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IMBALANCE OF POWERS: CAN CONGRESSIONAL LAWSUITS SERVE AS COUNTERWEIGHT?

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Table of Contents

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I. INTRODUCTION

On January 12, 1991, the United States Congress authorized President Bush to initiate hostile action using armed forces in the Persian Gulf.[1] During the earlier buildup of forces in the Gulf, President Bush had asserted, like many presidents before him, that he needed no congressional authorization or declaration of war. He, as commander-in-chief, could constitutionally order American military personnel to fight.[2] Indeed, even as he asked for explicit congressional support for the use of force in the Gulf, President Bush refused to concede that such approval was constitutionally required.[3]

Only a few weeks earlier, on December 13, 1990, Judge Harold Greene had denied injunctive relief sought by fifty-four members of the House of Representatives and one senator prohibiting President Bush from commencing war in the Persian Gulf without explicit congressional approval.[4] Unlike most courts faced with lawsuits involving the constitutional allocation of war powers between Congress and the President, Judge Greene boldly ruled that the issue did not present a political question and hence would, if appropriately postured, be justiciable.[5] Moreover, unlike the majority of courts which have decided whether congressional plaintiffs should be able to sue in their capacities as members of Congress, he ruled that the congressional plaintiffs neither lacked standing nor were equitably barred from obtaining relief.[6]

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1. Authorization for Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, 1991 U.S.C.C.A.N. (105 Stat.) 3.

2. *See Excerpts: The Great Debate on War Powers*, NAT'L L.J., Jan. 21, 1991, at 26; *see also Hearings on U.S. Policy in the Persian Gulf Before the Senate Committee on Foreign Relations*, 101st Cong., 2d Sess. 107, 109 (1990) (testimony of Secretary of State James Baker) [hereinafter *Hearings*].

3. *See Hearings*, *supra* note 2, at 107, 109.

4. *See* Dellums v. Bush, 752 F. Supp. 1141, 1152 (D.D.C. 1990).

5. *See id.* at 1141-46. An amicus brief by 11 constitutional and international law scholars argued, similarly, that questions concerning the constitutional allocation of the war-making power were justiciable and should, in a proper case, be addressed by the court. The law professors' brief took no position on whether the case before Judge Greene was properly postured. *See* Bruce A. Ackerman et al., *Ronald v. Dellums v. George Bush (D.D.C. 1990): Memorandum Amicus Curiae of Law Professors*, 27 STAN. J. INT'L L. 257 (1991).

6. Numerous lawsuits challenging presidential exercise of war powers as unauthorized by Congress have been dismissed as political questions. *See* Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976). For a recent example, see Ange v. Bush, 752 F. Supp. 509 (D.D.C. 1990). Of some nine lawsuits involving congressional plaintiffs, two were dismissed for lack of standing and on political question grounds. *See* Holtzman v. Schlesinger, 484

Nonetheless, Judge Greene denied the injunction on the ground that the matter was not ripe for adjudication because a majority of Congress had not chosen to confront the executive by officially indicating their desire to play a role in declaring or authorizing the Gulf War.[7]

Judge Greene's ruling was the most recent in a series of more than forty decisions dating back to the 1970s in which courts wrestled with the question of whether and when to entertain lawsuits by congressional plaintiffs. Congressional plaintiffs are frequently the only ones with the motivation and wherewithal[8] to prosecute such suits, which often raise critical issues concerning the constitutional allocation of powers between Congress and the executive.[9] Yet courts fear they will

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F.2d 1307 (2d Cir.), *cert. denied*, 416 U.S. 1321 (1973); Gravel v. Laird, 347 F. Supp. 7 (D.D.C. 1972). Another two were dismissed on equitable discretion grounds. Lowry v. Reagan, 676 F. Supp. 333 (D.D.C. 1987) (also citing political question grounds); Conyers v. Reagan, 578 F. Supp. 324 (D.D.C. 1984), *vacated as moot*, 765 F.2d 1124 (D.C. Cir. 1985). Four were dismissed on purely political question grounds. *See* Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985) (dismissing as moot separate claim that concerned the Boland Amendment); Crockett v. Reagan, 720 F.2d 1355 (D.C. Cir. 1983) (per curiam) (dismissing Foreign Assistance Act claim pursuant to court's equitable discretion), *cert. denied*, 467 U.S. 1251 (1984); Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973); Drinan v. Nixon, 364 F. Supp. 854 (D. Mass. 1973). The ninth case, *Dellums*, was dismissed pursuant to a particular branch of ripeness doctrine articulated by Justice Powell in Goldwater v. Carter, 444 U.S. 996 (1979). *See infra* part III.B.

7. *Dellums*, 752 F. Supp. at 1149-52. Official action may include passage of a law or joint resolution, or a relevant majority joining or authorizing a lawsuit.

8. Congressional plaintiffs are far more knowledgeable about executive activities in derogation of congressional authority than are members of the public. Congressional plaintiffs are also in a better position to challenge executive activities when such challenges are likely to be meaningful. Indeed, in some instances members of Congress will be the only ones with a sufficiently specific injury to gain standing. *See, e.g.*, Richardson v. Kennedy, 313 F. Supp. 1282 (W.D. Pa. 1970) (holding that taxpayer who claimed unconstitutional delegation of power to set congressional salaries lacked standing).

9. Of the more than 40 such suits, nine involved the specific allocation of war powers. *See supra* note 6. Nine involved the allocation of treaty-making and other foreign affairs-related powers. *See* Goldwater v. Carter, 444 U.S. 996 (1979); Dornan v. United States Secretary of Defense, 851 F.2d 450 (D.C. Cir. 1988); United Presbyterian Church v. Reagan, 738 F.2d 1375 (D.C. Cir. 1984); Daughtry v. Carter, 584 F.2d 1050 (D.C. Cir. 1978); Edwards v. Carter, 580 F.2d 1055 (D.C. Cir. 1978); Harrington v. Bush, 553 F.2d 190 (D.C. Cir. 1977); Harrington v. Schlesinger, 528 F.2d 455 (4th Cir. 1975); Burton v. Baker, 723 F. Supp. 1550 (D.D.C. 1989); Helms v. Secretary of the Treasury, 721 F. Supp. 1354 (D.D.C. 1989). Six addressed the propriety of appointments or discharge. *See* Melcher v. Federal Open Mkt. Comm., 836 F.2d 561 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1042 (1988); Riegle v. Federal Open Mkt. Comm., 656 F.2d 873 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981); Reuss v. Balles, 584 F.2d 461 (D.C. Cir.), *cert. denied*, 439 U.S. 997 (1978); McClure v. Carter, 513 F. Supp. 265 (D. Idaho), *aff'd sub nom.* McClure v. Reagan, 454 U.S. 1025 (1981); Nader v. Bork, 366 F. Supp. 104 (D.D.C. 1973); Williams v. Phillips, 360 F. Supp. 1363 (D.D.C. 1973). Four addressed executive vetoes and impoundment of allocated funds. *See* Barnes v. Kline, 759 F.2d 21 (D.C. Cir. 1985), *vacated as moot sub nom.* Burke v. Barnes, 479 U.S. 361 (1987); American Fed'n of Gov't Employees v.

become a forum to replay the political process, opening their doors to members of Congress disappointed in the outcome of a legislative battle or critical of executive action.[10]

In their efforts to strike an appropriate balance between these two concerns, courts have mobilized the doctrines of standing, equitable discretion, and ripeness.[11] At one extreme, then Judges Bork and Scalia have argued that congressional plaintiffs should never be afforded standing to sue in their official capacities.[12] Otherwise, they claim, an unelected, unprincipled judiciary will encroach on the work of the two democratically elected coordinate branches of government.[13] At the other extreme,[14] the Court of Appeals for the District of Columbia Circuit in *Mitchell v. Laird*[15] implied that the judiciary should entertain

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Pierce, 697 F.2d 303 (D.C. Cir. 1982) (per curiam); Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974); Brown v. Ruckelshaus, 364 F. Supp. 258 (C.D. Cal. 1973).

10. Carl M. McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241, 263-64 (1981). *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1962).

11. The courts have also declined to decide the merits of such suits by finding them to be political questions. *See, e.g.*, Holtzman v. Schlesinger, 484 F.2d 1307, 1311 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974). Although the choice to avoid the merits has much to do with the separation of powers issues which concern the courts in congressional plaintiff suits, political question determinations in no way rest on plaintiffs' status as members of Congress, and are thus not treated in this article.

12. Both judges have contended that members of Congress should be denied standing because they suffer no injury different than that of the public when the executive acts unconstitutionally, and such injury is too remote and non-specific to support standing. *See* Moore v. United States House of Representatives, 733 F.2d 946, 957 (D.C. Cir. 1984) (Scalia, J., concurring), *cert. denied*, 469 U.S. 1106 (1985); Vander Jagt v. O'Neill, 699 F.2d 1166, 1180 (D.C. Cir.) (Bork, J., concurring), *cert. denied*, 464 U.S. 823 (1983). Both concede that standing exists when a legislator's personal rights are in question. *Cf.* Powell v. McCormack, 395 U.S. 486 (1969) (involving a representative who challenged his own exclusion from the House).

13. The judges' concern with the unelected nature of the judiciary is misplaced where constitutional allocation of powers is at issue. The allocation of powers is constitutionally prescribed, and neither the executive branch nor Congress has, by itself, the power to amend the Constitution. *See* U.S. CONST. art. V. Instead, the judiciary interprets it when a controversy arises concerning its meaning. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

14. *But see* Nader v. Bork, 366 F. Supp. 104 (D.D.C. 1973).

15. 488 F.2d 611 (D.C. Cir. 1973). To its credit, the *Mitchell* court focused on legislative duties, rather than "legislator rights." *Id.* at 614. Several later cases, by framing the issue as that of injury to legislators' rights, rather than injury to our democratic system, lend a cast to the standing inquiry, suggesting that only those asserting their own private "rights" deserve standing. *See, e.g.*, Kennedy v. Sampson, 511 F.2d 430, 433-36 (D.C. Cir. 1974); McKinney v. United States Dep't of the Treasury, 614 F. Supp. 1226, 1239-41 (Ct. Int'l Trade 1985), *aff'd*, 799 F.2d 1544 (Fed. Cir. 1986). *But see* Pressler v. Simon, 428 F. Supp. 302, 304 (D.D.C. 1976) (granting Representative Pressler standing because he was "prevented from voting to perform a specific legislative duty expressly mandated by the Constitution"), *vacated on other grounds sub nom.* Pressler v. Blumenthal, 431 U.S. 169 (1977), *and aff'd by subsequent order*, 434 U.S. 1028 (1978). This ignores the tremendous importance of quasi-public and public law litigation in the

virtually all such actions that "bear upon" the legislative duty to impeach, appropriate, or legislate.[16]

The Bork and Scalia approach refuses to recognize for standing purposes injury to the congressional role in our constitutional scheme. In the name of preserving the balance of powers between the three branches, their approach completely eradicates the role of the judiciary in checking presidential encroachment on Congress' constitutionally mandated role.[17] Far from maintaining the balance of powers, the courts would, by adopting the Bork and Scalia approach, actually tilt the balance toward the executive.[18] On the other hand, as most courts quickly recognized, the *Mitchell* approach invited congressional end-runs around the legislative process and threatened to involve the courts in virtually every political dispute, because virtually all disputes can be framed to implicate the impeachment or legislative duties of members of Congress.[19]

Most courts have thus sought a middle ground that leaves room to entertain some congressional lawsuits but avoids those cases that either threaten to involve the courts in routine political battles or pose questions inappropriate for judicial resolution. While some courts have used

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post-industrial world. *See infra* text accompanying notes 224-33; *see also* John H. Ely, *Kuwait, the Constitution, and the Courts: Two Cheers for Judge Greene*, 8 CONST. COMMENTARY 1, 6 (1991) (suggesting that constitutional powers are not mere "perks," and that in such cases, the fate of citizens affected by impediments to the exercise of congressional authority is at stake).

16. *Mitchell*, 488 F.2d at 614. Of course, virtually all congressional cases will raise issues that "bear upon" either legislative or impeachment concerns. The *Mitchell* court dismissed as a political question the plaintiff's challenge to the legality of the Vietnam War. *Id.* at 613, 616. The court, nevertheless, described its grant of congressional standing broadly and indicated its willingness to decide other types of congressional suits. *Id.* at 613-14. *Mitchell* has been followed by other courts of appeals but its "bear upon" language was expressly repudiated in Harrington v. Bush, 553 F.2d 190, 209 (D.C. Cir. 1977).

17. The Framers knew very well that a single president could act more quickly and decisively than a collective body. Fearful of creating a powerful monarch, they carefully allocated certain powers (such as initiating war) primarily to Congress, and required congressional approval for the exercise of others (such as treaty-making and the appointment of officers and federal judges). Regarding the allocation of war powers, see DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 528 (Johnathan Elliott ed., 1866) (setting forth James Wilson's view that "[t]his system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress. . . ."). *See also* Jules Lobel, *Foreign Affairs and the Constitution: The Transformation of the Original Understanding*, *in* THE POLITICS OF LAW 273 (David Kairys ed., 1990).

18. Judicial refusal to entertain such suits does not operate symmetrically on both the executive and Congress, because of the executive's power simply to refuse to comply with or implement legislation. *See infra* part V.C.

19. *See supra* note 6; *Harrington*, 553 F.2d at 209.

a flexible approach to standing to describe the middle ground,[20] many others have looked to equitable principles or to the ripeness doctrine to assess whether the case merits a hearing. Under the rubric of "equitable" or "remedial" discretion, some courts have held that if relief could be obtained by further legislative action, courts should decline to entertain the congressional suit.[21] Others have followed Justice Powell's concurrence in *Goldwater v. Carter*,[22] and have held that until a relevant

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20. *See infra* part II.B. Congressional standing typically turns on the first prong of the Supreme Court's current four-part test: the requirement of injury-in-fact. The other requirements include: (1) an interest within the zone of protected interests; (2) causation by the defendant's wrongful action; and (3) a likelihood that the judicial action sought will remedy the wrong. Courts using standing to describe the middle ground reject the notion that members of Congress never suffer injuries different than injuries to the public, and accept notions of vote dilution, diminution or nullification, and, in one instance, impeding committee work, as constituting injury-in-fact. *See infra* notes 82-96 and accompanying text; *see also* American Fed'n of Gov't Employees v. Pierce, 697 F.2d 303, 305 (D.C. Cir. 1982) (per curiam) (granting standing because executive action impeded congressional committee work).

The standing inquiry, as a threshold determination, bars inquiry into the merits. *See generally* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988). To avoid constitutionalizing the inquiry and barring plaintiffs at the initial stages, the court of appeals adopted the equitable discretion approach, which emphasizes prudential rather than constitutional concerns in assessing justiciability. *See infra* part III.A.

21. *See* Dornan v. United States Secretary of Defense, 851 F.2d 450 (D.C. Cir. 1988); Humphrey v. Baker, 848 F.2d 211 (D.C. Cir.), *cert. denied sub nom.* Humphrey v. Brady, 488 U.S. 966 (1988); Melcher v. Federal Open Mkt. Comm., 836 F.2d 561 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1042 (1988); Gregg v. Barrett, 771 F.2d 539 (D.C. Cir. 1985); Moore v. United States House of Representatives, 733 F.2d 946 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985); Vander Jagt v. O'Neill, 699 F.2d 1166 (D.C. Cir.), *cert. denied*, 464 U.S. 823 (1983); Riegle v. Federal Open Mkt. Comm., 656 F.2d 873 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981); Burton v. Baker, 723 F. Supp. 1550 (D.D.C. 1989); Helms v. Secretary of the Treasury, 721 F. Supp. 1354 (D.D.C. 1989); Crockett v. Reagan, 558 F. Supp. 893 (D.D.C. 1982), *aff'd per curiam*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984).

The "equitable discretion" doctrine was developed by and has been largely confined to the D.C. Circuit. Its origins are generally traced to Judge Carl McGowan's famous article, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241 (1981), but early roots may be found in a 1974 *Yale Law Journal* Note arguing that courts should abandon the standing inquiry and instead use prudential and non-constitutional doctrines to handle congressional plaintiff suits. *See* Note, *Standing to Sue for Members of Congress*, 83 YALE L.J. 1665 (1974); *see also* Note, *Congressional Access to the Federal Courts*, 90 HARV. L. REV. 1632 (1977).

Among the criticisms of the equitable discretion doctrine are that (1) it gives the courts unfettered and unprincipled room to select among cases those that it wants to take (a criticism also aimed at standing doctrine), and (2) it is incoherent because further congressional action is always theoretically available to remedy the problem. *See* R. Lawrence Dessem, *Congressional Standing to Sue: Whose Vote Is This Anyway?*, 62 NOTRE DAME L. REV. 1, 9-13 (1986). Indeed, the doctrine cannot explain those cases which are generally agreed to have been properly entertained—the "pocket veto" cases—because they too could have been remedied by further legislative action repassing the legislation.

22. 444 U.S. 996, 997 (1979) (Powell, J., concurring).

majority[23] of Congress expresses its disagreement with executive action there is no confrontation between the branches and the matter is not ripe for court intervention. Judge Greene adopted this latter approach in *Dellums* when he held that until Congress as a whole acted to confront the President concerning his actions in the Gulf, judicial intervention was inappropriate.[24]

The primary weakness in the equitable discretion and ripeness approaches is that one can always frame congressional-executive disputes over allocation and exercise of powers as ones between fellow legislators, and thus suggest that further legislative action might offer relief.[25] In theory, Congress can always enact statutes, reassert, or clarify previously passed acts or resolutions. Also, proponents of this approach have failed to reconcile it with the "pocket veto" cases, in which courts reached the merits despite the fact that the statutes could simply have been passed again after Congress resumed its session. In the name of avoiding a replay of the political process in the courts, the equitable discretion doctrine forces that process to be repeatedly replayed in Congress.[26] And, like the ripeness approach, it fails to explain why it

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23. A majority may not be strictly necessary. In *Goldwater*, Justice Powell stated that "each branch" must "take[] action asserting its constitutional authority" before a court may consider a dispute between the President and Congress. *Id.* at 997 (Powell, J., concurring). Nevertheless, the numbers needed to "assert authority" may vary according to the nature of the question. For example, in a treaty or senatorial confirmation case, a vote of one-third of the Senate plus one additional vote—the number necessary to block executive action if Senate approval were constitutionally required—would be sufficient to create the requisite confrontation with the executive.

24. Dellums v. Bush, 752 F. Supp. 1141, 1151 (D.D.C. 1990).

25. At least one commentator has noted this problem. *See* Dessem, *supra* note 21, at 10.

26. This is precisely what happened in a number of contexts. *See, e.g.*, Lowrey v. Reagan, 676 F. Supp. 333 (D.D.C. 1987) (declining on equitable discretion grounds to determine the applicability of the War Powers Resolution to reflagging Kuwaiti tankers); Conyers v. Reagan, 578 F. Supp. 324 (D.D.C. 1984) (declining on equitable discretion grounds to determine the applicability of the War Powers Resolution to the invasion of Grenada), *aff'd on other grounds*, 765 F.2d 1124 (D.C. Cir. 1985). Congress thereafter entertained new efforts to amend the Resolution to clarify that it was intended to apply to such situations. *See* Stephen Kurkjian, *Debate Looms over Foreign Policy*, BOSTON GLOBE, Feb. 6, 1989, at 3 (describing efforts to change the War Powers Resolution after repeated executive non-compliance); Steven V. Roberts, *War Powers? What War Powers?*, N.Y. TIMES, Oct. 6, 1987, at A32 (describing problems with the War Powers Resolution and the *Lowry* lawsuit, and quoting one expert as stating that "Congress should not have to pass a new law in order to enforce a law already on the books"); Stephen J. Solarz, *Missing the Point on War Powers*, N.Y. TIMES, Oct. 28, 1987, at A31 (characterizing an effort to alter War Powers Resolution procedures as "a kind of tacit Congressional complicity in the President's refusal" to comply with the Resolution). In Crockett v. Reagan, 558 F. Supp. 893 (D.D.C. 1982), *aff'd per curiam*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984), the district court declined, under equitable discretion, to determine whether El Salvador should receive aid, despite that country's gross abuses of human rights, which violated the Foreign Assistance Act. *Id.* at

should be necessary to muster a congressional majority willing to reaffirm what the ratifiers adopted. Whether or not a current congressional majority would agree to reenact the present constitutional allocation of power, neither Congress nor the President has the legal right to change that distribution. Hesitating to dismiss the congressional plaintiffs, but rarely willing to reach the merits of their claims, the courts have allowed the executive to arrogate and Congress to abdicate constitutionally mandated powers and duties.

The story of congressional access to the courts thus has a Kafkaesque quality. As soon as one door is left slightly ajar for plaintiffs to scramble through, another magically appears with a large "Do Not Enter" sign.[27] There *is*, however, a principled way for the courts to permit congressional access faithful to the Constitution, while circumscribing the realm of judicial intervention in the business of politics. Unfortunately, the courts have yet to articulate it. Both the courts and members of Congress have a critical role in maintaining the constitutional balance of powers. When congressional plaintiffs bring claims that fundamentally concern the constitutional allocation of powers between the executive and Congress, rather than those that primarily dispute statutory interpretation or the policy choices of fellow legislators, the courts should entertain congressional lawsuits and recognize members of Congress as appropriate plaintiffs.

