappling with the question of congressional institutional plaintiff standing.[185] It is unclear how these Justices might evaluate the effect of *Raines* on institutional plaintiff suits and the House's alleged injury in this case.

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

[180] *Id*. at 2704.

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

[182] *Id*. at 2713 (Alito, J., dissenting).

[183] *Id*. at 2714.

[184] *Id*.

[185] *Id*. at 2688 (holding that the original plaintiff and 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 ruling and its affirmance in the Court of Appeals on BLAG's own authority").