Current doctrine needs refinement. Reflecting a muddled standing inquiry, the courts are almost evenly split in granting or denying standing to members of Congress.[28] The courts must explicitly recognize that when the executive usurps or undermines power constitutionally allocated to Congress, members of Congress are directly and palpably in-

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902-03. It also declined on political question grounds to determine whether the War Powers Resolution applied. *Id.* at 896-901. Congress thereafter passed a bill requiring the President to certify that El Salvador had made progress in human rights before it received aid, which President Reagan vetoed. *See* Bernard Gwertzman, *Schultz Says House Panel Wants to "Walk Away" from Salvador*, N.Y. TIMES, Mar. 7, 1984, at A1.

27. In each case, the courts employ a method they label "traditional" in an entirely new way. Thus, although the standing doctrine's "central notion, injury in fact" was, in Judge McGowan's view, inadequate "to encompass our special rules of legislator standing," it was nevertheless employed to determine congressional access to the courts. *See* McGowan, *supra* note 10, at 255. Yet Judge McGowan pioneered deployment of a newly minted version of judicial discretion against congressional access, one which proved an even more potent tool to avoid hearing such cases on the merits. *See* discussion *infra* part III.A. And when standing and equitable discretion seemed inadequate, "traditional" notions of ripeness were re-contoured to form a new hurdle for congressional plaintiffs. *See* discussion *infra* part III.

28. *See* Fletcher, *supra* note 20. For cases exhibiting split authority, see *infra* part II.

jured.[29] By failing to recognize a distinct injury to the congressional role, the standing inquiry sends courts looking for an injury to the interest of a legislator in this or that particular vote. The jurisdictional inquiry should focus on the traditional standing concerns by ensuring that a case is concrete and not advisory or collusive and that the parties can present with sufficient clarity facts necessary for the court to adjudicate the matter.[30]

Members of Congress should be granted standing whenever: (a) the controversy is genuine and no advisory opinion is sought; (b) those members possess sufficient information and proximity to the issue to present the case adequately; and (c) the claim concerns executive usurpation of a specific function constitutionally accorded Congress.[31]

Neither the "equitable discretion" nor the ripeness approach delimits the appropriate role for the courts. Each excludes the judiciary from the constitutional balance in those cases where it is most essential that it exercise judicial review. By requiring Congress to muster a majority willing to assert its rights and role against a popular president, who is often acting during a claimed emergency, the courts foster solo and possibly precipitous presidential action even though the Constitution dictates that both branches play a role.[32] It is precisely in areas such as war powers, appointments of federal officers and judges and treaty-making[33] that the Framers intended the inertia of the legislative

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29. The Court of Appeals for the D.C. Circuit, through its equitable discretion decisions, has implicitly done so.

30. *See* Fletcher, *supra* note 20, at 222. In my view, the standing inquiry should be limited to the traditional constitutional concerns: Whether the controversy is live and real (not collusive or seeking an advisory opinion), and whether the parties are sufficiently adverse and involved to present the facts adequately to the court. *See infra* part V.

31. A grant of standing is appropriate when the claim is that the executive is usurping or undermining the exercise of powers that are constitutionally accorded to Congress. When the claim involves executive misinterpretation of a legislative act or unconstitutional action by fellow legislators, which does not amount to wholly ceding to the executive Congress' constitutionally mandated role, the court may appropriately deny standing because no true injury to the allocation of powers is asserted.

As in all areas of law, there are gray areas. When executive "misinterpretation" of an act deliberately amends, rewrites, or nullifies legislation, such "misinterpretation" may impede or undermine Congress' role and thus support a grant of standing. *See infra* note part V.A.

Likewise it may be difficult to determine whether legislative action is merely constitutionally questionable or amounts to an abdication of legislative duty. These are, however, precisely the types of determinations that courts make every day.

32. In addition, judicial refusal to entertain suits concerning the proper allocation of constitutional powers places Congress in the role of the judiciary; Congress is forced to interpret the Constitution and then assert its own proper role.

33. Goldwater v. Carter, 444 U.S. 996 (1979), of course, raised the question of whether the

process to inhibit solo and possibly precipitous action in favor of deliberation, compromise and majority determination by the many and varied representatives of the people. The judiciary's refusal to interpret and declare the proper constitutional roles of the other branches without an assertion of prerogative by a "relevant"[34] legislative majority instead upsets the constitutional balance by allowing the legislature's inertia to encourage executive action.[35]

Indeed, the courts' wholesale refusal to adjudicate cases where the constitutional balance is violated and yet no congressional majority can be mustered allows, in effect, the political branches to amend the Constitution without following the requirements of Article V. Congress could cede to the President the sole power to make war, make and break treaties, appoint federal officers and the like simply by failing to demand by a majority a role in these areas.

Moreover, when courts insist that congressional plaintiffs return to their fellow legislators in instances in which a past majority has already spoken (as for example through the War Powers Resolution or in legislation that the President has pocket vetoed) they simply force Congress to replay the political process. That process may be vastly different as a result of internal changes in congressional membership and external changes of circumstance, thereby enabling the executive to "win" the game of politics by making end-runs around clear constitutional provisions. Even when the political process produces the same result, the American people have paid a price in wasted time and effort by our already overburdened legislative representatives, in addition to other costs associated with congressional activity.[36]

Framers intended congressional inertia to weigh against treaty-breaking as well. While the answer is not obvious from the constitutional text, it is precisely the sort of question the judiciary ought to decide. To require that a majority of Congress ask that the judiciary do so is to involve the judiciary only in those rare situations when a majority are willing to go on record opposing the President's action. Whenever the majority supports the presidential action, even if the action flagrantly violates the Constitution, the *Goldwater* principle prevents a member of Congress from seeking judicial relief.

34. The relevant majority will depend on the nature of the action and the constitutionally mandated role. For example, both the House and Senate share the power to declare war. U.S. CONST. art. I, § 8, cl. 11. Only the Senate, however, ratifies treaties and consents to appointments. U.S. CONST. art. II, § 2, cl. 2.

35. In contrast with this view, Professor Blumoff has endorsed the ripeness approach as appropriately limiting judicial intervention, at least in the context of foreign affairs. *See* Theodore Y. Blumoff, *Judicial Review, Foreign Affairs and Legislative Standing*, 25 GA. L. REV. 227 (1991); *see also infra* note 181 (discussing the problems with the ripeness doctrine and Professor Blumoff's argument).

36. Such costs may include reprinting the legislation, extra physical plant expenses, and

Many, if not most, congressional lawsuits are aimed at ensuring that our government remains a government of three branches in the face of the rise of executive power, which was so feared by the Framers.[37] In many such cases, "what is at stake is the equilibrium established by our constitutional system."[38] If the courts continue to reject the efforts of congressional members to maintain the balance of powers by refusing to take the opportunity to "say what the law is,"[39] we will all be the losers.

Parts II and III review the development of doctrines concerning congressional plaintiffs, focusing on the subject matter of the cases and the concerns of the courts. Some of the reasons for the recent emergence and proliferation of lawsuits brought by members of Congress and the problems with the approaches the courts have used to limit such suits are discussed briefly. Part IV demonstrates that a proper understanding of the judiciary's function in a democratic society supports allowing congressional plaintiffs access to courts in certain cases. Part V, articulates a principled position by which courts may delimit those cases in which adjudication is appropriate, and then illustrates how that approach may be implemented in specific areas.

II. THE RISE OF CONGRESSIONAL STANDING

As former Judge Bork noted in his lengthy dissent in *Barnes v. Kline*, "[t]he phenomenon of litigation directly between Congress and the President concerning their respective constitutional powers and prerogatives is a recent one."[40] The first such litigation was brought in 1972 by Congressman Mike Gravel to challenge President Nixon's pursuit of the undeclared war in Indochina.[41] Others soon followed. Some

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additional franking to inform constituents about the repeat process.

37. This rise is most evident in the foreign affairs arena. *See, e.g.*, Harold Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1258-75 (1988). It is, nevertheless, evident in other areas as well. *See* W. Lawrence Church, *History and the Constitutional Role of Courts*, 1990 WIS. L. REV. 1071.

38. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring).

39. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

40. Barnes v. Kline, 789 F.2d 21, 41 (D.C. Cir.) (Bork, J., dissenting), *vacated as moot sub nom.* Burke v. Barnes, 479 U.S. 361 (1987). The pivotal word in his carefully worded sentence is "directly," because there has always been considerable litigation respecting the constitutional allocation of powers between the branches in which the branches espoused opposing positions.

41. Gravel v. Laird, 347 F. Supp. 7 (D.D.C. 1972).

cases similarly addressed the Vietnam War while others arose from a variety of executive (and occasionally congressional) actions.[42]

A number of factors contributed to the sudden emergence of such suits. The 1960s and 70s, an era of civil rights struggle in the streets and in the courts, saw the rise of law reform litigation as a means to protect individual rights, and along with it came the liberalization of the doctrines of standing. Congressional lawsuits seemed a logical means to "reform" the law concerning the separation of powers, which several scholars and numerous plaintiffs believed to be an unconstitutional arrogation of power by the executive.[43] Courts willing to enlarge traditional doctrine by granting standing to groups claiming only a generalized interest in protecting the environment[44] might well be more inclined to hear the complaints of members of Congress charging executive overreaching.

But such suits would probably never have been brought in the heyday of strong party leaders such as House Speaker Sam Rayburn and Senate Majority Leader Lyndon Johnson. A suggestion of disapproval from either, and any member contemplating suit would probably have abandoned the notion.[45] Beginning in the 1960s, the dominance of party leaders like Sam Rayburn and Lyndon Johnson began to disintegrate under pressure from below to "open up" the party system. Rules changes, particularly within the Democratic Party, diminished the leaders' power. At the same time, new members of Congress, often elected without party aid (even over party opposition), demonstrated a willingness to resist party authority. Disagreement within the parties

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42. *See, e.g.*, Harrington v. Schlesinger, 528 F.2d 455 (4th Cir. 1975); Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973); Drinan v. Nixon, 364 F. Supp. 854 (D. Mass. 1973).

43. *See infra* notes 204-09 and accompanying text.

44. *See, e.g.*, United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973).

45. *See generally* ROBERT L. PEABODY, LEADERSHIP IN CONGRESS: HABILITY, SUCCESSION AND CHANGE (1976); Robert L. Peabody, *Senate Party Leadership; From the 1950s to the 1980s, and* Charles O. Jones, *House Leadership in an Age of Reform, in* UNDERSTANDING CONGRESSIONAL LEADERSHIP (Frank H. Mackaman ed., 1981); BARBARA SINCLAIR, MAJORITY LEADERSHIP IN THE U.S. HOUSE (1983); HENDRICK SMITH, THE POWER GAME: HOW WASHINGTON WORKS (1988); Lloyd N. Cutler, *Party Government Under the American Constitution*, 134 U. PA. L. REV. 25 (1985).

Presidential control over individual members of Congress has also declined, due in part to the decline of the "coattail" effect by which presidents have ensured that party members riding on their "coattails" would win election or reelection, the diminishing importance of presidential support in elections, and the decline of party importance and strength in general. These factors might explain the occasional lawsuit by members of Congress against a president of the same party.

was strong over the war, over the federal role in civil rights, and over the enormous changes occurring in lifestyles and norms throughout the country.[46] Maverick members, noting the potential strength in the law reform arsenal, used it to attempt to halt perceived executive overreaching, particularly when their colleagues and leaders failed to react, either because of lethargy or acquiescence in executive acts.

Finally, with Richard Nixon's election, Congress as a whole and the President were of opposing political parties for the first time since Eisenhower left office in 1961. Reliance upon internal party politics to contain presidential ambition or interbranch disputes was thus no longer a possibility, and litigation became the last resort. Indeed, in recognition of the importance of legal action to congressional politics, both houses recently established permanent legal offices responsible for intervening in important litigation on behalf of each house.

Congressional plaintiffs have been largely unsuccessful in their efforts to enlist the courts' aid.[47] The courts have reached the merits in only eight of the more than forty lawsuits in which members of Congress were plaintiffs. In three of those eight cases the courts did not address the plaintiffs' congressional status.[48] In all but two of the re-

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46. *See generally* sources cited *supra* note 45.

47. Whether their actions were successful in political terms is, of course, another question. It is notable that President Bush sought congressional approval only weeks after the court ruled in Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990), that, if ripe, the court would decide on whether congressional action was required before initiation of hostilities in the Persian Gulf. *See* Ely, *supra* note 15, at 6; John Omicinski, *History of War Powers: It's Always a Fight*, Gannett News Service, Jan. 17, 1992, *available in* LEXIS, Nexis Library, Omni File; David G. Savage & Michael Ross, *U.S. Judge Refuses to Block Bush from Starting a War*, L.A. TIMES, Dec. 14, 1990, at A22.

48. The courts reached the merits in American Fed'n of Gov't Employees v. Pierce, 697 F.2d 303 (D.C. Cir. 1982) (per curiam); Edwards v. Carter, 580 F.2d 1055 (D.C. Cir. 1978); Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974); Pressler v. Simon, 428 F. Supp. 302 (D.D.C. 1976); *vacated on other grounds sub nom.* Pressler v. Blumenthal, 431 U.S. 169 (1977), *and aff'd by subsequent order*, 434 U.S. 1028 (1978); Nader v. Bork, 366 F. Supp. 104 (D.D.C. 1973); Williams v. Phillips, 360 F. Supp. 1363 (D.D.C. 1973). Courts addressed the merits but did not address the plaintiff's congressional status in three cases. *See* Environmental Protection Agency v. Mink, 410 U.S. 73 (1973), *superseded by statute as stated in* NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 226 (1978); Diggs v. Schultz, 470 F.2d 461 (D.C. Cir. 1972); McKinney v. United States Dep't of the Treasury, 614 F. Supp. 1226 (Ct. Int'l Trade 1985), *aff'd*, 799 F.2d 1544 (Fed. Cir. 1986). In addition, courts addressed the merits in an additional two cases brought by state legislators. Dennis v. Luis, 714 F.2d 628 (3d Cir. 1984); Idaho v. Freeman, 529 F. Supp. 1107 (D. Idaho 1981), *vacated sub nom.* National Org. for Women, Inc. v. Idaho, 459 U.S. 809 (1982).

The exact number of congressional suits varies depending on how one counts. Members of Congress sued in their official capacities on more than 40 occasions, but the courts in the three decisions noted above did not address the issue of status as members of Congress. (This figure

maining cases the courts found the plaintiffs' congressional status to be an obstacle to granting relief.[49]

A. The Early Legislator Standing Cases

Initially, the plaintiffs' special status as members of Congress was treated, if at all, primarily under the rubric of standing.[50] Evolution in standing analysis made the complex task of delineating the parameters of cognizable injury in congressional cases more difficult. Most courts handled concerns about that status by focusing on whether members of Congress could properly be described as having suffered injury-in-fact in the particular situation at issue. In doing so, they were following the lead taken in 1939 in *Coleman v. Miller*,[51] the Supreme Court's only ruling directly addressing the status of legislative plaintiffs.

In *Coleman*, five justices, three in the plurality and two in dissent, found that twenty Kansas legislators, whose votes would have been sufficient to block Kansas' ratification of a federal constitutional amendment, had standing to challenge the legality of the governor's tie-break-

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excludes Powell v. McCormick, 395 U.S. 486 (1969), in which Adam Clayton Powell sued concerning his personal status as a member of the House of Representatives.) In a fourth case, members of Congress intervened in one lawsuit when the executive defendant challenged the constitutionality of certain legislation. *See* Ameron, Inc. v. United States Army Corps of Eng'rs, 787 F.2d 875 (3d Cir. 1986).

The courts have denied standing to state legislators suing in their official capacities in at least two instances. *See* Korioth v. Briscoe, 523 F.2d 1271 (5th Cir. 1975); Wilt v. Beal, 363 A.2d 876 (Pa. Commw. Ct. 1976).

49. Several courts have barred claims on political question grounds. *See supra* note 6. Of those courts relying on political question grounds, three courts dismissed the claims because the plaintiffs were members of Congress. *See* Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir.), *cert. denied*, 416 U.S. 936 (1974); Lowry v. Reagan, 676 F. Supp. 333 (D.D.C. 1987); Gravel v. Laird, 347 F. Supp. 7 (D.D.C. 1972); *see also* Korioth v. Briscoe, 523 F.2d 1271 (5th Cir. 1975) (denying standing to state legislators who sued in their official capacities); Wilt v. Beal, 363 A.2d 876 (Pa. Commw. Ct. 1976) (same). One concurring opinion in another decision noted that the plaintiffs were members of Congress while stating that the court should dismiss the claim because it was not ripe. *See* Sanchez-Espinoza v. Reagan, 770 F.2d 202, 210 (D.C. Cir. 1985) (Ginsburg, J., concurring). The court in Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990), dismissed on similar ripeness grounds. Only in one decision was the plaintiffs' status found to present no impediment to adjudication. *See* Mitchell v. Laird, 422 F.2d 611 (D.C. Cir. 1973).

50. *See, e.g.*, Recess v. Balles, 584 F.2d 461 (D.C. Cir.), *cert. denied*, 439 U.S. 997 (1978); Harrington v. Bush, 553 F.2d 190 (D.C. Cir. 1977); Metcalf v. National Petroleum Council, 553 F.2d 176 (D.C. Cir. 1977); Harrington v. Schlesinger, 528 F.2d 455 (4th Cir. 1975); Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974); Holzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); Public Citizen v. Sampson, 379 F. Supp. 662 (D.D.C. 1974), *aff'd without op.*, 515 F.2d 1010 (D.C. Cir. 1975); Brown v. Ruckelhaus, 364 F. Supp. 258 (C.D. Cal. 1973).

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

ing favorable vote. The Court held that the tie-breaking vote had effectively nullified the senators' votes and hence would, if illegal, constitute cognizable injury. "We think that these senators have a plain, direct, and adequate interest in maintaining the effectiveness of their votes" wrote the Court.[52] Injury to that interest supported standing.

Four Justices, per Justice Frankfurter, concurring, strongly disagreed, contending that Supreme Court jurisdiction was limited to matters that "to the expert feel of lawyers constitute[d] 'Cases' or 'Controversies.'" Justice Frankfurter insisted that *Coleman* was neither. "Cases" and "Controversies" encompassed only those demonstrating "the requisites of litigation" appropriate to the "litigious process," "actual controversies" and "litigious business." To be entitled to judicial assistance, plaintiffs had to demonstrate a "specialized interest of their own" or a "special, individualized stake" in the litigation. Frankfurter maintained that the *Coleman* legislators were, by contrast, "merely self-constituted spokesm[en]," raising "political concern[s] which belong to us all."[53] Their claims, he urged, were "public controversies clothed in the form of private litigation," and not the private sort of harm "appropriate for disposition by judges."[54] Frankfurter explained that such public controversies were inappropriate for judicial resolution because the Framers had not intended courts "to meddle with matters that require no subtlety to be identified as political issues."[55] He suggested that "doctrines of judicial self-limitation" de-

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52. *Id.* at 438. The Court did not indicate that it conferred standing because all 20 dissenting senators joined the suit. Although the appellants in *Kennedy v. Sampson* argued the significance of this fact, the Court of Appeals for the D.C. Circuit rejected it as a controlling principle. *See* Kennedy v. Sampson, 511 F.2d 430, 434-35 (D.C. Cir. 1974).

53. Justice Frankfurter struggled mightily with the problem of distinguishing politics from law that has plagued many scholars. Much of his effort was tautological, and reminiscent of Justice Stewart's famous assertion about pornography: "I know it when I see it." *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964). For Frankfurter, cases and controversies are recognizable as such by lawyers' "expert feel" because they are "litigious" in nature and "appropriate for disposition by judges." *Coleman*, 307 U.S. at 460 (Frankfurter, J., concurring).

As several critical legal scholars have argued, this hollow analysis is inevitable because the formal distinction between law and politics lacks substance. *See generally* CRITICAL LEGAL STUDIES 4 (Alan C. Hutchinson ed., 1989) ("The main target of [critical legal studies] has been the crucial distinction between law and politics . . . ."); THE POLITICS OF LAW (David Kairys ed., rev. ed., 1990).

54. *Coleman*, 307 U.S. at 461 (Frankfurter, J., concurring). Justice Frankfurter echoes James Madison who interpreted the "case and controversy" language to limit jurisdiction to "cases of a Judiciary Nature." *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430 (M. Farrand ed., 1966). Whether Madison's intended limits parallel those of Frankfurter remains debatable. *See also* Blumoff, *supra* note 35, at 252-53.

55. *Coleman*, 307 U.S. at 460 (Frankfuter, J., concurring).

rived from proper "conceptions regarding the distribution of governmental powers" underlay the Framers' choice to limit jurisdiction to "Cases" and "Controversies." In a precursor to Judge Bork's expanded rendition, Justice Frankfurter pictured the majority's holding as sending the Court down a slippery slope toward intrusive and inappropriate review of a wide variety of internal legislative rules and procedures.[56]

No such slide occurred. Not until the 1970s was federal jurisdiction again invoked by legislative plaintiffs. Moreover, congressional plaintiffs have sought review of the legislature's internal rules or procedures in only one case.[57] Rather, congressional lawsuits have sought court review of the President's authority to violate constitutional provisions and to administer various statutes in a given manner.[58] Some suits also challenge the constitutionality of legislation delegating to the President powers allegedly accorded to Congress.[59]

The Court of Appeals for the D.C. Circuit in *Mitchell v. Laird*[60] was the first to address directly the effect of congressional status upon plaintiffs' standing to sue. In *Mitchell*, thirteen representatives claimed that the Nixon administration's prosecution of the Vietnam War lacked proper constitutional authorization. The plaintiffs asserted injury to their "Constitutional right, as members of the Congress of the United States, to decide whether the United States should fight a war."[61] The court rejected this injury as insufficient to support standing on the questionable ground that Congress' right to declare war was not "exclusive."[62] The court nonetheless conferred standing on its own sug-

56. *Id.* at 469-70 (Frankfuter, J., concurring). The Court's refusal on political question grounds to rule on the legality of the tie-breaking ratification vote had the same result as denying standing.

57. Vander Jagt v. O'Neill, 699 F.2d 1166 (D.C. Cir.), *cert. denied*, 464 U.S. 823 (1983).

58. *See supra* notes 6, 9.

59. *See, e.g.*, Humphrey v. Baker, 848 F.2d 211 (D.C. Cir.), *cert. denied sub nom.* Humphrey v. Brady, 488 U.S. 966 (1988); Pressler v. Simon, 428 F. Supp. 302 (D.D.C. 1976), *vacated on other grounds sub nom.* Pressler v. Blumenthal, 431 U.S. 169 (1977), *aff'd by subsequent order*, 434 U.S. 1028 (1978).

60. 488 F.2d 611 (D.C. Cir. 1973).

61. *Id.* at 614.

62. *See id.* at 613-14. The court suggested that somehow because the President may have the right to "take the initiative" in responding to "a belligerent attack, or [in a] grave emergency," plaintiffs were not harmed by prosecution of the war without a declaration. *Id.*

It is unclear why the court believed that injury to a non-exclusive right to declare war failed to confer standing. In evaluating a motion to dismiss for want of standing, the courts ordinarily interpret the plaintiffs' allegations as true. *See* Worth v. Seldin, 422 U.S. 490, 501 (1975). Presumably the plaintiffs in Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974), claimed that even if not "exclusively" empowered to decide whether to go to war, their declaration was constitutionally required.

gested bases. The court found that because the defendants' actions, if illegal, would "bear upon the duties of plaintiffs to consider whether to impeach defendants, and upon plaintiffs' quite distinct and different duties to make appropriations to support the hostilities, or to take other legislative actions related to such hostilities," plaintiffs had standing to sue.[63] Apart from this reference to plaintiffs' special duties as members of Congress, the court did not discuss the implications of plaintiffs' status as such. No reference was made to the separation of powers concerns raised by Frankfurter's *Coleman* concurrence.[64]

The *Mitchell* court's generous standing approach was never followed, and it was later repudiated by the circuit.[65] Instead, most courts followed the Second Circuit's lead in *Holtzman v. Schlesinger*.[66] In that case, the Court of Appeals for the Second Circuit denied Representative Holtzman standing to seek declaratory and injunctive relief to halt the undeclared Vietnam War.[67] The court of appeals also dismissed Holtzman's claim as a non-justiciable political question but suggested in dicta that congressional plaintiffs suffer injury only if executive action impairs their abilities to participate fully in congressional activities and votes. The test was not whether Holtzman's effectiveness was impaired, but whether her alleged ineffectiveness was due to denial

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63. *Mitchell*, 488 F.2d at 614.

64. The court found the issue regarding the legality of the war to be a political question. *Id.* at 614-16. That the court did not address the separation of powers concerns is not surprising, because the Supreme Court had already indicated in Flast v. Cohen, 392 U.S. 83, 100 (1968) that "[t]he question [as to] whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems. . . ." and such concerns were hence no part of the standing inquiry. As argued *infra*, the Court may have been correct in failing to find special separation of powers concerns. *See* discussion *infra* part IV.B.

65. One D.C. district court did find standing, citing the *Mitchell* standard. Williams v. Phillips, 360 F. Supp. 1363 (D.D.C.), *stay denied*, 482 F.2d 669 (D.C. Cir. 1973). The *Williams* standing decision was never reviewed by a higher court, and no court of appeals has ever adopted or followed the *Mitchell* standard. *See, e.g.*, Harrington v. Bush, 553 F.2d 190 (D.C. Cir. 1977) (rejecting *Mitchell* explicitly and noting the failure of any court of appeals to follow *Mitchell*'s holding).

66. 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974).

67. *Id.* at 1315. The district court had denied the defendants' motion to dismiss, holding that Holtzman had standing and the matter was not a political question, and declaring the Vietnam War illegal and enjoining its prosecution. The court stayed its own judgment pending appeal, setting off a round of appeals to the Supreme Court to vacate the stay. *See* Holtzman v. Schlesinger, 414 U.S. 1304 (Marshall, Circuit Justice 1973) (denying application to vacate the court of appeals' order that stayed the district court injunction); Holtzman v. Schlesinger, 414 U.S. 1316 (Douglas, Circuit Justice 1973) (granting second application to vacate the stay); Schlesinger v. Holtzman, 414 U.S. 1321 (Marshall, Circuit Justice 1973) (ordering stay of district court injunction).

by the executive of her ability to participate fully in the congressional process. Not only was Holtzman a full participant in the congressional process, noted the Court, but "[t]he fact that her vote was ineffective was due to the contrary votes of her colleagues and not the defendants herein."[68]

B. Kennedy v. Sampson *and the Current Congressional Standing Test*

Kennedy v. Sampson,[69] the first appellate case to find standing, reach the merits, and hold for the plaintiff, involved precisely the type of injury to members' ability to participate in constitutional processes that *Holtzman* suggested might support standing. Senator Kennedy challenged, as an unconstitutional nullification of his vote, President Nixon's 1970 attempt to "pocket veto" the Family Practice of Medicine Act (the "Act"), which had been passed by overwhelming majorities in both Houses.[70] Kennedy sought a declaration that the Act had become law and an injunction requiring its publication as such.[71] The panel unanimously affirmed the district court's finding that Kennedy had standing as "an individual United States Senator who voted in favor of [the Act]."[72] Analyzing standing along two different lines suggested by Supreme Court decisions, the court found both a "logical nexus"[73] between the claimant (Kennedy) and the claim (nullification of his previously cast vote and denial of his right to vote to override a veto), and that Senator Kennedy had suffered injury-in-fact, and was

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68. *Holtzman*, 484 F.2d at 1315. Apparently the court neither considered whether the contrary votes of her colleagues had denied Holtzman a constitutionally mandated opportunity to vote not to declare war, nor whether such a denial by her colleagues might appropriately support standing to challenge the executive's actions pursuant to an allegedly improper process.

69. 511 F.2d 430 (D.C. Cir. 1974).

70. Congress passed the Act just before it adjourned for an intrasession recess. The Senate appointed an official to receive vetoed bills while Congress was in temporary recess, but the President nonetheless refused to return the Act to Congress for possible override. Instead, he issued a statement of disapproval announcing his refusal to sign the Act. *Id.* at 432.

The Pocket Veto Case, 279 U.S. 655 (1929), upheld the President's power to veto a bill by failing to return it to Congress when Congress was in recess as provided in Article I of the U.S. Constitution. U.S. CONST. art. I, § 7, cl. 2.

71. Since the Act itself would have expired by the time of the Court's decision, its publication would have had limited effect. The concurring opinion in *Kennedy*, however, said the issue was still not moot. *Kennedy*, 511 F.2d at 446 (Fahy, J., concurring).

72. *Id.* at 433.

73. *Id.* (citing Flast v. Cohen, 392 U.S. 83, 102 (1968)).

within the "zone of interests"[74] protected by the constitutional guarantees regarding vetoes and overrides.[75]

To defendants' assertion that the constitutional provisions in question protect only the interests of Congress itself or one of its houses, the court responded that "in light of the purpose of the standing requirement . . . the better reasoned view . . . is that an individual legislator has standing to protect the effectiveness of his vote with or without the concurrence of other members of the majority."[76] Noting that the primary concern of standing doctrine is that litigants have sufficient personal stake to ensure that the matter is litigated with the necessary concreteness and specificity, the court found Kennedy to be a proper litigant. According to standing doctrine, the Court said, a litigant need only be "among the injured," not the "*most* grievously or *most* directly injured."[77] The fact that Senator Kennedy's injury was in a sense "derivative" of the injury to Congress' as a whole did not negate the fact that nullification of his individual vote was a "nonetheless substantial" injury.[78] *Kennedy* thus established that individual members of Congress denied a constitutionally mandated voting opportunity, or denied participation in a constitutionally specified process, are proper plaintiffs.[79]

The Court of Appeals for the D.C. Circuit and other courts that have addressed congressional standing have followed the test articulated in *Kennedy*, albeit with varied and sometimes confused explanations of the rule.[80] In the 1970s, the Court of Appeals for the D.C. Circuit sometimes also seemed to condition standing on whether congressional claimants' colleagues approved or disapproved of the claims.[81] In decisions during the 1980s, however, the court suggested a

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74. These two requirements were derived from Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 152-53 (1970), and were said to apply to parties who challenge administrative action.

75. *See* U.S. CONST. art. I, § 7, cl. 2.

76. Kennedy v. Sampson, 511 F.2d 430, 435 (D.C. Cir. 1974).

77. *Id.* The court cited Baker v. Carr, 369 U.S. 186, 204 (1962) and *Flast*, 392 U.S. at 106 and *Camp*, 397 U.S. at 152-53 for its basic propositions concerning standing.

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

79. *Id.* at 433, 436. According to the *Kennedy* court, *Coleman* did not dictate otherwise because the *Coleman* Court had not relied on the fact that plaintiffs included all 20 legislators who voted against ratification and who, but for the allegedly illegally cast tie-breaking vote, would have prevailed. *Id.* at 435.

80. *See, e.g.*, Vander Jagt v. O'Neill, 699 F.2d 1166 (D.C. Cir.), *cert. denied*, 464 U.S. 823 (1983); Riegle v. Federal Open Mkt. Comm., 656 F.2d 873, 877-79 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981).

81. *See, e.g.*, Harrington v. Bush, 553 F.2d 190, 202-03 (D.C. Cir. 1977).

broader, more liberal view of congressional standing.[82] Generally, when members of Congress as plaintiffs have alleged that the executive deprived them of a constitutionally mandated opportunity to vote, standing to sue has been upheld. The Court of Appeals for the D.C. Circuit reaffirmed the *Kennedy* doctrine in another pocket veto case, *Barnes v. Kline*,[83] decided several years later.[84]

Similarly, in *Moore v. United States House of Representatives*,[85] eighteen members of Congress were found to have standing to challenge a revenue bill when they alleged a nullification of their right to have revenue bills originate in the House and not the Senate.[86] "Deprivation of a constitutionally mandated process of enacting law," inflicted a specific injury on a member of Congress sufficient to support standing.[87]

In another decision, a three-judge panel conferred standing upon Representative Pressler when he challenged a newly enacted method of setting salaries for federal officers, including members of Congress, as unconstitutional.[88] The court held that "where . . . a member of Con-

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82. *See, e.g.*, Vander Jagt v. O'Neill, 699 F.2d 1166 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 823 (1983); American Fed'n of Gov't Employees v. Pierce, 697 F.2d 303 (D.C. Cir. 1982) (per curiam).

83. 759 F.2d 21, 26 (D.C. Cir. 1985), *vacated as moot sub nom.* Burke v. Barnes, 479 U.S. 361 (1987).

84. Similarly the Court of Appeals for the D.C. Circuit surveyed its prior decisions and drew a distinction between:

> (1) a diminution in congressional influence resulting from an Executive action that nullifies a specific congressional vote or opportunity to vote, in an objectively verifiable manner—which, we have found, constitutes injury in fact; and (2) a diminution in a legislator's effectiveness, subjectively judged by him or her, resulting from Executive action withholding information or failing to obey a statute . . . in which situations we do not find injury in fact. To be cognizable for standing purposes, the alleged diminution in congressional influence must amount to a disenfranchisement, a complete nullification or withdrawal of a voting opportunity; and the plaintiff must point to an objective standard in the Constitution, statutes or congressional house rules, by which disenfranchisement can be shown.

Goldwater v. Carter, 617 F.2d 697, 702 (D.C. Cir. 1979) (footnotes omitted).

85. 733 F.2d 946 (D.C. Cir. 1984).

86. *Id.* at 951-52; *see also* Humphrey v. Baker, 848 F.2d 211 (D.C. Cir. 1988) (granting standing to congressional plaintiffs, but dismissing on equitable discretion grounds); Melcher v. Federal Open Mkt. Comm., 836 F.2d 561 (D.C. Cir. 1987) (same); Gregg v. Barrett, 771 F.2d 539 (1985) (same).

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

88. Pressler v. Simon, 428 F. Supp. 302 (D.D.C. 1976), *vacated on other grounds sub nom.* Pressler v. Blumenthal, 431 U.S. 169 (1977), *and aff'd by subsequent order*, 434 U.S. 1028 (1978). The district court dismissed Pressler's claim on the merits. *Id.* at 306. The district court in *Pressler* was ultimately affirmed by the Supreme Court. Justice Rehnquist wrote, however, that the "affirmance does not reflect this Court's agreement with the conclusion reached by the district court on the merits," but rather, "could rest as readily on our conclusion that the appellant lacked

gress alleges he is prevented from voting to perform a specific legislative duty expressly mandated by the Constitution, the suit may be cognizable by the courts so long as there is no attempt being made to interfere with the internal workings of the Congress itself."[89] The panel distinguished Representative Pressler's claim from one merely brought by a legislator unhappy with the outcome of a vote.[90]

Finally, in *Dellums v. Bush*,[91] the district court applied the circuit's standing test to grant standing to congressional plaintiffs who challenged President Bush's threatened initiation of war in the Persian Gulf without first obtaining congressional authorization. The *Dellums* plaintiffs' claim of impingement on their constitutionally ordained obligation to declare war perfectly fit the paradigm of congressional standing established by the court of appeals. The President was threatening injury to the plaintiffs by denying them the opportunity to vote in a situation in which the Constitution explicitly requires their approval.

Other circuits have followed the D.C. Circuit's approach to congressional standing. The Court of Appeals for the Third Circuit applied the D.C. Circuit's standing test to a suit brought by eight members of the Virgin Islands legislature challenging a governor's appointment of an acting commissioner of commerce.[92] The court found that the nullification of the legislators' statutory right to advise and consent to executive appointments provided a uniquely personal and legally cognizable injury.[93] The Court of Appeals for the Eleventh Circuit recently recognized that "under the modern test for standing a legislator's loss of effectiveness in voting constitutes injury in fact."[94] The court denied standing, however, on the ground that plaintiff Senator Chiles had only a "subjective belief" that his effectiveness was diminished.[95] The court contrasted Chiles' claim with a congressional assertion that required procedures had not been followed. In such a case, the legislator's loss

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standing to litigate." *See* Pressler v. Blumenthal, 434 U.S. 1028, 1028-29 (1978) (Rehnquist, J., concurring).

89. *Pressler*, 428 F. Supp. at 304.

90. *See id.*

91. 752 F. Supp. 1141, 1147 (D.D.C. 1990).

92. Dennis v. Luis, 741 F.2d 628 (3d Cir. 1984).

93. *Id.*

94. Chiles v. Thornburgh, 865 F.2d 1197, 1205-06 (11th Cir. 1989).

95. *Id.* Senator Chiles argued that the Attorney General's failure to carryout pre-enactment promises diminished the effectiveness of his vote. *Id.* at 1206.

can be "objectively measured" and hence she may have suffered a legally cognizable injury.[96]

Although at times their rationales were unclear, courts have denied standing in numerous other cases in which congressional plaintiffs failed to assert deprivation of a constitutionally mandated procedure or opportunity to vote.[97] But for the most part when this type of deprivation has occurred, courts have granted standing to congressional plaintiffs. A grant of standing, however, has not usually resulted in a ruling on the merits. Rather, other doctrines have been invoked which allow courts to avoid adjudicating congressional claims.

III. The Rise of Equitable Discretion and Ripeness as Bars to Congressional Lawsuits

The 1980s saw an abrupt shift of emphasis in courts' analysis regarding whether congressional plaintiffs could obtain judicial relief. Rather than utilizing standing doctrine as a gatekeeper, the courts turned instead to prudential considerations framed in terms of "equitable discretion" or of "ripeness." The result has been, at best, confusion and muddle; it has been, at worst, a tacit reworking of the Constitution itself.

By the end of the 1970s, courts had analyzed the jurisdictional impact of plaintiffs' congressional status in some seventeen cases and had reached the merits in only a handful. Declining jurisdiction in most cases, courts raised the specter of "roving commissions" of members of Congress; "small groups" or "even individual[s]" seeking out the courts to continue their political battles, which would "inevitably" lead to unwarranted court intrusion into the "proper affairs of the coequal branches of government."[98] Standing was frequently invoked to prevent such intrusion. Yet standing doctrine, whose parameters had been developed in relation to lawsuits brought by private parties, often seemed ill-suited to address concerns related to congressional status. Indeed, in the early 1980s, the courts turned elsewhere.

A. Equitable or Remedial Discretion

In an influential article, D.C. Circuit Judge McGowan charted a

96. *Id.* at 1206.

97. United Presbyterian Church v. Reagan, 738 F.2d 1375, 1381 (D.C. Cir. 1984) (refusing to confer standing to challenge an executive order because the representative was not denied the right to vote).

98. *See* Harrington v. Bush, 553 F.2d 190, 214 (D.C. Cir. 1977).

new course, arguing that the doctrines of standing, political question, and ripeness "fail in varying degrees to account for the underlying separation of powers concerns" raised when members of Congress sue the executive branch.[99] Instead, he urged, courts should use their "traditional discretion to grant or withhold equitable relief" as a tool to address those separation of powers concerns.[100]

McGowan demonstrated that D.C. Circuit decisions in the 1970s had been imposing more stringent standing requirements on congressional claimants than on "ordinary" plaintiffs, contrary to the circuit's own purported principle that "there are no special standards for determining congressional standing."[101] The notion that congressional plaintiffs were not injured if they could obtain redress from their colleagues was misguided, Judge McGowan argued, because private plaintiffs were not required to exhaust other avenues of relief in order to demonstrate injury. Rather than imposing this unwarranted constitutional burden and creating unnecessary doctrinal confusion, courts should grant standing whenever the traditional tests were met[102] but use their equitable discretion to deny relief if it appeared that they were being asked to intervene in the activities of coordinate branches before the political process had played itself out.[103] Courts ought to deny a remedy to legislative plaintiffs whose "dispute is really with fellow legislators" and "who could get substantial relief from [them]."[104] But such prudential considerations were better addressed, he argued, through case-by-case analysis than by establishing special rules for congressional standing that might altogether foreclose courts from taking cases by importing separation of powers concerns into standing analysis.

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99. McGowan, *supra* note 10, at 244.

100. *Id.*

101. *Id.* at 254 (quoting Harrington v. Bush, 553 F.2d 190, 204 (D.C. Cir. 1977) (emphasis omitted)).

102. "[T]he maximum burden which a plaintiff must bear to attain standing [is]: establishment of (i) injury-in-fact (ii) to an interest protected by the relevant law (iii) where the injury is caused by defendants' actions or capable of judicial redress." Riegle v. Federal Open Mkt. Comm., 656 F.2d 873, 878 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981).

103. Judge McGowan's approach was first adopted in *Riegle* as "circumscribed equitable discretion" to indicate that there were special circumstances in congressional plaintiff cases that warranted denial of jurisdiction for prudential reasons even when plaintiffs should be granted standing. *Id.* at 881; *see also* McGowan, *supra* note 10, at 265. The word "circumscribed" was later dropped by most courts, and the term "remedial discretion" came to be applied when plaintiffs sought not merely declaratory, but also injunctive relief. *See, e.g.*, United Presbyterian Church v. Reagan, 738 F.2d 1375, 1381 n.5 (D.C. Cir. 1984); Vander Jagt v. O'Neil, 699 F.2d 1166, 1175 n.25 (D.C. Cir.), *cert. denied*, 464 U.S. 823 (1983).

104. McGowan, *supra* note 10, at 263.

A few months later, the D.C. Circuit adopted his view.[105] When Michigan Senator Riegle asserted that the appointment of certain members of the Federal Open Market Committee (FOMC) violated his Article I right to confirm the appointment of federal officers, the Court of Appeals for the D.C. Circuit granted Riegle standing,[106] despite its ruling three years earlier which denied standing in an almost identical case brought by Congressman Reuss.[107] The court in *Riegle* held that the senator's alleged "inability to exercise his right under the Appointments Clause of the Constitution is an injury sufficiently personal to constitute an injury-in-fact."[108]

The court nonetheless dismissed Riegle's claim, using its newly applied "equitable discretion" to address separation of powers concerns.[109] The court found that "there can be no doubt that Senator Riegle's congressional colleagues are capable of affording him substantial relief" by amending the legislation setting up the FOMC.[110] Noting that "the war over public versus private control of the Committee . . . has been waged in the legislative arena since 1933" and that a bill to require Senate approval of the "private" members had recently been introduced, the court held that "[i]t would be unwise to permit the federal courts to become a higher legislature where a congressman who has failed to persuade his colleagues can always renew the battle."[111]

The court thus sought to separate standing and separation of powers concerns.[112] The new doctrine would, according to the court, serve

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105. *Riegle*, 656 F.2d at 880-81. Senator Riegle, like Congressman Reuss before him, was challenging appointments to the Federal Open Market Committee, which plays an important role in the Federal Reserve System, made by private banks without congressional approval. *Id.* at 877.

106. *Id.* at 882.

107. *See* Reuss v. Balles, 584 F.2d 461 (D.C. Cir. 1978).

108. *Riegle*, 656 F.2d at 878.

109. *Id.* at 881-82.

110. *Id.* at 881.

111. *Id.* at 882. The court added, "Where a congressional plaintiff could obtain substantial relief from his fellow legislators through the enactment, repeal or amendment of a statute, this Court should exercise its equitable discretion to dismiss the legislator's action." *Id.* at 881.

112. *Id.* at 882. The *Riegle* court also suggested that whether a similar action could be brought by a private plaintiff would be an important factor in whether the court should exercise its equitable discretion. The court said it "would welcome congressional plaintiff actions involving non-frivolous claims of unconstitutional action which, because they could not be brought by a private plaintiff and are not subject to legislative redress, would go unreviewed unless brought by a legislative plaintiff." *Id.* Later courts rejected the notion that they should entertain congressional suits merely because a matter might otherwise go unreviewed. *See, e.g.*, Melcher v. Federal Open Mkt. Comm., 836 F.2d 561, 564-65 (D.C. Cir. 1987) (noting that the U.S. Supreme Court in Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982), expressly rejected that notion), *cert. denied*, 486 U.S. 1042 (1988).

as a more precise articulation of the underlying separation of powers concerns. It would not permit congressional plaintiffs to "circumvent the processes of democratic decisionmaking,"[113] yet would assure that "nonfrivolous claims of unconstitutional action which could only be brought by members of Congress will be reviewed on the merits."[114]

The equitable discretion doctrine has not fulfilled this promise. Rather, it has almost invariably resulted in dismissal of congressional lawsuits, even "nonfrivolous" ones. Throughout the 1980s, the Court of Appeals for the D.C. Circuit dismissed congressional challenges to several allegedly unconstitutional executive, and occasionally congressional, acts while always citing equitable or remedial discretion. The courts dismissed on equitable grounds challenges to the Reagan Administration's provision of aid to El Salvador in alleged violation of the human rights provisions of the Foreign Assistance Act;[115] the 1987 U.S. escort operations for reflagged Kuwait tankers in the Persian Gulf in alleged violation of the War Powers Resolution;[116] the House of

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113. *Riegle*, 656 F.2d at 881.

114. *Id.*

115. Crockett v. Reagan, 558 F. Supp. 893, 902 (D.D.C. 1982), *aff'd per curiam*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984). In *Crockett*, 29 representatives challenged the United States' military actions in El Salvador as violative of the Constitution's War Powers Clause, the War Powers Resolution, and the Foreign Assistance Act of 1961. *Id.* at 895. The district court found that the war powers issues presented non-justiciable political questions because of the difficulty of finding whether hostilities in El Salvador were imminent. *Id.* at 896-98. Noting the parties' starkly different versions of the nature of United States' activities in El Salvador, the court held that it "lack[ed] the resources and expertise (which are accessible to the Congress) to resolve disputed questions of fact concerning the military situation in El Salvador." *Id.* at 898.

The court erred in finding that difficult fact-finding renders a question "political." Courts are expert at choosing among different versions to decide facts. Moreover, courts often decide whether activities such as those in El Salvador constitute hostilities in civil actions claiming benefits accorded during wartime. *See, e.g.*, York Life Ins. Co. v. Bennion, 158 F.2d 260, 264 (10th Cir. 1946), *cert. denied*, 331 U.S. 811 (1947); Jackson v. North Am. Assurance Soc'y, 183 S.E.2d 160, 160-61 (Va. 1971). Moreover, as the Iran-Contra hearings demonstrated, the "resources and expertise" accessible to Congress are no more likely to resolve disputed questions of fact than is a court. *See generally* Koh, *supra* note 37, at 1275-79.

The court found it unnecessary to address whether the war powers claims should also be dismissed on equitable discretion grounds. *Crockett*, 558 F. Supp. at 901. The court, however, did dismiss on equitable discretion grounds plaintiffs' claim that providing security assistance to El Salvador violated the Foreign Assistance Act because that country failed to make progress on human rights. "[P]laintiffs' dispute," the court said, "is primarily with their fellow legislators who have authorized aid to El Salvador while specifically addressing the human rights issue, and who have accepted the President's certifications." *Id.* at 902.

116. Lowry v. Reagan, 676 F. Supp. 333 (D.D.C. 1987). In *Lowry*, 110 representatives, who claimed that the reporting requirements of the War Powers Resolution had been triggered by the 1987 U.S. escort operations for reflagged Kuwaiti tankers in the Persian Gulf and by the

Representatives' allegedly discriminatory allocation of committee assignments;[117] the invasion of Grenada in purported violation of the War Powers Clause of the Constitution;[118] a tax statute that originated in the Senate rather than House;[119] the failure to maintain the accuracy of the congressional record,[120] the constitutionality of the Federal Salary Act;[121] the Boland Amendment's constraints on executive support

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September 21, 1987 attack on an Iranian Navy ship laying mines in the Gulf, sought an order requiring the President to submit the report. *Id.* at 334. The court declined to hear the case, citing "prudential considerations" and the political question doctrine. The court found that "[a]lthough styled as a dispute between the legislative and executive branches," the suit was really "a by-product of political disputes within Congress regarding the applicability of the War Powers Resolution." *Id.* at 338. Pointing to the numerous bills that were introduced to repeal or strengthen the War Powers Resolution and to a statement by one plaintiff that he joined the suit to resolve a question "Congress seemed unwilling to decide," the court concluded that the dispute was intra-branch and refused to "render a decision that . . . would impose a consensus on Congress." *Id.* at 338-39. Three senators who were plaintiffs withdrew from the lawsuit. *Id.* at 334 n.1.

117. Vander Jagt v. O'Neill, 699 F.2d 1166 (D.C. Cir. 1982), *cert. denied*, 464 U.S. 823 (1983). In *Vander Jagt*, the court found that 14 Republican representatives had standing to challenge the House Democratic leadership's allegedly discriminatory allocation of committee assignments. *Id.* at 1168-77. The court, nevertheless, denied relief. *Id.* It held that it would be unwise to interfere with the House's method of allocating committee assignments not because it lacked power to act, nor because "a remedy could not be fashioned," but because it would be a " 'startlingly unattractive' idea" for the court to tell the House speaker how to handle such matters. *Id.* at 1176 (quoting Davids v. Akers, 549 F.2d 120, 123 (9th Cir. 1977)).

118. Conyers v. Reagan, 578 F. Supp. 324 (D.D.C. 1984), *appeal dismissed as moot*, 765 F.2d 1124 (D.C. Cir. 1985). In *Conyers*, the court was confronted with a challenge by 11 representatives, who argued that the Grenada invasion violated the Constitution's War Powers Clause. *Id.* at 325; *see also* U.S. CONST. art. I, § 8, cl. 11 (War Powers Clause). Plaintiffs sought a declaration of illegality and an injunction directing the removal of U.S. forces from Grenada. *Conyers*, 578 F. Supp. at 326. The court declined to rule "based on the doctrine of circumscribed equitable/remedial discretion," and asserted that the plaintiffs possessed "the institutional remedies available to Congress as a body; specifically, the War Powers Resolution . . . appropriations legislation or even impeachment." *Id.* at 327 (citations omitted). If the plaintiffs were unable to persuade the requisite number of legislators to employ these "remedies," "it would be unwise for this Court to scrutinize that determination. . . ." *Id.* at 327. By the time the matter reached the Court of Appeals for the D.C. Circuit, it was dismissed as moot because the invasion had ended. *See* Conyers v. Reagan, 765 F.2d 1124 (D.C. Cir. 1985).

119. Moore v. United States House of Representatives, 733 F.2d 946 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985).

120. Gregg v. Barrett, 771 F.2d 539 (D.C. Cir. 1985).

121. Humphrey v. Baker, 848 F.2d 211 (D.C. Cir.), *cert. denied*, 438 U.S. 966 (1988). Senator Humphrey and five representatives challenged the constitutionality of the Federal Salary Act. The district court found that the plaintiffs had standing but dismissed on the merits. *Id.* at 213-14. The district court relied upon the disfavored, if not repudiated, dicta in *Riegle* disapproving dismissal on equitable discretion grounds when no private plaintiff could bring suit. *Id.* at 213. The panel, "fully mindful . . . that this circuit's recently minted doctrine of equitable discretion has not even been addressed, much less endorsed, by the Supreme Court", believed itself bound by circuit precedent to dismiss the suit as one primarily between members of the legislature, for which "an 'in-house' remedy" was available. *Id.* at 214.

of the Nicaraguan contras;[122] and yet again to allegedly improper appointments to the FOMC.[123]

While the equitable discretion doctrine has been widely applied by the D.C. Circuit, it has come under increasing attack from inside and outside the court. Judge Harry Edwards, concurring in *Melcher v. Federal Open Market Committee*, concluded that "[u]pon reflection, it is no longer clear to me that equitable discretion is a viable doctrine upon which to determine the fate of constitutional litigation."[124] Judges Starr and Ginsburg, constituting the majority in *Melcher*, agreed with Edwards by way of a footnote.[125] The unanimous panel in *Humphrey v. Baker*[126] applied the doctrine, yet expressly stated that it shared the concerns expressed by Edwards. Former Judges Bork and Scalia also both criticized the doctrine as "rudderless adjudication"[127] or "ad hoc" case-by-case determination of whether it is "wise" or "useful" to intervene in a particular dispute.[128] The Court of Appeals for the D.C. Circuit, however, has never openly disavowed the doctrine,[129] in all likelihood because it has proved useful in avoiding adjudication of troubling congressional claims. The court thus has continued, despite criticisms of the doctrine, to apply equitable or remedial discretion as its law.

The doctrine has engendered considerable confusion. First, the *Riegle* court's suggestion that the availability of private plaintiffs was relevant in deciding whether to reach the merits in congressional suits appeared to run afoul of the Supreme Court's holding in *Schlesinger v. Reservists Committee to Stop the War*.[130] The Court there stated that "[t]he assumption that if respondents [citizens] have no standing to sue, no one would have standing, is not a reason to find standing."[131] That apparent inconsistency was resolved by the court of appeals' later

122. Dornan v. United States Secretary of Defense, 851 F.2d 450 (D.C. Cir. 1988).

123. Melcher v. Fed. Open Mkt. Comm., 836 F.2d 561 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1042 (1988).

124. *Melcher*, 836 F.2d at 565 (Edwards, J., concurring).

125. *Id.* at 565 n.4.

126. 848 F.2d 211, 214 (D.C. Cir.), *cert. denied*, 438 U.S. 966 (1988). The panel consisted of Judges Wald, Starr and Edwards. *Id.* at 212.

127. Vander Jagt v. O'Neill, 699 F.2d 1166, 1184 (D.C. Cir.) (Bork, J., concurring), *cert. denied*, 464 U.S. 823 (1983).

128. Moore v. United States House of Representatives, 733 F.2d 946, 963 (D.C. Cir. 1984) (Scalia, J., concurring), *cert. denied*, 469 U.S. 1106 (1985).

129. Additionally, some commentators have criticized the doctrine. *See, e.g.*, Sophia C. Goodman, Note, *Equitable Discretion to Dismiss Congressional-Plaintiffs' Suits: A Reassessment*, 40 CASE W. RES. L. REV. 1075 (1990).

130. 418 U.S. 208 (1974).

131. *Id.* at 227.

holding that despite the dicta in *Riegle*, a senator could not challenge the FOMC appointment process, despite the unlikelihood of a successful private challenge.[132]

Second, it remained unclear whether there remained any standing barrier to adjudication of congressional lawsuits. Shortly after *Riegle*, the Court of Appeals for the D.C. Circuit suggested that it had virtually abandoned the standing inquiry in congressional lawsuits and that, as long as members of Congress could claim that they were in any way injured or their political power diluted; the only inquiry would be whether the court should exercise its remedial discretion to deny relief.[133] But more recent decisions have continued to recognize and follow the distinctions made in *Kennedy, Goldwater* and *Harrington* between the denial of an opportunity to vote and the mere diminution in the effectiveness of a vote by denying standing to representatives who allege only the latter injury.[134]

The main problem with the remedial discretion doctrine, however, lies in the formulation itself. The inquiry as to whether "the congressional plaintiff can obtain substantial relief from his fellow legislators, through the enactment, repeal or amendment of a statute" actually offers no guideline because any challenge brought by members of Congress can be framed as one as to which Congress itself can grant relief.

For example, the paradigmatic cases of congressional injury are the pocket veto cases, *Kennedy v. Sampson* and *Barnes v. Kline*. In each case, Congress enacted a statute, the President exploited an imminent congressional recess by failing to sign or return the statute for possible override, instead declaring it not to be law, and members of Congress challenged the "pocket veto." In each case, the court of appeals found standing, reached the merits, and upheld the congressional claim. But in each case, the plaintiffs could have obtained relief from fellow legislators; Congress could have reenacted the law and forced the President to veto it through the normal process.[135] Yet plainly the

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132. *See* Melcher v. Federal Open Mkt. Comm., 836 F.2d 561 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1042 (1988).

133. *See* Vander Jagt v. O'Neill, 699 F.2d 1166, 1168-69, 1174-75 n.24 (D.C. Cir.), *cert. denied*, 464 U.S. 823 (1983).

134. *See, e.g.*, United Presbyterian Church v. Reagan, 738 F.2d 1375, 1381-82 (D.C. Cir. 1984); Helms v. Secretary of the Treasury, 721 F. Supp. 1354 (D.D.C. 1989).

135. Presidents use the "pocket veto" because of a claimed ambiguity or loophole in constitutional veto provisions. Were Congress to reenact a statute following its recess however, the President could not refuse to return an unsigned law for possible veto without creating a clear constitutional crisis. For a thorough discussion of the pocket veto, see Kennedy v. Sampson, 511 F.2d

senators had suffered nonfrivolous injury. Even though Senators Kennedy and Barnes could have obtained relief from their fellow legislators, they were injured precisely in having to re-enact the law; their first vote having been nullified. They would be required to spend time and energy redoing what had already been done: mustering energy, votes, and commitments to gain re-enactment. The constitutional process specifying a limited time within which the President must sign, veto, or permit a law would have been rendered meaningless.[136]

Similarly, the dispute in *Dellums v. Bush*[137] could have been characterized as one between fellow legislators. There, the district court properly held that remedial discretion was inapplicable.[138] While the claim that the President should be prevented from acting absent a congressional declaration of war plainly asserted a dispute between the branches, a congressional remedy was possible. Congress could have enacted a statute denying the President the power and funding to conduct offensive military operations in the Persian Gulf.[139] Although as a practical matter—given the threat of an executive veto or even executive defiance—that course was probably foreclosed, relief from fellow members of Congress was theoretically available. Indeed, two other district courts reached this conclusion in cases involving congressional war powers challenges to the executive's alleged unlawful use of force abroad.[140] Both of those courts dismissed in their "remedial discretion" because plaintiffs could theoretically obtain legislative relief.[141] Thus,

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430, 437-440 (D.C. Cir. 1974).

136. A congressional enactment becomes law if the President has not returned it to Congress within 10 days (exclusive of Sundays) after he receives it, "unless the Congress by their Adjournment prevent its Return." U.S. CONST. art. I, § 7, cl. 2. In *Barnes* and *Kennedy*, each house had designated an official to receive returned enactments during the recesses. Barnes v. Kline, 759 F.2d 21, 24 (D.C. Cir. 1985), *vacated as moot sub nom.* Burke v. Barnes, 479 U.S. 361 (1987); *Kennedy*, 511 F.2d at 432. Hence, Congress had not "prevent[ed]" the return of legislation.

137. 752 F. Supp. 1141 (D.D.C. 1990).

138. *Id.* at 1148-49.

139. Article I of the Constitution grants Congress not only the power of the purse, but the authority to raise armies (and arguably the power to refuse to raise them). U.S. CONST. art. I, § 8, cl. 12. Of course, were the President to refuse to obey legislation denying funds or troops to a particular war effort, the courts may again be faced with the question of whether individual members of Congress could sue or whether they should muster the necessary members to pass further legislation or to impeach.

140. *See* Lowrey v. Reagan, 676 F. Supp. 333, 337-39 (D.D.C. 1987); Conyers v. Reagan, 578 F. Supp. 324, 326-37 (D.D.C. 1984), *appeal dismissed as moot*, 765 F.2d 1124 (D.C. Cir. 1985).

141. *See Lowrey*, 676 F. Supp. at 337-38; *Conyers*, 578 F. Supp. at 327. The *Lowrey* court also invoked a ripeness analysis as part of its equitable discretion. *Lowrey*, 676 F. Supp. at 340-41.

application of equitable and remedial discretion to congressional suits results in decisions and outcomes at least as confused, unpredictable, and inconsistent as those under the "muddled" standing doctrine it was designed to replace.

The remedial discretion doctrine's focus on whether an individual legislator can obtain relief from her colleagues is misplaced. The real question to be addressed when members of Congress sue is the nature of their injuries, a traditional standing inquiry. When the executive takes action either: (1) without first obtaining constitutionally required congressional approval; or (2) that nullifies a congressional vote already taken, the individual legislator is injured irrespective of whether Congress could or does take corrective action eventually forcing the executive to comply. This is so because the constitutional injury lies precisely in Congress and its individual members having to replay the political process by voting again on the same underlying issue in order to reverse or preclude executive action. If the Constitution requires the President to obtain congressional approval before taking certain action, individual members of Congress are injured when the President takes that action without seeking their consent even though they might be able to convince a congressional majority to stop the President.[142] The fact that a majority might be *un*willing to vote to stop or reverse the executive's action is irrelevant, even though in a real sense a part of the individual member's complaint is with her colleagues.

The remedial discretion doctrine is less objectionable when used to dismiss claims of legislators challenging the enactment of a statute or other actions taken by Congress.[143] Yet here too, the key question should not be whether plaintiffs can get relief from their fellow legislators but should be an inquiry into the nature of the action being challenged. When a legislator complains that her colleagues have passed an unconstitutional statute (other than one which seeks to delegate to the

142. Indeed, members of Congress are injured because they are responsible for determining whether to go to war, to enact treaties, to appoint federal officers and the like. When they are effectively prevented from carrying out these duties, their very purpose in being legislators is rendered a nullity. Arguably, the injury could not be more personally significant despite Frankfurter's, Bork's and Scalia's claims to the contrary.

143. Most congressional claims that are dismissed based on remedial discretion have, in fact, involved these types of challenges. *See, e.g.*, Moore v. United States House of Representatives, 733 F.2d 946, 956 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985); Riegle v. Federal Open Mkt. Comm., 656 F.2d 873, 881-82 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981); *see also* Helms v. Secretary of Treasury, 721 F. Supp. 1354 (D.D.C. 1989) (dismissing, on equitable discretion grounds, congressional challenge to regulations implementing a statute).

executive a power accorded Congress), or have held an improper congressional hearing, or have taken some other allegedly improper action that does not rise to the level of a constitutional process injury, courts can properly exercise discretion to deny review on the ground that to do otherwise might constitute unnecessary meddling in the affairs of another branch. By contrast, when a member of Congress claims a deprivation of her ability to carry out a constitutionally mandated vote, especially one that is structured to operate as a check on executive power, the equitable discretion doctrine should not be applicable.

This was in essence Judge Greene's holding in *Dellums v. Bush*.[144] While Judge Greene left open the door to congressional standing and declined to use equitable discretion doctrine as a barricade, he nonetheless borrowed from Justice Powell a third doctrinal bar.

B. Ripeness

Representative Dellums and his fifty-three co-plaintiffs managed to proceed quite far into the jurisdictional maze created for congressional plaintiffs. Judge Harold Greene not only ruled that their challenge presented a justiciable issue,[145] but that the plaintiffs met the test for congressional standing.[146] He further held that their claim should not be dismissed on equitable discretion grounds.[147] In the end, however, the congressional plaintiffs were trapped in the maze by a special branch of the ripeness doctrine, which was first articulated by Justice Powell in *Goldwater v. Carter*.[148]

In 1979, President Carter gave notice of the United States' intent to terminate its mutual defense treaty with Taiwan as part of the process of recognizing the People's Republic of China. Senator Goldwater and several of his colleagues responded by bringing an action in federal district court, claiming that treaty-breaking, like treaty-making, required the approval of two-thirds of the Senate. The district court

144. 752 F. Supp. 1141 (D.D.C. 1990).

145. *Id.* at 1145-46. The political question doctrine has been much employed to bar adjudication of the merits of claims similar to those of congressional plaintiffs as to which private plaintiffs plainly have standing. *See* Ange v. Bush, 752 F. Supp. 509 (D.D.C. 1990) (dismissing on political question grounds a claim similar to that dismissed on ripeness grounds in Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990)). *See generally* Henkin, *supra* note 6. Justice Rehnquist, in Goldwater v. Carter, 444 U.S. 996, 1002-1006 (1979) (Rehnquist, J., concurring), preferred using this most malleable of rationales to bar congressional plaintiffs' suits as well.

146. *Dellums*, 752 F. Supp. at 1147-48.

147. *See id.* at 1148-49.

148. 444 U.S. 996 (1979).

found standing and ruled on the merits that treaty-breaking required either the Senate's advice and consent or the approval of both houses.[149] The court of appeals, sitting en banc, upheld the senators' standing to sue.[150] The court, however, reversed on the merits, ruling that the President could unilaterally terminate this particular treaty.[151]

The Supreme Court, without hearing argument, vacated and dismissed.[152] Justice Rehnquist, writing for himself and three other justices, found that the dispute presented a non-justiciable political question.[153] Justice Powell, concurring, rejected the political question rationale, opining instead that the issue was not ripe for adjudication until a majority of Congress or the Senate had voiced its disagreement with the presidential exercise of authority.[154]

Justice Powell agreed with the plurality that the differences between the President and Congress "almost invariably . . . turn on political rather than legal considerations."[155] He disagreed, however, with Justice Rehnquist that the issue of whether the President can unilaterally terminate a treaty was non-justiciable. Powell argued by analogy that if the President signed a mutual defense treaty with a foreign country and announced that it would go into effect despite its rejection by the Senate, the Court surely ought to adjudicate a hypothetical constitutional challenge brought by a group of senators.[156] Justice Powell, as he often did, sought a middle ground between Rehnquist's sweeping political question rationale and the lower court's decision to grant congressional standing and rule on the merits. For Justice Powell, the middle ground lay in the proposition that

> [t]he Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse. Otherwise, we would encourage small groups or even individual Members of Congress to seek judicial resolution of issues before the normal political process has the opportunity to resolve the conflict.[157]

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149. Goldwater v. Carter, 481 F. Supp. 949 (D.D.C. 1979).

150. Goldwater v. Carter, 617 F.2d 697 (D.C. Cir. 1979) (en banc).

151. *Id.*

152. *Goldwater*, 444 U.S. at 996.

153. *Id.* at 1002 (Rehnquist, J., concurring).

154. *Id.* at 997 (Powell, J., concurring).

155. *Id.* Justice Marshall concurred only in the result, while Justices Blackmun and White would have heard argument in the case. *Id.* at 1006. Justice Brennan voted to uphold the D.C. Circuit. *Id.*

156. *Id.* at 999-1000 (Powell, J., concurring).

157. *Id.* at 997 (Powell, J., concurring).

Impasse would be reached, thus rendering the matter "ripe" for judicial adjudication, only when the congressional plaintiffs constituted a majority of Congress (or the Senate) and had in some formal manner expressed their disagreement with the President.[158] "If the Congress chooses not to confront the President," Justice Powell said, "it is not our task to do so."[159]

Justice Powell's reasoning has gained ascendancy in the lower courts. Relying on Powell's analysis, Judge Revercomb in *Lowry v. Reagan*[160] dismissed a claim brought by 110 members of the House of Representatives that the President violated the War Powers Resolution by his 1987 decision to use U.S. naval ships to escort reflagged Kuwaiti vessels in the Persian Gulf.[161] Judge Revercomb indicated that he would have adjudicated the dispute had Congress enacted a resolution stating that "hostilities" existed in the Persian Gulf, thereby triggering the resolution, and the President still refused to comply with it.[162] Judge Joyce Hans Green reached an identical conclusion in dismissing a congressional challenge to the executive's dispatch of advisors to El Salvador.[163] Judge Ruth Bader Ginsburg also relied upon Justice Powell's opinion in a case challenging aid to the Nicaraguan *contras*.[164]

The most extensive elaboration of Powell's reasoning was articulated by Judge Harold Greene in *Dellums v. Bush*.[165] Refusing to grant the plaintiffs' motion for a preliminary injunction, Greene required that the plaintiffs:

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158. *Id.* at 997-98 (Powell, J., concurring). Justice Powell did not specify what formal action was necessary to create a "confrontation:" For example, whether, a majority vote expressing opposition to executive action was necessary, or whether some other action such as voting to authorize a lawsuit would suffice. For an argument that either a joint resolution, or judicial notice that a relevant majority has authorized a lawsuit, or a suit joined by bipartisan leadership would suffice, see Blumoff, *supra* note 35, at 341.

159. *Goldwater*, 444 U.S. at 998 (Powell, J., concurring). One might, of course, interpret Justice Powell to mean a "relevant majority", that is, the number constitutionally required to take or to block presidential action in any given case. Thus, for example, as to Goldwater's assertion that treaty-breaking required the same two-thirds Senate vote as treaty-making, the relevant majority would be 34 Senators (the number sufficient to prevent treaty ratification). To determine, however, that less than a majority of the Senate was necessary to create a confrontation would have required determining the merits of the dispute.

160. 676 F. Supp. 333 (D.D.C. 1987).

161. *Id.* at 341.

162. *Id.*

163. *See* Crockett v. Reagan, 558 F. Supp. 893 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984).

164. *See* Sanchez-Espinoza v. Reagan, 770 F.2d 202, 210 (D.C. Cir. 1985) (Ginsburg, J., concurring).

165. Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990).

> be or *represent* a majority of the Members of the Congress: the majority of the body that under the Constitution is the only one competent to declare war, and therefore also the one with the ability to seek an order from the courts to prevent anyone else, i.e. the Executive, from in effect declaring war.[166]

In Judge Greene's view, congressional standing was proper because the claimed injury was the deprivation of a constitutionally mandated duty or right to vote for or against a declaration of war.[167] Furthermore, Judge Greene viewed the plaintiffs' injury as real, traceable to the President's actions, and likely to be redressed by a decision requiring such a vote before hostilities commenced.[168] He maintained that the court should not dismiss in its remedial discretion because the suit represented neither an "intra-congressional" battle, nor an attempt to gain a ruling that a statute was unconstitutional. Instead, the controversy was, in his view, one truly between the branches, and genuine relief was not available from the plaintiffs' colleagues.[169]

True, further action from colleagues such as a "joint resolution counselling the President to refrain from attacking Iraq without a congressional declaration of war" might make the action more concrete, and thus satisfy Powell's concern about ripeness.[170] The need for judicial restraint, however, did not arise from the possibility that this further playing out of the political process might resolve the dispute. Indeed, a joint resolution probably would not stop the President from attacking if he believed, as he had many times asserted, that a declaration was not constitutionally required. Furthermore, the so-called " 'remedies' of cutting off funding to the military or impeaching the President" were not available "either politically or practically," and hence, the court asserted, their purported availability did not mandate discretionary dismissal.[171] Moreover, such "remedies" would not afford the relief requested from the court, which was the "opportunity to debate and vote on the wisdom of initiating a military attack" *before* starting a war.[172]

Although the court concluded that "in principle, an injunction may issue at the request of Members of Congress to prevent the conduct of a war which is about to be carried on without congressional

166. *Id.* at 1151.
167. *Id.* at 1147-48.
168. *Id.*
169. *Id.* at 1148-49.
170. *Id.* at 1149.
171. *Id.*
172. *Id.*

authorization,"[173] it refused to grant such an injunction because the matter was, in its view, unripe, pursuant to Justice Powell's concurrence in *Goldwater*.[174] Congress had failed to bring the interbranch dispute to a head by making clear its position on "whether it deems such a declaration [of war] necessary. . . ."[175] Until it did, it had not reached an "impasse" with the President. What, asked the court, if it enjoined executive action without congressional assent and it turned out that a legislative majority either believed the President constitutionally free to act without their assent, or were content to leave the "diplomatically and politically delicate decision" to him? It would not do, the court declared, to "force a choice upon the Congress."[176]

Judge Greene's decision was a masterful political compromise. He undoubtedly recognized that Congress was at least partially to blame for the executive's action due to its failure to assert more aggressively its constitutional prerogatives.[177] His opinion may well have been an attempt to goad Congress into fulfilling its responsibilities. In asserting that he would assert jurisdiction if Congress acted, Greene highlighted the main advantage of Powell's ripeness approach: It places the burden on Congress to shoulder some responsibility before the courts will intervene.

Furthermore, Greene's opinion probably put more political pressure on the President to obtain congressional approval for the war effort than anything else he could have done. Technically, all he did was deny plaintiffs' motion for preliminary injunction. Nevertheless, while a finding that a case is not ripe would ordinarily dictate dismissing the action, Judge Greene did not dismiss plaintiffs' claims. He clearly rejected the President's asserted sole authority over the decision to go to war.[178] Given the facts of the Persian Gulf conflict, the court had

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173. *Id.*

174. *Id.* at 1150-51. According to the court, the matter had not apparently reached an impasse from the President's side because the "brink" of war had not been reached and diplomatic solutions still seemed possible. *Id.* at 1151-1152. But the court said it did not have to reach that issue unless and until the "congressional ripeness issue" was resolved, at which point there would "still be time enough to determine" whether the President's commitment to military operations is sufficiently clear as to justify a decision by the court. *Id.* at 1152.

175. *Id.* at 1149-50.

176. *Id.* at 1151. For a reply to this reasoning, see *infra* text accompanying notes 184-86.

177. For highlight of congressional failures, see John H. Ely, *The American War in Indochina, Part I: The (Troubled) Constitutionality of the War They Told Us About*, 42 STAN. L. REV. 877 (1990) and John H. Ely, *The American War in Indochina, Part II: The Unconstitutionality of the War They Didn't Tell Us About*, 42 STANFORD L. REV. 1093 (1990).

178. *See* Ely, *supra* note 15, at 1.

> no hesitation in concluding that an offensive entry into Iraq by several hundred thousand U.S. servicemen . . . could be described as a "war" within meaning of Article I, Section 8, Clause 11 of the Constitution. To put it another way, the Court is not prepared to read out of the Constitution the clause granting to the Congress, and to it alone, the authority to "declare war."[179]

Thus, he virtually invited the plaintiffs to renew their motion for injunctive relief if Congress clearly expressed its disapproval of unilateral executive warmaking and if the President showed himself committed to offensive military action. Had a handful of votes shifted in the Senate, the plaintiffs could have been back before Judge Greene in January to take him up on his offer.

Judge Greene surely knew that a ruling in the plaintiffs' favor would have invited immediate reversal by the court of appeals. Given the federal courts' hostile reception to war powers cases in general, and to those brought by congressional plaintiffs in particular, Greene's decision may have done more in a practical sense to foster executive compliance with the War Powers Clause than any ruling on the merits.

Judge Greene's opinion, nevertheless, illustrates the problem with the ripeness approach to congressional claims. When the court decides that members of Congress cannot sue unless a congressional majority expressly and formally endorses their position, the court is in essence reworking the Constitution. Article I, Section 8 of the Constitution requires a declaration of war before the President can send U.S. troops to war. Judge Greene in effect reversed the requirement, allowing the President to decide unilaterally to go to war unless a majority of Congress was willing to vote affirmatively to stop him. The Constitution does not read that the President can go to war alone unless a majority of Congress is willing to oppose him openly. If Congress is uncertain, divided, bickering or confused, and therefore fails to address the issue of whether to go to war, the Constitution prohibits the President from taking that momentous step alone. Our country cannot constitutionally go to war unless Congress explicitly votes in favor of doing so.[180] Al-

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179. Dellums v. Bush, 752 F. Supp. 1141, 1146 (D.D.C. 1990).

180. *See* Lobel, *supra* note 17; Ely, *supra* note 15, at 1. While there is considerable controversy over the precise meaning and parameters of the constitutional allocation of war powers, many courts and commentators agree that the core content includes a requirement of congressional authorization before the President can begin full-scale hostilities. *See, e.g., Dellums*, 752 F. Supp. at 1144-45; Alexander M. Bickel, *Congress, the President and the Power to Wage War*, 48 CHI.-KENT L. REV. 131, 145-47 (1971); David S. Friedman, *Waging War Against Checks and Balances—The Claim of an Unlimited Presidential Power*, 57 ST. JOHN'S L. REV. 213, 272-73 (1983); William P. Rogers, *Congress, the President, and the War Powers*, 59 CAL. L. REV. 1194,

though Judge Greene was unprepared to "read out of the Constitution," Congress' Article I war powers, he was, nevertheless, prepared to distort the constitutional requirements.[181]

In a footnote, Judge Greene suggested that he was simply denying plaintiffs judicial relief.[182] His whole opinion, however, is undergirded by a reinterpretation of the Constitution. Early in the *Dellums* opinion, Judge Greene suggested that the armed forces involved in the Persian Gulf conflict "are of such magnitude and significance as to present no serious claim that a war would not ensue if they became engaged in combat, and it is therefore clear that congressional approval is required *if Congress desires to become involved.*"[183] The Constitution, however, does not state that the power to declare war shall be in Congress' hands "if Congress desires to become involved." It is Congress' *obligation* to become involved and it can no more evade that responsibility than it could evade its responsibility to ratify treaties or confirm the President's nominees for the federal bench and cabinet positions.

1213 (1971). Debate centers around questions concerning what activity is sufficient to constitute war-making and what congressional acts constitute authorization. *Compare* Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1391 (1989) (asserting that the President may use force only when there is congressional authorization or to repel armed attack) *and* Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 699-702 (1972) (arguing that, when the Constitution was adopted, the "common understanding" was that Congress had the power to commence war, whether declared or not) *with Mitchell*, 488 F.2d at 615 (stating that "it is constitutionally permissible for Congress to use another means than a formal declaration of war to give its approval to a war . . . .) *and* Eugene V. Rostow, *"Once More unto the Breach:" The War Powers Resolution*, 21 VAL. U. L. REV. 1, 17 (1986) (noting "it equally settled" that "the President can use or threaten to use the armed forces without any action by Congress . . . where international law justifies the proportional use of force . . . .").

181. Professor Blumoff argues that historical vagary and change demand that courts accord the political branches flexibility in adapting the constitutional scheme to meet current needs and political realities. He argues further that the courts should, for prudential reasons, decline jurisdiction to determine the validity of such adaptation, even if it runs counter to what may be the relatively clear intent of the Framers. *See* Blumoff, *supra* note 35, at 334-63. It may be that Blumoff is correct that Congress and the President should be able by mutual consent to permit certain constitutional provisions (such as the "statements and accounts," incompatibility, or origination clauses) to fall into desuetude or, as he puts it, "textual extinction." *Id.* at 316, 347-48. Arguably even this proposition is questionable. But surely agreement between the President and 34 senators should not be able to do so in such crucial areas of modern politics as entering (or breaking) treaties or making important appointments over the objection of many members of Congress. And surely the courts should not abdicate a role of ensuring constitutional fidelity in such a critical area as warmaking simply because a momentary majority in a time of apparent crisis may acquiesce in an unconstitutional process. Requiring that such a process change be made by constitutional amendment would hardly be "a steep price to pay" in this sort of case. *See id.* at 348.

182. *See Dellums*, 752 F. Supp. at 1152 n.27.

183. *Id.* at 1145 (emphasis added).

Similarly, in his discussion of ripeness, Judge Greene suggested that it would be problematic if the court issued the injunction requested by plaintiffs, and Congress subsequently determined that the President could constitutionally act without its consent or simply were "for whatever reason content to leave this diplomatically and politically delicate decision to the President."[184] But Congress cannot constitutionally leave this "delicate" decision over war and peace to the President, because to do so is to acquiesce in an unconstitutional act. Just as the courts have held that Congress and the President cannot agree to a legislative veto arrangement to overcome difficult tensions that stem from the rise of the modern administrative state,[185] they cannot agree to transform the War Powers Clause even though modern war-making has also changed. The Court has elsewhere made clear that the mere existence of a longstanding historical practice cannot override the Constitution's explicit commands.[186]

The problem with the ripeness approach is more apparent when we juxtapose the constitutional requirements that the *Goldwater* and *Dellums* plaintiffs claimed had been violated with the requirements Justice Powell and Judge Greene would impose before adjudicating congressional claims. Goldwater claimed, and the district court agreed, that the Constitution required the President to obtain the same approval of the Senate for abrogating as for entering into a treaty—a two-thirds vote (sixty-seven senators).[187] Under Goldwater's and the district court's interpretation, thirty-four senators opposed to termination would have been sufficient to block executive termination.[188] Nevertheless, Justice Powell's ripeness doctrine suggests that the court should not act until a Senate *majority* (fifty-one or more senators) confronts the President by enacting a resolution or taking some other formal action. Hence, under Justice Powell's formulation, thirty-four or even forty-nine senators would not have been sufficient to establish the requisite confrontation necessary for a ripe dispute to exist.[189]

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184. *Id.* at 1150.

185. *See* INS v. Chadha, 462 U.S. 919 (1983).

186. *See id.* at 942.

187. *See* Goldwater v. Carter, 481 F. Supp. 949, 965 (D.D.C.), *rev'd*, 617 F.2d 697 (D.C. Cir.), *vacated*, 444 U.S. 996 (1979).

188. Indeed, 34 senators, one-third of the Senate plus one, would be sufficient.

189. The Supreme Court could not, without addressing the merits of Senator Goldwater's claim, determine whether and how much less than a Senate majority would be sufficient to create a confrontation. It is possible, of course, that a court may employ this sort of "backwards" analysis of the merits to grant standing to a mere 34 supplicants. Powell's opinion, however, leaves

Similarly, Judge Greene required a congressional majority to assert its constitutional position before the court would intervene. Suppose, however, that while a majority of House members opposed the President's actions in the Persian Gulf, a Senate majority supported the President's view and was prepared to let him act without congressional interference. The Constitution clearly would proscribe unilateral executive action; but Judge Greene would not adjudicate Representative Dellums' suit. At a minimum, had Judge Greene realized the implications of his ripeness determination, he would surely have permitted a congressional lawsuit when a majority of *either* house asserted a position contrary to the President's. That he did not suggests that he failed to recognize the implications of the ripeness doctrine he invoked.

Moreover, if the ripeness doctrine is designed to ensure that the dispute between the branches is not hypothetical or abstract, then that requirement had already been satisfied in *Dellums*. There is no question that a "live" controversy existed in 1990 between Congress and the President concerning the appropriate constitutional procedures to be followed before a military attack against Iraq could be launched. Indeed, Secretary of State James Baker stated that "there is a genuine and substantial debate between the executive and legislative branches of this government" as to whether the Constitution requires prior congressional authorization of U.S. military actions in the Persian Gulf other than to protect U.S. citizens or respond to emergency situations.[190] That a disagreement existed was also clear from the state-

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unclear whether the requisite "confrontation" could be created by bringing a lawsuit. If a legislative confrontation were required, 34 senators could not create one by resolution (which requires a majority). Indeed, 34 senators might not even be able to force a vote on such a resolution to demonstrate their views. And it is unlikely that they would do so (even if they could), simply to create a record for a court that might be asked to rule on ripeness, especially since most courts dismiss such suits on other grounds.

190. Plaintiff's Memorandum in Support of Motion for a Preliminary Injunction at 14, Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990) (No. 90-2866) (quoting *Special White House Briefing with Secretary of State James A. Baker, III*, Federal News Service, Nov. 14, 1990, *available in* LEXIS, Nexis Library, FEDNEW File). Secretary Baker's statement was merely one of many made by the Bush Administration, asserting that the President and Congress have "a constitutionally different view . . . on the question of the [President's] authority to commit forces." *See, e.g., Hearings, supra* note 2, at 107 (statement of Secretary of State James Baker); *see also* Dan Balz, *Bush Asks Congress to Back Force Against Iraq*, WASH. POST, Jan. 9, 1991, at A16 (quoting Vice President Quayle who said, "Bush will feel free to use military force regardless of the congressional debate, unless Congress votes to cut off military funding."); John Elson, *Just Who Can Send Us to War?*, TIME, Dec. 17, 1990, at 33 (quoting Defense Secretary Dick Cheney who stated, "The President, as Commander-in-Chief . . . has the authority to commit U.S. forces" and does not "require any additional authorization from Congress."); Helen Thomas, *Bush Asks Congress to Authorize Use of Force Against Iraq*, UPI, Jan. 8, 1991, *available in* LEXIS, Nexis

ments of prominent congressional leaders in November and December of 1990.[191]

This disagreement was not of recent vintage. Seventeen years ago, in legislation enacted by the two-thirds majority needed to override a presidential veto, Congress expressed its strong position that

> [t]he constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, . . . [may be] exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.[192]

Congress thus asserted its powers vis-à-vis the President. Presidents have simply ignored that assertion. For seventeen years, presidents have flouted the provisions of the War Powers Resolution.[193] President Bush similarly chose to ignore the law. It would have been futile for Congress to restate the position it articulated in 1973 and in subsequent statements that the Constitution means what it says: That Congress must declare war.

One might argue that Justice Powell's approach will not result in reworking the Constitution because it merely bars the claims of congressional plaintiffs. Private plaintiffs will always be able to insist on constitutional fidelity. There are, however, major difficulties with sepa-

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Library, UPI File (reporting that "White House officials stressed . . . that Bush believes he has the power to commit troops to battle in the Persian Gulf under his authority as commander in chief").

191. *See* Adam Clymer, *Senate Prepares for a Gulf Debate Soon after Baker Meets with Aziz*, N.Y. TIMES, Jan. 5, 1991, at A4 (indicating that "[t]oday's Senate session began with a series of Democratic speeches contending that the Constitution required President Bush to obtain Congressional approval before any attack on Iraq" and also quoting Senator Tom Harkin of Iowa who stated, "Congress alone has the power to declare war'); John Elson, *Just Who Can Send Us to War?*, TIME, Dec. 17, 1990, at 33 (noting the House Democratic Caucus' approval by a vote of 117-37 of a non-binding resolution which states that unless American lives are in immediate danger, the President must obtain prior congressional approval to initiate offensive action); Donald Lambro, *Gephardt Poses Gulf Resolution from Democrats*, WASH. TIMES, Dec. 20, 1990, at A3 (quoting House Majority Leader Richard Gephardt who stated that if the President goes to war without congressional approval, "then I think we could be in a constitutional crisis"); Ruth Marcus, *Congress and President Clash Over Who Decides on Going to War*, WASH. POST, Dec. 14, 1990, at A46 (quoting Defense Secretary Dick Cheney, who said the President needs no "additional authorization" from Congress, and also quoting Senate Majority Leader George Mitchell who held the "firm view . . . that the president has no legal authority, none whatsoever, to commit American troops . . . without congressional authorization.").

192. 50 U.S.C. § 1541(c) (1988).

193. John H. Ely, *Suppose Congress Wanted a War Powers Act that Worked*, 88 COLUM. L. REV. 1379, 1379-81 (1988).

rating private and congressional claims in this way. First, the concerns of Justice Powell and Judge Greene are not really about who can sue, but when and under what circumstances the courts should hear these claims. Second, the courts have simply deployed other doctrines to bar similar suits by private plaintiffs. For example, five years after *Goldwater v. Carter*, a district court dismissed on political question grounds the *Goldwater*-like claim of several private businessmen that President Reagan's unilateral termination of the U.S.-Nicaraguan Treaty of Friendship, Commerce and Navigation required Senate ratification.[194] The district court held their claim to be squarely governed by *Goldwater v. Carter* despite the difference in the plaintiffs' status.[195] Similarly Judge Greene's colleague, Judge Lamberth, dismissed a serviceman's challenge to President Bush's Persian Gulf actions on political question grounds, holding that "[i]nterjecting the court into this political process will only exacerbate the problems facing this nation."[196] And third, in many cases there will be no private plaintiffs sufficiently injured to assert standing.[197]

The real concern expressed by the courts in connection with each of the doctrines deployed to avoid the adjudication of congressional lawsuits is the courts' role in our democratic society. The courts are re-evaluating, and largely restricting, their roles in this area by barring both congressional and private plaintiffs by using doctrines as standing, equitable discretion, political question, ripeness, and private right of action. The next section examines this re-evaluation.

IV. DEMOCRACY, SEPARATION OF POWER AND THE ROLE OF THE COURTS

As the foregoing discussion demonstrated, the courts have struggled mightily over the appropriate stance toward congressional plaintiffs, but have largely refused to rule on the merits of the claims. They have erred in rejecting this particular class of cases. The courts should entertain congressional plaintiffs who challenge improper arrogation or

194. Beacon Products Corp. v. Reagan, 633 F. Supp. 1191 (D. Mass. 1986), *aff'd on other grounds*, 814 F.2d 1 (1st Cir. 1987). The plurality in *Goldwater*, on the other hand, had distinguished a case involving private parties from the *Goldwater* case. *See* Goldwater v. Carter, 444 U.S. 996, 1002 (1979) (Rehnquist, J., concurring).

195. *Beacon Products*, 633 F. Supp. at 1198-99.

196. Ange v. Bush, 752 F. Supp. 509, 518 (D.D.C. 1990).

197. In the case of war declarations, many potential private plaintiffs may not be sufficiently injured or aware of their injuries until it is, for all practical purposes, too late for a judicial ruling to be meaningful.

delegation of powers constitutionally belonging to one branch when those powers have been structured to operate as a check on the other branches. Courts should cease deploying doctrinal barriers (whether subsumed within standing, equitable discretion or ripeness analysis) out of misplaced fears about undermining separation of powers, and should instead decide the merits of such cases. While relatively few in number, these cases are critically important to maintaining the balance of powers properly in the modern world.

The courts are abdicating an important responsibility to maintain the proper balance between the branches. In this part, the reasons offered by the courts are criticized. Then, the ways in which the judicial role can be confined within appropriate boundaries by setting principled limits on the type and number of so-called "vindication-of-constitutional-powers"[198] suits courts ought to entertain are outlined. These limits are more fully articulated in Part V.

A. Judicial Abstention and the Rise of Presidential Power

The arguments against hearing cases by congressional plaintiffs generally focus on concerns about maintaining the separation of powers between the branches and suggest that entertaining such suits will enlarge the judiciary's power at the expense of the other branches. Urged most strenuously by Justice Scalia and former Judge Bork, this position confines the judiciary to the place envisioned by the Framers in 1787, and ignores the vast changes that have taken place in all three branches in the post-industrial world. Entertaining such suits, writes Bork, will work "a major shift in basic constitutional arrangements," one "flatly inconsistent with the judicial function designed by the Framers of the Constitution."[199] Decrying the enlarged role already played by the judiciary as undemocratic, and insisting that congressional suits will contribute enormously and without principled limit to judicial power, Scalia and Bork view the doctrine of standing as properly embodying their concerns and appropriately barring congressional lawsuits.[200]

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198. Barnes v. Kline, 759 F.2d 21, 44 (D.C. Cir. 1985) (Bork, J., dissenting), *vacated as moot sub nom.* Burke v. Barnes, 479 U.S. 361 (1987).

199. *Id.* at 42.

200. Both judges would probably entertain suits by individual members of Congress asserting private harm, such as Representative Powell when deprived of his House seat, or Senator Buckley, who challenged election regulations that allegedly impeded his reelection. *See* Powell v. McCormick, 395 U.S. 486 (1969); Buckley v. Valeo, 424 U.S. 1 (1976).

The specter of an uncontrolled and all-powerful judiciary entirely fails to recognize the possibility that judicial growth may have occurred precisely to balance the even greater growth of power in the other branches. Not surprisingly, given the sixty-four fold growth in the country's population and the enormous changes wrought by the industrial, transportation and communications revolutions,[201] the size and power of the executive and legislative branches have grown beyond anything that the Framers contemplated.[202] The federal government, which in 1790 boasted only a few thousand employees, now employs nearly three million persons. Its budget has grown from roughly four million to nearly one trillion dollars.[203]

Moreover, the numerous factors contributing to that growth have, especially in recent years, enlarged the power of the executive branch. The United States' influence in foreign affairs has increased dramatically since World War II, and the President has been its key spokesperson.[204] Although the growth of federal power has expanded the scope of all three branches, the largest part has fallen to the executive.[205] Increasingly, Congress has delegated to the executive branch numerous tasks either supposedly too complex to be handled legislatively or too controversial for members who are subject to attack by well-funded po-

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Both judges focus their ire on what they consider to be judicial activism in the expansion of jurisdiction, the substance of decisions and the nature of relief. *See, e.g.*, Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983) (decrying expansive interpretation of standing); *see also* Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 292 (1990) (Scalia, J., concurring); Webster v. Reproductive Health Servs., 492 U.S. 490, 532 (1989) (Scalia, J., concurring); Dronenburg v. Zech, 746 F.2d 1579, 1582 (D.C. Cir. 1984) (statement by Bork, J., accompanying court order); Vander Jagt v. O'Neill, 699 F.2d 1166, 1177 (D.C. Cir.) (Bork, J., concurring), *cert. denied*, 464 U.S. 823 (1983).

Although he apparently prefers to dismiss complaints as non-justiciable political questions, Justice Rehnquist appears to share the Bork/Scalia approach to standing. *See* Pressler v. Blumenthal, 434 U.S. 1028 (1978) (Rehnquist, J., concurring).

201. Since 1790, the geographical area of the United States has quadrupled and its population has grown more than 60-fold, from under four million to about a quarter billion. Enormous changes have taken place in the role of government, as well as the activities of Unites States' citizens. *See* Church, *supra* note 37, at 1075.

202. *Id.* Judge Bork acknowledges Congress' growth when he argues that modern presidents need free reign in foreign affairs because Congress has grown too unwieldy to take "swift, decisive and flexible action." *See* Robert H. Bork, *Forward* to THE FETTERED PRESIDENCY at x (L. Gordon Crovitz & Jeremy A. Rabkin eds., 1989) [hereinafter Bork, *Forward*].

203. Church, *supra* note 37, at 1075.

204. *See* ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY (1973); Koh, *supra* note 37, at 1292-97.

205. Koh, *supra* note 37, at 1292-97.

litical action committees and the vagaries of a fickle electorate.[206] Although Congress has frequently incorporated in its legislative delegations devices such as reporting requirements and legislative vetoes intended to limit and control executive power, the courts have routinely ignored these devises or have declared them unconstitutional.[207] As former Justice Abe Fortas observed in 1974,

> [t]he controls that the Founding Fathers adopted are no longer adequate. The balance that the Founding Fathers ingeniously devised no longer exists. It has been destroyed by the complexities of modern life, the vast expansion of governmental function, the decline of Congress due to the growth in the number of its members and, principally, to its failure effectively to reorganize its management and procedures, and by the enormous increase in presidential power and prestige.[208]

Many congressional lawsuits seek to contain this enhancement of executive power in areas arguably allocated elsewhere by the Constitution.[209] The courts are particularly needed to restore the balance of

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206. *See generally* Church, *supra* note 37. For an alternative view, see Bork, *Forward*, *supra* note 202.

207. *See* INS v. Chadha, 462 U.S. 919 (1983); Koh, *supra* note 37, at 1300-04.

208. Abe Fortas, *The Constitution and the Presidency*, 49 WASH. L. REV. 987, 1003 (1974).

209. Nine suits involve challenges to claimed presidential exercise of war powers without congressional authorization. *See* cases cited *supra* note 6. Three involve alleged failure to obtain congressional approval regarding treaty making or breaking and the disposal of government property. *See* Goldwater v. Carter, 444 U.S. 996 (1979); Edwards v. Carter, 580 F.2d 1055 (D.C. Cir.), *cert. denied*, 436 U.S. 907 (1978); Public Citizen v. Sampson, 379 F. Supp. 662 (D.D.C. 1974), *aff'd*, 515 F.2d 1018 (1975). Two involve allegedly improper pocket vetoes. *See* Barnes v. Kline, 759 F.2d 21 (D.C. Cir. 1985), *vacated as moot sub nom.* Burke v. Barnes, 479 U.S. 361 (1987); Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974). Three involve allegedly unauthorized national security expenditures and activities or failure to provide information concerning them. *See* EPA v. Mink, 410 U.S. 73 (1973), *superseded by statute as stated in* NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 226 (1978); United Presbyterian Church v. Reagan, 738 F.2d 1735 (D.C. Cir. 1984); Harrington v. Bush, 553 F.2d 190 (D.C. Cir. 1977). Three challenge the failure to obtain congressional approval for appointments and firings. *See* American Fed'n of Gov't Employees v. Pierce, 697 F.2d 303 (D.C. Cir. 1982) (per curiam); Nader v. Bork, 366 F. Supp. 104 (D.D.C. 1973); Williams v. Phillips, 360 F. Supp. 1363 (D.D.C. 1973). And others challenge executive impoundment of allegedly appropriated funds, executive pardons of war deserters, and the executive's claimed failure to properly carry out congressional directives. *See* Chiles v. Thornburgh, 865 F.2d 1197 (11th Cir. 1989); Daughtry v. Carter, 584 F.2d 1050 (D.C. Cir. 1978); Burton v. Baker, 723 F. Supp. 1550 (D.D.C. 1989); Helms v. Secretary of the Treasury, 721 F. Supp. 1354 (D.D.C. 1989); Brown v. Ruckelshaus, 364 F. Supp. 258 (C.D. Cal. 1973).

Still others involve challenges to legislative grants to the executive of powers that are allegedly required to be exercised by Congress: Humphrey v. Baker, 848 F.2d 211 (D.C. Cir. 1988) (salary acts); Melcher v. Federal Open Mkt. Comm., 836 F.2d 561 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1042 (1988) (composition of the Federal Open Market Committee); Riegle v. Federal Open Mkt. Comm., 656 F.2d 873 (D.C. Cir.), *cert. denied*, 439 U.S. 997 (1978); Reuss v. Balles,

power. Yet against the suggestion that it is the executive, in the modern era, that has dangerously enlarged its powers beyond those contemplated by the Framers, Judge Bork and Justice Scalia have insistently invoked the danger to democracy emanating not from dictatorial presidents, but from dictatorial courts and a meddling Congress.[210]

A clear connection thus exists between Bork's and Scalia's views on the procedural propriety of adjudicating congressional lawsuits and their substantive views of the modern presidency. Both Bork and Scalia support a strong president free from congressional interference.[211] To the extent that their positions about the role of the courts in ensuring the proper functioning of constitutional processes rest on this substantive premise, adoption of a different substantive view would suggest a different posture concerning congressional plaintiff standing. If one believes that Congress, not the executive, needs the special solicitousness of the courts to redress the skewed balance of powers that has emerged in late twentieth century America, one would then be led to look favorably upon certain types of congressional claims. This, of course, Judge Bork and Justice Scalia would deny on the basis that it is not simply solicitousness for presidential power that drives their analysis of congressional standing but other concerns as well. The first of these is a claimed inherent difference in the nature of judicial, legislative and executive functions.

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584 F.2d 461 (D.C. Cir), *cert. denied*, 439 U.S. 997 (1978); Pressler v. Simon, 428 F. Supp. 302 (D.D.C. 1976), *vacated on other grounds sub nom.* Pressler v. Blumenthal, 431 U.S. 169 (1977), *and aff'd by subsequent order*, 434 U.S. 1028 (1978).

Only a few are unrelated to executive arrogation of power. *See* Dornan v. United States Secretary of Defense, 851 F.2d 450 (D.C. Cir. 1988) (stating that Boland Amendment arrogates executive powers over foreign affairs); Gregg v. Barrett, 771 F.2d 539 (D.C. Cir. 1985) (inaccuracy of *Congressional Record*); Southern Christian Leadership Conference v. Kelley, 747 F.2d 777 (D.C. Cir. 1984) (court sealing of records); Moore v. United States House of Representatives, 733 F.2d 946 (D.C. Cir.), *cert. denied*, 464 U.S. 823 (1983) (origination of tax bill); Vander Jagt v. O'Neill, 694 F.2d 1166 (D.C. Cir.), *cert. denied*, 464 U.S. 823 (1983) (House committee assignments); Metzenbaum v. Federal Energy Regulatory Comm'n, 675 F.2d 1282 (D.C. Cir. 1982) (House rules regarding pipeline waivers).

210. *See* Barnes v. Kline, 759 F.2d 21 (D.C. Cir. 1985) (Bork, J., dissenting), *vacated as moot sub nom.* Burke v. Barnes, 479 U.S. 361 (1987); Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985); Vander Jagt v. O'Neill, 699 F.2d 1116 (D.C. Cir.), *cert. denied*, 464 U.S. 823 (1983). Judge Bork asserts that the presidency has been weakened "significantly" by Congress, which is "worrisome" because "America has usually prospered most in eras of strong presidents, and the state of today's world makes the capacity for strong executive action more important than ever." Bork, *Forward*, *supra* note 202, at ix.

211. *See* Morrison v. Olson, 487 U.S. 654, 697-734 (1988) (Scalia, J., dissenting); Ramirez de Arellano v. Weinberger, 724 F.2d 143, 147 (D.C. Cir. 1983), *rev'd en banc*, 745 F.2d 1500 (D.C. Cir. 1984); Bork, *Forward*, *supra* note 202.

B. Doctrinal Formalism and the Public/Private Distinction

To contain the claimed danger of judicial dictatorship, Justice Scalia, in particular, has deployed a doctrinal formalism that posits clear boundaries demarking judicial, legislative and executive powers.[212] Judicial power, in his view, exists "solely to decide on the rights of individuals,"[213] and any other use works an improper enhancement of that power. It is never appropriate for the judiciary to "umpire disputes between [the] branches regarding their respective powers" unless private rights are harmed, lest "the system of checks and balances [be] replaced by a system of judicial refereeship."[214]

Legislative power exists solely to make laws, not to supervise their administration, nor to exercise any other powers, such as prosecutorial powers, which are "quintessentially" executive.[215] Yet when it comes to powers exercised by the executive to which the Constitution accords the legislature a clear and critical if not dominant role, such as the power to initiate hostilities or make treaties,[216] boundary formalism is inexplicably relaxed. Bork and Scalia have typically either argued an expansive interpretation of executive power, or upheld the executive usurpation of Congress' role by raising jurisdictional barriers to court challenges.[217]

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212. *See, e.g.*, Morrison v. Olsen, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) (arguing that prosecutorial powers are "purely" executive, and that there are other "purely" judicial and legislative powers that have not been and cannot be exercised by other branches). Justice Scalia asserts this view despite the increasing rule-making authority accorded to executive agencies, and the increasingly "judicial" authority exercised by special masters and administrative law judges.

213. Moore v. United States House of Representatives, 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia, J., concurring) (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803)), *cert. denied*, 469 U.S. 1106 (1985). Tellingly, Justice Scalia neither cites nor discusses cases involving organizational and representational standing in other arenas. While a case can certainly be made that political representation differs in important respects from other representative activities, Justice Scalia makes no attempt to make such a case.

214. *Moore*, 733 F.2d at 959 (Scalia, J., concurring).

215. *Morrison*, 487 U.S. at 706 (Scalia, J., dissenting); *see also* Bork, *Forward*, *supra* note 202, at xiii ("Each branch is designed for unique functions."); James G. Wilson, *Constraints of Power: The Constitutional Opinions of Judges Scalia, Bork, Posner, Easterbrook and Winter*, 40 U. MIAMI L. REV. 1171, 1199-1203 (1986).

216. *See* Koh, *supra* note 37, at 1621-23.

217. *See, e.g.*, George H. Aldrich et al., *Comments on the Articles on the Legality of the United States Action in Cambodia*, 65 AM. J. INT'L L. 76, 79-81 (1971) (Professor Bork's comments); Robert H. Bork, *Erosion of the President's Power in Foreign Affairs*, 68 WASH. U. L.Q. 693, 695-705 (1990). Thus, in war powers challenges, they have either concluded that the plaintiffs lack standing or that the issue is a non-justiciable political question. *See* Sanchez-Espinoza v. Reagan, 770 F.2d 202, 210 (D.C. Cir. 1985); Crockett v. Reagan, 720 F.2d 1355, 1356-57 (D.C. Cir. 1983) (per curiam) (Bork, J., concurring), *cert. denied*, 467 U.S. 1251 (1984). Indeed, de-

Justice Frankfurter was the first, of course, to deploy a formalist conception as to the inherent nature of judicial activity to explain why legislative plaintiffs should be denied standing.[218] His repeated reference to "the requisites of litigation," the "litigious process," "actual controversies" and "litigious business" did little to elucidate why legislators' complaints about a specific allegedly illegal act that had nullified their votes was not an "actual" controversy amenable to the "litigious process."[219] Justice Frankfurter fell back on the notion later relied on by Justice Scalia that legislators had no "private" interest in their votes; they were merely representing a public interest which each individual citizen possessed in some degree.[220] That their votes as representatives had been undermined did not make the harm "private" in the same way that denial of an individual's vote was.[221] Frankfurter, like Bork and Scalia, viewed litigation as private and individual, as contrasted with more public and political concerns that belonged in the

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spite his vehement attack on the equitable discretion as affording no guidance and hence unbounded power to the judiciary, Justice Scalia has at least once relied on discretion to decline ruling on the claims of private plaintiffs. *See Sanchez-Espinoza*, 770 F.2d at 208.

218. *See* Coleman v. Miller, 307 U.S. 433 (1939) (Frankfurter, J., concurring).

219. *See id.* at 462 n.4 (Frankfurter, J., concurring).

220. *See id.* at 467 (Frankfurter, J., concurring). Moore v. United States House of Representatives, 733 F.2d 946, 958 (D.C. Cir. 1984) (Scalia, J., concurring), *cert. denied*, 469 U.S. 1106 (1985). Yet why should claims in which we all share harm be political and not for courts, while if harm is more particular to one of us, courts can hear the claim? It was not, of course, true, as Judge Bork implies in Barnes v. Kline, 759 F.2d 21, 52-53 n.9 (D.C. Cir. 1985) (Bork, J., dissenting), *vacated as moot sub nom.* Burke v. Barnes, 479 U.S. 361 (1987), that claims of psychological injury were justiciable during the Framers' time. Our understanding of injury has changed significantly since that era. We thus might as easily include injury to the legislative role as to individual psychological well-being. Indeed, during the Framers' time, women could not assert injury in the deprivation of their children, which were the property of husbands, not mothers. But the independent role and interest of a mother in her children have since been recognized. *See* Martha Minow, *"Forming Underneath Everything that Grows:" Toward a History of Family Law*, 1985 WIS. L. REV. 819, 827-34; Lee E. Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135, 1142. Legislators do not assert mere dissatisfaction at the unconstitutional workings of government when they claim injury to their ability to carry out their constitutionally ordained *job duties*, any more than an organizational plaintiff is expressing mere dissatisfaction with destruction of the environment. *See, e.g.*, United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973).

221. *Coleman*, 307 U.S. at 460-70 (Frankfurter, J., concurring). Justice Frankfurter ran into trouble distinguishing several cases that held that a deprivation of an individual's right to vote constituted a harm for standing purposes. *See id.* at 464 (Frankfurter, J., concurring). Democratic theory posits the individual vote as a public (if not always disinterested) act. It is an act that is essential to the well-being of democracy as a whole, and not necessarily to the individual. The harm of vote denial is a public harm, regardless of whether the votes nullified are those of individuals or legislators. Only by treating an individual's vote as primarily a private, self-interested act can the distinction be maintained.

political arena,[222] and he believed that a clear line could be drawn between public and private.[223]

In seeking to limit "litigious business" to private-type litigation, Frankfurter ignored, as have Bork and Scalia, the vast changes that have taken place in the modern industrial state and in the litigation it produces.[224] That litigation frequently involves extremely "public" and political issues, brought sometimes by private individuals to vindicate traditional "legal interests," but other times brought by organizational, representative, and governmental plaintiffs to delineate or vindicate highly public, governmentally conferred rights and benefits. Often "private" plaintiffs, although harmed, act not primarily to protect traditional legal interests but to vindicate political positions.[225] Frankfurter's references concerning the inherently private nature of litigation could not adequately explain why such cases met "the requisites of litigation," but *Coleman* did not, merely because the plaintiffs were legislators.[226]

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222. *See id.* at 470 (Frankfurter, J., concurring). As the majority in *Moore* was quick to point out concerning Judge Scalia's similar reasoning, this argument treats the standing issue in political question terms. *See* Moore v. United States House of Representatives, 733 F.2d 946, 953 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985). It should equally to apply to private litigants raising "public" concerns, even those that can allege private harm sufficient to confer standing. *Id.*

223. Alan Freeman & Elizabeth Mensch, *The Public-Private Distinction in American Law and Life*, 36 BUFF. L. REV. 237 (1988); *see also* sources cited *supra* note 45.

224. *See* Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1435-51 (1988).

225. *See, e.g.*, Consolidated Edison Co., Inc. v. Public Serv. Comm'n, 447 U.S. 530 (1980) (asserting First Amendment right to promote position on nuclear power); First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978) (challenging government limits on corporate expenditures used to influence votes on issues not directly affecting the corporation).

Indeed, since Justice Frankfurter's time, Congress has explicitly conferred on private plaintiffs the right to sue irrespective of their standing in traditional terms—to act as private "attorneys general"—to further the public interest. *See, e.g.*, Administrative Procedure Act of 1947, 5 U.S.C. § 702 (1988) (granting the right to sue if "adversely affected or aggrieved by agency action"); Fair Housing Act, 42 U.S.C. §§ 3601-3617 (1988) (extending the right to sue for one "who claims to have been injured by a discriminatory housing practice"); Federal Communications Act, 47 U.S.C. § 402(b)(6) (1988) (granting judicial review for one "aggrieved or whose interests are adversely affected"); *see also* Sunstein, *supra* note 224.

226. Presumably, any private person whose business or whose religious practices were impacted by the child labor amendment at issue in Coleman v. Miller, 307 U.S. 433 (1939), would have had standing to contest the allegedly illegal ratification challenged by the legislative plaintiffs. Justice Frankfurter never explained why in such circumstances the matter whose analysis would require the same abstract evaluation of legal and constitutional requirements and would relate not at all to particular facts concerning plaintiff's business or religion should be viewed as more inherently "litigious" in nature. For cases involving child labor as a religious practice, see McLaughlin v. McGee Bros., 681 F. Supp. 1117 (W.D.N.C. 1988); Shiloh True Light Church of

Despite the illogic in many instances of the public/private distinction, it is one that runs deep in American jurisprudence. Its use in analyzing standing extends well beyond cases involving congressional plaintiffs. Indeed, Judge Scalia invariably dismissed private claims challenging U.S. foreign policy because of his asserted reluctance to permit courts to adjudicate these "public policy" issues, irrespective of who brought the lawsuit.[227] An influential opinion by Justice Powell, repeatedly cited by Judge Bork, expresses this hostility both to public interest litigation brought by private citizens and to congressional standing:

> [W]e risk a progressive impairment of the effectiveness of the federal courts if their limited resources are diverted increasingly from their historic role to the resolution of public-interest suits brought by litigants who cannot distinguish themselves from all taxpayers or all citizens. The irreplaceable value of the power articulated by Mr. Chief Justice Marshall lies in the protection it has afforded the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action. It is this role, not some amorphous general supervision of the operations of the government, that has maintained public esteem for the federal courts and has permitted the peaceful coexistence of the countermajoritarian implications of the judicial review and the democratic principles upon which our Federal Government in the final analysis rests.[228]

The Court has thus refused to adjudicate broad challenges to law enforcement practices,[229] an Internal Revenue Service policy that allegedly encouraged racial discrimination,[230] and executive branch disposition of property to a religious group,[231] because hearing these cases would turn the courts into "continuing monitors of the wisdom and

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Christ v. Brock, 670 F. Supp. 158 (W.D.N.C. 1987).

227. Justice Scalia has deployed a remarkable array of doctrines (such as private cause of action, discretionary nature of relief, political question) to foreclose private plaintiffs from interjecting the courts into "sensitive," "foreign affairs matter[s]." *See, e.g.*, Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985). Justice Rehnquist has for the most part similarly declined to hear cases involving challenges to U.S. foreign policy, but has done so primarily on political question grounds. *See, e.g.*, Goldwater v. Carter, 444 U.S. 996, 1002 (1979) (Rehnquist, J., concurring).

228. United States v. Richardson, 418 U.S. 166, 192 (1974) (Powell, J., concurring).

229. *See* O'Shea v. Littleton, 414 U.S. 488 (1974).

230. *See* Allen v. Wright, 468 U.S. 737 (1984).

231. *See* Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982).

soundness of Executive action,"[232] and turn them away from their appropriate roles as arbiters and protectors of private rights.[233]

Indeed, Dean Jesse Choper has taken Bork and Scalia's argument to its logical conclusion. He argues that the federal judiciary should never "decide constitutional questions concerning the respective powers of Congress and the President vis-à-vis one another," even when those constitutional questions are raised by individuals who suffer "cognizable and immediate injury."[234] For Choper, these issues are nonjusticiable, "their final resolution to be remitted to the interplay of the national political process."[235]

This attempted distinction between public and private lawsuits, a boundary formalism based on the "inherent" nature of the functions of each branch, fails to recognize that the court's crucial role in maintaining separation of powers cannot be so neatly categorized. It is no less an "inherently" judicial function for the court to interpret the Constitution to determine whether the President can send young Americans to fight and possibly die in the Persian Gulf than it is for the courts to interpret a statute or the Constitution to determine whether the executive branch has exceeded its authority in interfering with someone's

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232. *Allen*, 468 U.S. at 760 (1984) (quoting Laird v. Tatum, 408 U.S. 1, 15 (1972)).

233. At least one commentator has ascribed the importation of separations of powers concerns into standing analysis to Justice O'Connor's majority opinion in *Allen v. Wright*. Those concerns are evident in Frankfurter's concurrence in Coleman v. Miller, 307 U.S. 433, 460 (1939) (Frankfurter, J., concurring). *See* Gene R. Nichol, Jr., *Abusing Standing: A Comment on* Allen v. Wright, 133 U. PA. L. REV. 635 (1985).

234. JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 263 (1980).

235. *Id.* It is questionable whether the courts could long retain authority and respect if they continually refused to adjudicate disputes that implicate the relative powers of Congress and the President. Numerous cases involving important property and human rights turn, for example, on the constitutional validity of actions taken by the executive branch that allegedly violates congressional power or statutory dictates, and visa versa. *See, e.g.*, Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221 (1986) (involving the President's alleged failure to enforce wildlife protection laws); INS v. Chadha, 462 U.S. 919 (1983) (involving the right to an extended immigration visa); Dames & Moore v. Regan, 453 U.S. 654 (1981) (involving Iranian hostage agreement and U.S. property claims); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (involving the President's seizure of privately owned steel plants).

Moreover, when the courts refuse to decide such disputes, that refusal increases the friction between the branches, and undermines the branches' ability to carry out their government responsibilities. For example, were the courts to refuse to determine the validity of presidential pocket vetoes, they would have forced Congress to spend time and energy to repass arguably valid legislation, at the expense of other matters that desperately require attention. When the courts refuse to enforce the War Powers Resolution, they similarly condemn Congress to endlessly replay the political process. Ultimately, such refusal forces Congress to use disruptive techniques such as delaying appointments, treaties and trade agreements to control the President and policy.

property. While one issue pertains to broad national policy and the other may or may not impact that policy, the function of the courts remains the same: to interpret legal requirements and ensure conformity with the law.[236] It is precisely the courts' role to ensure that national policy is made in conformity with the processes set forth in the Constitution, just as it is precisely its role to assure that the government acts vis-à-vis its citizens in conformity with those processes. The courts need not turn themselves into "continuous monitors of the wisdom and soundness of Executive action."[237] They need merely to act in their traditional role as umpires of disputes; ensuring that, irrespective of the wisdom of her policy, the President does not overstep constitutional boundaries.[238] Congressional lawsuits can be one important mechanism to achieve that end.

C. Congressional Plaintiffs and the Slippery Slope

Former Judge Bork invokes the slippery slope when he argues that granting jurisdiction over congressional claims will enormously enhance judicial power. The logic of entertaining congressional plaintiffs, he insists, requires opening courthouses without principled limit to all other governmental plaintiffs.[239] Because standing addresses the "interests that courts are willing to protect,"[240] if those interests include what he

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236. Indeed, many cases claiming violation of "private" rights have enormous public impact. For example, the much debated and carefully crafted compromise bill to "automatically" reduce the budget deficit was ruled unconstitutional in the context of a "private" claim by the National Treasury Employees Union concerning wage increases its members would have lost under the statute. While Representative Synar and 11 other members also sued, the Supreme Court treated the claims together and ignored issues of congressional standing because "private" claimants were present. *See* Bowsher v. Synar, 478 U.S. 714 (1986). For other cases in which the resolution of individual "private" claims have had significant public impact, see Dames & Moore v. Regan, 453 U.S. 654 (1981); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

237. *See* Allen v. Wright, 468 U.S. 737, 760 (1984) (quoting Laird v. Tatum, 408 U.S. 1, 15 (1972)).

238. Sometimes, especially in the foreign policy arena, the umpire role can be touchy and difficult, and can result in momentous decisions. This is also true, however, with private litigation in the modern world. When the Supreme Court refused to allow President Truman to seize the steel mills in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), and when the court rendered uncertain and potentially invalid some 200 statutes containing legislative vetoes in INS v. Chadha, 462 U.S. 919 (1983), and when the court invalidated the entire structure Congress had established to contain the budget deficit in Bowsher v. Synar, 478 U.S. 714 (1986), its decisions were surely as momentous as the decisions required by challenges to the pocket veto or to the President's treaty-breaking authority.

239. Barnes v. Kline, 759 F.2d 21, 45-47 (D.C. Cir. 1985) (Bork, J., dissenting), *vacated as moot sub nom.* Burke v. Barnes, 479 U.S. 361 (1987).

240. *Id.* at 44 (Bork, J., dissenting).

terms "vindication-of-constitutional-powers,"[241] then standing must be granted to all other bodies that have been accorded constitutional powers. Members of the executive and judicial branches, as well as the states and their officials, would have the right to be heard, causing an enhancement of the power of the "unrepresentative" judiciary.[242]

Parading "horribles," Judge Bork imagines legislators in droves abandoning "oversight hearings, budget restrictions, political struggle, appeals to the electorate and the like"[243] in favor of a trek down the street to the courthouse.[244] But his specific examples are weak. He suggests that legislators might immediately have brought the famous 1929 pocket veto challenge without awaiting a private plaintiff claiming money damages, hardly a "revolutionary" expansion of court jurisdiction or a disastrous result. And he decries the possibility that members of Congress might have standing to challenge presidential troop commitments as violative of the War Powers Resolution. Again this is a result neither shocking nor revolutionary, particularly in the light of the repeated and unsuccessful efforts to use political methods to constrain presidential war-making, and the judiciary's role in weakening those attempts at political control by its invalidation of the legislative veto.[245] Bork inveighs against the possibility that the legislative veto would have been challenged immediately upon its first inclusion in leg-

241. *Id.*

242. *Id.* at 43-47 (Bork, J., dissenting). Indeed, almost as an afterthought, Judge Bork suggests that "one would think" that interests created by legislation or regulations, not merely constitutional ones, could confer standing as well. *Id.*

243. *Id.* at 44 (Bork, J., dissenting). It is probably not accidental that Bork, a conservative, decried the potential failure of Congress to act because "historically they always have." *Id.*

244. In fact, most congressional lawsuits followed use of some or all of these procedures and tactics. In some cases, such as the war powers cases, members of Congress believed they had already availed themselves of political remedies by passing the War Powers Resolution. *See, e.g.*, Crockett v. Reagan, 702 F.2d 1355 (D.C. Cir. 1983) (per curiam), *cert. denied*, 467 U.S. 1251 (1984); Lowry v. Reagan, 676 F. Supp. 333 (D.D.C. 1987). Only as a last resort have congressional plaintiffs marched to the courts to enforce the Constitution. *See, e.g.*, Goldwater v. Carter, 444 U.S. 996 (1979) (petitioning the Court after resolution was introduced); Harrington v. Bush, 553 F.2d 190 (D.C. Cir. 1977) (petitioning the court after 23 resolutions were introduced); Dellums v. Bush, 752 F.2d Supp. 1141 (D.D.C. 1990) (petitioning the court after congressional hearings were held and after 110 House members wrote the President expressing their concern about the failure to obtain congressional approval).

245. *See* INS v. Chadha, 462 U.S. 919 (1983). Most challenges under the War Powers Resolution have boasted private plaintiffs who were accorded standing without revolutionary result, although their claims were ultimately dismissed under the political question doctrine. While several of these political question dismissals were arguably incorrect, it would not enlarge judicial jurisdiction to perform the political question analysis in relation to legislative rather than private plaintiffs.

islation, a result that might have *reduced* the opportunity for judicial intervention (and would certainly have reduced confusion) by nipping in the bud the use of legislative vetoes and preventing their subsequent inclusion in over 200 bills, all subject to challenge following *INS v. Chadha*.[246]

Former Judge Bork argues that no such terrible result will follow if standing doctrine is properly understood. Bork first understood that doctrine to limit congressional lawsuits to those asserting exactly the sort of vote nullification injury as was challenged in *Kennedy v. Sampson*.[247] But he quickly came to view *Kennedy* as incorrectly decided, believing instead that standing should never be granted to members of Congress suing as such.[248] Frequently quoting Justice Powell for the proposition that the standing inquiry is "founded in concern about the proper—and properly limited—role of the courts in a democratic society,"[249] he has insisted that permitting congressional lawsuits will uncontrollably expand judicial power. To accord standing to members of Congress inevitably and improperly "enhances the power and prestige of the federal judiciary at the expense of [the presidency, Congress, and the states]."[250]

Bork's claim, while typical of the slippery slope argument, like most such arguments, begs the question. No flood of litigation followed *Coleman v. Miller*,[251] despite Justice Frankfurter's similarly expressed fear that affording standing to Kansas legislators would lead to "courts sit[ting] in judgment on the manifold disputes engendered by procedures for voting in legislative assemblies."[252] Moreover, courts, judges and lawyers are in the business of drawing distinctions and establishing boundaries. Principled distinctions can be made between various types of claims by public actors, ones which will properly limit such claims.

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246. *See id.* at 967. *Chadha* bordered on exactly the sort of collusive situation that the "Case or Controversy" requirement was supposed to preclude. Both Chadha and the INS sought the same result: elimination of the legislative veto. And the case was arguably moot by the time it reached the Supreme Court; Chadha had married an American citizen, and thus became entitled to citizenship irrespective of any "veto" Congress might have exercised. *Id.* at 937.

247. 511 F.2d 430 (D.C. Cir. 1974).

248. *See* Vander Jagt v. O'Neill, 699 F.2d 1166, 1177 (D.C. Cir.) (Bork, J., concurring), *cert. denied*, 464 U.S. 823 (1983).

249. *See* Barnes v. Kline, 759 F.2d 21, 43 (D.C. Cir. 1985) (Bork, J., dissenting) (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)), *vacated as moot sub nom.* Burke v. Barnes, 479 U.S. 361 (1987).

250. *Id.* at 42 (Bork, J., dissenting).

251. 307 U.S. 433 (1939).

252. *Id.* at 470 (Frankfurter, J., concurring).

One method of distinguishing claims, though surely not the only one, is suggested in Part V.

D. Separation of Powers Review and the Court's Legitimacy

Underlying the arguments of Powell, Scalia, Bork and others on congressional standing is the view that the federal judiciary's legitimacy is undermined when it interferes too extensively or hastily in the political process. As Judge Bork argued in his *Barnes v. Kline* dissent, "The legitimacy and thus the priceless safeguards of the American tradition of judicial review may decline precipitously if such innovations are allowed to take hold."[253] In this respect, the countermajoritarian dilemma that led Judge Bork to his personally disastrous theory of original intention,[254] Justice Scalia to his narrow reading of liberty for due process purposes,[255] and Justice Frankfurter to his extreme deference to the political branches,[256] underlies their hostility to congressional standing.

But the countermajoritarian dilemma supports federal court review of congressional claims alleging executive usurpation of a process that is constitutionally structured to act as a check on executive power. Unlike many claims arising under the Bill of Rights, congressional lawsuits challenging executive violation of separation of powers strictures do not require the court to disable the democratically elected political branches of government. A court's decision that certain individual decisions are so private as to be beyond the purview of government regulation disables both the federal and state governments from regulating such individual decisionmaking. By contrast, a court decision that the President cannot declare war without congressional approval merely requires that the President and Congress act jointly to engage our country in a war. It does not tell the branches what they can or cannot do as a substantive matter, it merely tells them as a matter of procedure how the Constitution requires that it be done. As Judge Breyer stated in adjudicating an executive foreign policy action that had not followed the proper procedural requirements:

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253. *Barnes*, 759 F.2d at 71 (Bork, J., dissenting).

254. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA 267-343 (1990); Ronald M. Dworkin, *The Bork Nomination*, 9 CARDOZO L. REV. 10 (1987); Philip B. Heymann & Fred Wertheimer, *Why the United States Senate Should Not Consent to the Nomination of Judge Robert H. Bork to be a Justice of the Supreme Court*, 9 CARDOZO L. REV. 21 (1987).

255. *See* Michael H. v. Gerald D., 491 U.S. 1101 (1989).

256. *See* Dennis v. United States, 341 U.S. 494, 517 (1951) (Frankfurter, J., concurring).

> [W]e do not *limit* the exercise of foreign affairs powers by the other branches, so much as we allocate the powers of decision-making *between* the other two branches . . . . We do not arrogate to ourselves the power to make foreign policy, so much as we preserve the constitutional "equilibrium" between the President and Congress. . . .[257]

Thus, congressional lawsuits challenging unconstitutional executive actions do not strongly implicate "democracy" and "countermajoritianism" because the court is not telling a majority it cannot act. They merely enforce the constitutional allocation of power between two democratically elected branches of government, both purporting to represent the popular will. Granting jurisdiction over these separation of powers claims is in this respect a "weaker" form of judicial review that requires the judiciary to expend less of its precious "legitimacy" than do "private" cases that, in establishing individual rights, preclude majority action.[258]

Issues involving allocation of powers between the branches are often viewed as inherently ambiguous, as lacking authoritative textual or intentionalist answers, and therefore requiring courts to create, rather than seek out previously determined, constitutional boundaries. The Constitution does not, for example, specifically answer the question of whether Senate advice and consent is required to break a treaty. In such situations, the argument goes, the political branches should be left to determine the contours of their respective powers, and the courts should not intervene to draw bright lines and rigid boundaries. As one commentator has argued, "[t]he bottom line is that it is often impossible to reach determinative answers in the area of foreign affairs."[259]

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257. Wald v. Regan, 708 F.2d 794, 800 (1st Cir. 1983), *rev'd on other grounds*, 468 U.S. 222 (1984).

258. Because separation of powers review sought by members of the legislature is a less intrusive and interventionist mode of review, countries such as France, experimenting with limited judicial review have turned to that method of obtaining review. France traditionally eschewed judicial review as a an intrusion on democratic rule. The constitutional council established in 1958 to review legislative acts for conformity with the Constitution, approached its task cautiously, relying heavily on process-based judicial review in its early opinions. Nevertheless, the French and other European variants of judicial review that were established after World War II expressly permit a minority of legislators to seek constitutional review. *See generally* Burt Neuborne, *Judicial Review and Separation of Powers in France and the U.S.*, 57 N.Y.U. L. REV. 363 (1982).

This is not to say that French or other European modes of judicial review should be adopted. Process-based judicial review is simply a less ambitious and more limited form of review than its substantive variant. To the extent that Bork, Scalia and others are genuinely concerned about preserving democratic processes and protecting popular will, entertaining congressional claims is less intrusive than the other forms of adjudication that they readily endorse.

259. Blumoff, *supra* note 35, at 357.

But the courts are surely no less able to read and interpret the constitutional text in many congressional cases than when they interpret other broad or ambiguous constitutional provisions. Indeed, congressional suits challenging executive power typically involve constitutional provisions whose meaning both textually and historically is far clearer than, for example, the broadly worded aspirational texts of the First and Fourth Amendments.[260]

Dellums v. Bush[261] is a case in point. Both the text of the Constitution and the Framers' intent are clear that President Bush's foray into the Persian Gulf could not be initiated without congressional assent.[262] To the extent that the countermajoritarian concern is one of imposing solutions on the political branches that are not textually and historically grounded, *Dellums* is an easier case than many of the individual rights cases that courts have decided in recent decades. The courts surely ought not, following Justice Powell's analysis, defer to the political branches to work out a solution when the text and what is known of the Framers' intent indicates that the Constitution requires a particular solution.[263]

To decline jurisdiction in such cases undermines the judiciary's legitimacy by allowing the political branches to ignore the express wishes of the "people" who ratified the Constitution. It is precisely because both the executive and legislative branches claim in such situations to

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260. Courts have been quite comfortable limiting the reach of legislative bodies into areas they find protected by the often quite ambiguous provisions of the Bill of Rights. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 5-1, 14-7, 14-8, 15-1 to 15-21 (2d ed. 1988). It is when the power is executive and, especially, related to foreign affairs, that the courts become queasy. *See* Koh, *supra* note 37, at 1313-17. That they do so may be understandable, but their unwillingness to decide such cases cannot logically derive from alleged textual ambiguity.

261. 752 F. Supp. 1141 (D.D.C. 1990).

262. *See* U.S. CONST. art. I., § 8, cl. 11. While commentators disagree vociferously about the precise meaning of some of the textual terms (such as what constitutes a war, to what extent the President's powers as commander-in-chief permit certain kinds of military action, and whether continued funding by Congress constitutes authorization to wage war) commentators and courts would agree that the core meaning of the text requires congressional action to authorize a full-scale war such as the one that occurred in the Persian Gulf. *See* sources cited *supra* note 180.

263. The trick is to determine which congressional claims the court ought to adjudicate and why. Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990), is easier than Goldwater v. Carter, 444 U.S. 996 (1979) in the sense that its claim is textually clear: The Constitution affirmatively embodies an allocation of war powers, which is supported by the history surrounding its making. *See supra* note 17. By contrast, *Goldwater* seeks to imply a senatorial right and duty not explicitly stated but arguably implied in the Constitution: the right to vote on treaty abrogation as well as treaty ratification. Under my test, the latter ought be construed as a claim concerning the framework of balanced powers between the branches, even if on the merits the court should decide that no such power exists.

be speaking on behalf of the people that judicial monitoring is so crucial. When the constitutional scheme dictates a particular method by which popular will is to be ascertained, and that method is being undermined, judicial abdication becomes an unwarranted form of judicial activism. It substitutes the judiciary's view that the arrogating branch more accurately represents popular will rather than following the Framers' scheme as to how that will should be expressed. If the Framers' intent is dispositive in individual rights cases, why so easily discard it when it comes to separation of powers?

The Court of Appeals for the D.C. Circuit in *Barnes v. Kline* best stated why, in at least some instances, the courts should not consign congressional claims to the political process under the guise of promoting separation of powers:

> [A] "political solution" would at best entail repeated, time-consuming attempts to reintroduce and repass legislation, and at worst involve retaliation by Congress in the form of refusal to approve presidential nominations, budget proposals, and the like. That sort of political cure seems to us considerably worse than the disease, entailing, as it would, far graver consequences for our constitutional system than does a properly limited judicial power to decide what the Constitution means in a given case. . . . By defining the respective roles of the two branches in the [war-making] process, this court will help to preserve, not defeat, the separation of powers.[264]

V. ARTICULATING A PRINCIPLED THEORY OF CONGRESSIONAL STANDING

The courts have struggled to find a middle ground between adjudicating all congressional lawsuits and refusing to hear any. Standing, ripeness, and equitable discretion doctrines have all been used to attempt to define that middle. Justice Powell's ripeness approach in *Goldwater v. Carter*, Judge Greene's decision in *Dellums v. Bush*, and to a large extent the equitable discretion doctrine, all define the middle ground essentially as permitting suits by individual members of Congress only when plaintiffs act, in effect, as representatives of the whole Congress which has expressed its desire to challenge executive overreaching. For the reasons indicated in Parts III and IV, that approach is flawed because it effectively allows Congress through silence or inaction to permit the President to violate the Constitution.

Instead, courts should entertain congressional claimants whenever

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264. Barnes v. Kline, 759 F.2d 21, 29 (D.C. Cir. 1985), *vacated as moot sub nom.* Burke v. Barnes, 479 U.S. 361 (1987).

they challenge executive conduct that deprives them of a constitutionally mandated role, which has been designed to serve as a check on executive power. Courts should hear such cases irrespective of whether other members of Congress are willing to permit or collaborate with executive overreaching or to abdicate their congressional responsibilities.

On the other hand, courts should deny standing to congressional plaintiffs who claim only that executive conduct has reduced the effectiveness of a particular vote or action, as for example, because the executive has failed to provide information claimed to be necessary for a meaningful vote,[265] or because the executive has supposedly violated a statute.[266] Similarly, plaintiffs challenging action by others in Congress lack standing unless they allege an unconstitutional delegation of authority to the President[267] or a violation so grave as to seriously undermine the constitutional scheme.[268]

This test would permit individual members of Congress standing to challenge certain allegedly unconstitutional executive actions, but would preclude those suits not asserting a specific injury to a constitutionally mandated process designed to include, indeed require, their participation in decisionmaking. It avoids former Judge Bork's slippery slope by severely limiting congressional standing. Representative Dellums' suit asserting that an executive order conferring authority on the intelligence communities violated a congressional statute would be dismissed,[269] as would Senator Helms' suit seeking to force disclosure of FBI files concerning Martin Luther King.[270] But Goldwater's and Dellums' treaty and war powers claims would be cognizable, because both assert deprivations of an important role and duty in the constitutional process of treaty-breaking and war-making.

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265. *See* Harrington v. Bush, 553 F.2d 190 (D.C. Cir. 1977); Helms v. Secretary of the Treasury, 721 F. Supp. 1354 (D.D.C. 1989).

266. *See* Chiles v. Thornburgh, 865 F.2d 1197 (11th Cir. 1989); United Presbyterian Church v. Reagan, 738 F.2d 1375 (D.C. Cir. 1984); *see also* Wilt v. Beal, 363 A.2d 876, 881 (Pa. Commw. Ct. 1976) (denying standing to Pennsylvania legislator claiming that executive action "frustrated" the purpose of a statute).

267. *See* Dornan v. United States Secretary of Defense, 851 F.2d 450 (D.C. Cir. 1988); Gregg v. Barrett, 771 F.2d 539 (D.C. Cir. 1985); *see also Lawmakers Join Federal Suit to Stop Federal Raise*, N.Y. TIMES, Oct. 30, 1992, at A16.

268. A hypothetical example might be wholesale denial to members of the opposite party access to information, to committee participation, or to some other requisite of office.

269. *See* United Presbyterian Church v. Reagan, 738 F.2d 1375 (D.C. Cir. 1984).

270. *See* Southern Christian Leadership Conference v. Kelley, 747 F.2d 777 (D.C. Cir. 1984).

A. Enforcing Legislation Versus Challenging a Procedural Deprivation

Both the test articulated above and the D.C. Circuit's current view on standing (albeit muddled by equitable discretion and ripeness) seek to draw a crucial line between a congressional claim that the President is violating a statute and a claim that the President is depriving legislators of a right to vote on an issue. Drawing this distinction removes a wide range of potential congressional actions and provides an early stopping point along Bork's slippery slope. Congressional standing could not become a mechanism whereby individual members of Congress monitor executive actions, bringing lawsuits whenever they believe that the executive is not in full or proper compliance with existing law.

The distinction also seems to make theoretical sense. Congressional claims that the executive is violating existing law are the sorts of generalized grievances that courts have held insufficient to confer standing.[271] While it is the legislature's special role to make laws, it is the executive's to implement them, and improper implementation that does not rise to the level of nullification is not a significantly greater injury to legislators than it is to the public. The public does not share Representative Dellums' injury when he is denied his right to vote on whether to go to war (although they are affected by it); they are not denied any ability to act or carry out their duties as citizens. But they do in large measure share Representative Harrington's injury when he claims that the Central Intelligence Agency is not fully complying with the law, for both are equally harmed by executive failure to execute the law faithfully.[272]

But on closer inspection, this theoretical justification does not suf-

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271. *See* Metcalf v. National Petroleum Council, 553 F.2d 176 (D.C. Cir. 1977); Harrington v. Schlesinger, 528 F.2d 455 (4th Cir. 1975); Metzenbaum v. Brown, 448 F. Supp. 538 (D.D.C. 1978).

272. *See* Harrington v. Bush, 553 F.2d 190 (D.C. Cir. 1977). Arguably Harrington's injury is greater than that of the general public, because, unlike the public, he had the right to vote on the legislation. But even had he done so, he would not have been deprived of his ability to carry out his constitutional role; rather his claim would still be based on the executive's failure to carry out its proper role, a grievance he shares with the public. While the line between nullification of his vote and mere diminishment may not always be easy to draw, it does make theoretical sense. Moreover, to recognize vote diminishment as injury would potentially entangle the courts in endless political disputes, because any maladministration arguably diminishes the vote of a legislator who supported the legislation in question. While this charge might equally be levelled at my suggestion that courts take jurisdiction when executive inaction amounts to nullification, such cases are far fewer and simpler to discern.

fice. Why should legislators have a greater interest in ensuring that their right to vote on certain legislation is affirmed than in ensuring that the result of their vote is respected by the executive? For example, the D.C. Circuit has correctly accorded members of Congress standing to sue when the President has "pocket-vetoed" legislation. That decision is based on the theory that the President has denied those members their process-based right to vote to override the veto.[273] But what if the President chose not to veto the disagreeable legislation and instead chose to sign it, simultaneously proclaiming that she believed the law to be unconstitutional and hence was not going to comply with it. In that case under both the proposed formulation and the D.C. Circuit's, legislators would not have standing to challenge the President's actions. No opportunity to vote was denied; executive actions outside the legislative arena merely affected the subsequent effectiveness of the vote.

That result seems difficult to support even under existing congressional standing doctrine. If nullification of a vote is the critical criterion, then why should it be any less a "nullification" for the President to refuse to comply with a vote than to "pocket-veto" it? And while non-compliance might seem the sort of generalized violation of law which does not give rise to standing, it could easily be recast in constitutional terms as a violation of the President's Article II duty to enforce the law of the land.

In such a case the President would essentially be denying legislators the right to vote on legislation by refusing to comply with legislation already enacted. Why should members of Congress have standing to sue over executive initiation of war in violation of Article I, Section 8 and not have standing to sue over executive violation of a statute in disregard of Article I, Section 8 and Article II, Section 3? Surely such executive violations as the Reagan Administration's violation of the Boland Amendment rise to the same constitutional level as would an illegal pocket veto of the same legislation.

One justification for the existing line is that our courts have consistently found it easier to justify procedural rather than substantive review, although there is a clear connection between the two. Judicial review of whether the executive has followed the procedure outlined in the Constitution seems to comport more with traditional duties and ob-

273. Barnes v. Kline, 759 F.2d 21 (D.C. Cir. 1985), *vacated as moot sub nom.* Burke v. Barnes, 479 U.S. 361 (1987); Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974).

ligations of courts than review of whether the executive has substantively complied with congressional legislation. This distinction between substantive and process review, however suspect, runs deep in American constitutional law and accounts for what Professor Tribe has termed "The Puzzling Persistence of Process-Based Constitutional Theories."[274]

There is, however, a second better response. It rests on the distinction between challenges alleging failure to implement legislation and those claiming violations of particular and specific mechanisms designed to allocate and maintain a balance of power between the branches. The Constitution does not merely provide that legislative power is to be vested in Congress and executive power in the President. The Framers established a set of procedures for making treaties, appointing judges, and overriding vetoes. They also articulated a set of specific powers they thought necessary for Congress to perform, some of which are antecedent to executive authority to act. The choices embodied in our constitution represent solutions to particular problems and potential abuses that concerned the Framers.

When the executive denies members of Congress the ability to perform a task specifically delegated to them, she does more than violate general separation of powers principles incorporated in the notion that the executive has the duty to enforce the laws that Congress enacts. She attempts to reverse a specific constitutional judgment directed at preventing dictatorial government. The fact that certain specific procedures and powers were articulated in the Constitution provides Congress with a stronger and more specific interest in enforcing such procedures and preventing usurpation of those powers than its generalized separation of powers interest in ensuring that the President complies with her constitutional duty to enforce the law.

Therefore, courts should recognize two exceptions to the general rule that legislators lack standing when merely seeking enforcement of already enacted law. The first is the obvious case in which the President openly refuses to enforce the law and that refusal amounts to nullification. When the President expressly and openly refuses to comply with a statute the refusal should be treated as tantamount to an illegal pocket veto. The second is when Congress has enacted what is termed "framework legislation" aimed at ensuring that the constitutional allo-

274. Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980).

cation of powers is carried out. This type of quasi-constitutional legislation supports congressional standing for the same reasons that violations of the underlying constitutional provisions do. When Congress enacts a law designed to ensure its ability to carry out its constitutional authority, it makes sense for the courts to allow members of Congress to sue when the statute is violated.

The most obvious and well-known example of this type of legislation is the War Powers Resolution.[275] Several district courts have dismissed congressional claims challenging alleged violations of the War Powers Resolution under the equitable or remedial discretion doctrine.[276] It seems peculiar for the courts to hold that when Congress enacts a statute designed to enforce the constitutional mandate that the President shall not use force for an extended period without congressional approval, an action seeking enforcement of that statute should be referred back to Congress for the enactment of another statute enforcing the first statute which was only designed to enforce the Constitution in the first place. Such repetitious re-enactment serves no purpose but to avoid judicial review. Certainly it contributes to accretion of executive authority, despite the clear constitutional authority under which Congress has repeatedly attempted to act.

B. Suits Challenging Congressional Actions

Congressional claims challenging acts of Congress directly raise the concerns that underlie the equitable discretion doctrine. While a strong argument can be made that standing should be denied members of Congress whenever they raise such claims, two general categories should be distinguished.

In the first, a legislator sues claiming that Congress has done something that interferes with or trenches upon another branch's power. That legislator has no standing to sue, because there has been no usurpation of the legislator's power. Congress may be acting unconstitutionally, but that alleged unconstitutional action is for the injured branch to address. The paradigmatic illustration is Representative Dornan's suit challenging the Boland Amendment as an unconstitutional infringement of executive power.[277]

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275. 50 U.S.C. §§ 1541-1548 (1988).

276. *See, e.g.*, Lowry v. Reagan, 676 F. Supp. 333 (D.D.C. 1987); Crockett v. Reagan, 558 F. Supp. 893 (D.D.C. 1982), *aff'd per curiam*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984).

277. Dornan v. United States Secretary of Defense, 676 F. Supp. 6 (D.D.C. 1987), *aff'd*,

The second type of claim raises more substantial problems. In this case, members of Congress sue the executive for acting pursuant to power allegedly delegated unconstitutionally by Congress. For example, Senator Humphrey and five members of the House of Representatives sued then Treasury Secretary James Baker, attacking the constitutionality of the 1967 Salary Act, which granted the President power to recommend salary increases for senators, representatives, federal judges and certain executive officers.[278] The Court of Appeals for the D.C. Circuit dismissed on equitable discretion grounds. Relief could not only be gained from fellow legislators, but it was the actions of those fellow legislators that Senator Humphrey was challenging. The executive was only acting in compliance with a legislative mandate.

Perhaps courts should deny standing in such suits. They represent not merely congressional silence or acquiescence in executive usurpation, but an affirmative grant of power to the executive. While Part III has demonstrated that members of Congress should not be required to gain the assent of their colleagues in order to challenge what they consider unconstitutional executive action, this case is different because Congress has acted, albeit in a manner that other members claim to be unconstitutional. There is at least more justification in such cases for precluding review.

Nevertheless, these type of suits should also be heard on the merits. The member of Congress who is denied an opportunity to vote on an issue is injured irrespective of whether her colleagues agree with her. Congress should not be able to amend the Constitution either by silence or express delegation of power to the executive. If, for example, Congress enacted a statute giving the President the power unilaterally to appoint federal judges, dissenting members are just as injured as when Congress acquiesces silently in executive arrogation of power.

Indeed, the decision on the merits will not be difficult in most of these cases. When Congress and the President act in unison, their actions are rarely found unconstitutional.[279] As with the political question

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851 F.2d 450 (D.C. Cir. 1988). A similar rule should apply in cases such as Gregg v. Barrett, 771 F.2d 539 (D.C. Cir. 1985), that claim congressional failure to properly carry out a constitutional duty committed solely to Congress, which neither alleges wholesale failure to carry out a constitutional mandate nor claims an unconstitutional delegation of power to another branch. In such a case, the claim is analogous to improper implementation of a statute by the executive and the relief should be sought through political processes.

278. Humphrey v. Baker, 848 F.2d 211 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 966 (1988).

279. *But see* INS v. Chadha, 462 U.S. 919 (1983).

doctrine, the courts often raise jurisdictional barriers when a decision may easily be made, and indeed, appears often to rest on a decision on the merits.[280] Two examples illustrate the point.

In *Vander Jagt v. O'Neill*, fourteen Republican members of the House of Representatives sued the House Democratic leadership, alleging that the Democrats systematically discriminated against them by providing them with fewer seats on House committees than they were proportionally entitled.[281] The Court of Appeals for the D.C. Circuit employed equitable discretion doctrine to dismiss, holding that the case "was essentially a suit by some members of Congress against others."[282] Yet while purporting to avoid the merits, the court of appeals actually addressed the Equal Protection and First Amendment challenges. The court chose neither to deny standing nor to hold that the Speech and Debate Clause absolutely immunized the defendants. The court instead found that it ought to reserve its power to intervene in "egregious circumstances,"[283] where the "committee system could be manipulated beyond reason."[284] By refusing to "reserve its powers,"[285] however, it essentially addressed the merits and found no manipulation sufficient to constitute a violation of the Fourteenth and First Amendments. It thus held that those amendments do not prohibit legislative bodies from assigning members to whatever committees they choose absent egregious circumstances amounting to irrationality.

That is precisely what the Court of Appeals for the Ninth Circuit held in a case "nearly identical" to Vander Jagt's action involving the Arizona State House.[286] Invocation of the court's equitable discretion was thus wholly unnecessary. Similarly in *Humphrey v. Baker*,[287] the court dismissed Senator Humphrey's case on equitable discretion grounds, while affirming the district court's judgment on the merits.

C. *Executive Challenges*

Judge Bork's dissent in *Barnes v. Kline* raised the possibility of a multitude of executive officials bringing claims in federal courts if

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280. *See* Henkin, *supra* note 6, at 598-601.

281. Vander Jagt v. O'Neill, 699 F.2d 1166 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 823 (1983).

282. *Id.* at 1175.

283. *Id.*

284. *Id.* at 1170.

285. *See id.* at 1176-77.

286. Davids v. Akers, 549 F.2d 120 (9th Cir. 1977).

287. 848 F.2d 211, 217 (D.C. Cir.), *cert. denied*, 488 U.S. 966 (1988).

standing is granted in congressional lawsuits. Once one realizes why this will not occur, why it is unnecessary to accord executive officials standing to challenge unconstitutional congressional acts, the importance of congressional standing to maintaining the constitutional balance of power becomes clear.

Executive officials do not need standing to challenge congressional actions because, unlike members of Congress, they already have a mechanism to ensure that their claims are heard by the courts. They can simply refuse to act; they can fail to enforce a statute or to comply with particular aspects of it. If a private party brings suit to challenge the failure to enforce, the executive official has a day in court. If a private party challenges the legislation itself, the executive's claim of purported unconstitutionality is heard; indeed, the executive can often intervene as an amicus once a private party has standing. If no one makes such a challenge, the executive freely ignores the allegedly unconstitutional (or merely disliked) statute unless Congress and the executive work out a suitable compromise.[288]

By contrast, members of Congress have no similar ability. If the courts do not intervene on their behalf to enforce the constitutional allocation of powers, more often than not, individuals will have neither standing, nor sufficient knowledge and resources to sue. Thus, year by year, act by act, executive power will continue to increase at the expense of Congress, and at the expense, ultimately, of the American polity.

VI. CONCLUSION

The time is past "ripe" for courts to reassess and reassert their role in the delicate balance of powers which has enabled our system to

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288. The War Powers Resolution is an example of repeated executive refusal to implement or follow legislation. Justice Powell's concurrence in *Goldwater* suggests that if Congress as a whole brought suit, the courts should take jurisdiction. *See* Goldwater v. Carter, 444 U.S. 996 (1979) (Powell, J., concurring). Certainly if the courts adopted that view, it would encourage political compromise. But if the opinions of Justices Rehnquist and Scalia are harbingers of things to come, it is far more likely that the political question doctrine or other barriers will be deployed to avoid adjudication of the merits of even egregious refusals by the executive to implement legislation. For a discussion of the frequency with which Judge Scalia invokes procedural barriers to the adjudication even of so-called "private" claims, see James G. Wilson, *Constraints of Power: The Constitutional Opinions of Judges Scalia, Bork, Posner, Easterbrook and Winter*, 40 U. MIAMI L. REV. 1171 (1986). For examples of Scalia's and Rehnquist's views, see Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985); Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1550 (D.C. Cir. 1984) (Scalia, J., dissenting), *vacated*, 471 U.S. 1113 (1985); *Goldwater*, 444 U.S. at 1002 (Rehnquist, J., concurring).

"long endure." Congressional lawsuits have increased in number because executive power has grown to vast dimensions. It is especially important that, as enormous changes are wrought in the configuration of world affairs and the role of the United States within it, Congress' role in fashioning the future be carefully and steadfastly maintained.

When members of Congress are deprived of the ability to exercise the powers accorded them, to perform the duties required of them, they are injured and their cases should (if appropriately concrete and ripe in the traditional sense) be heard. When courts deploy doctrinal barriers to avoid adjudicating such cases, they abdicate their critical role in the three-branch balance the Framers wrought by reading themselves out of the constitutional balance just when it is most important that they weigh in. The majority of congressional suits involve attempts to check executive power. When courts refuse to hear and rule on the merits in such cases, the United States as a whole, and each of us individually, is injured.