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## Equitable Discretion to Dismiss Congressional-Plaintiff Suits: A Reassessment

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## NOTES

### EQUITABLE DISCRETION TO DISMISS CONGRESSIONAL-PLAINTIFF SUITS: A REASSESSMENT\*

*The United States Court of Appeals for the District of Columbia Circuit has devised a doctrine called equitable discretion to screen congressional-plaintiff suits. The Author argues that the doctrine should be abandoned. She proposes that the courts be guided by existing standing principles in deciding whether to hear these cases.*

WHEN MEMBERS OF Congress sue members of the executive branch or their own colleagues, they pose unique problems to a system of separated powers. Such suits, once practically unheard of, have become relatively common. The recent trend began in the early 1970's, when congressmen sought to persuade the courts to declare illegal various executive activities related to the Vietnam War effort.<sup>1</sup> Since then, congressmen have brought suits to challenge a wide variety of governmental actions, including pocket vetoes,<sup>2</sup> CIA spending,<sup>3</sup> United States involvement in Nicaragua,<sup>4</sup>

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1. See, e.g., *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973) (challenging bombing and military involvement in Cambodia), *cert. denied*, 416 U.S. 963 (1974); *Mitchell v. Laird*, 488 F.2d 611 (D.C. Cir. 1973) (challenging the continuing activities in Indochina without a declaration of war or an explicit authorization by Congress); *Drinan v. Nixon*, 364 F. Supp. 854 (D. Mass. 1973) (same as *Holtzman*); *Gravel v. Laird*, 347 F. Supp. 7 (D.D.C. 1972) (challenging operations in Vietnam without a congressional declaration of war).

2. *Burke v. Barnes*, 479 U.S. 361 (1987); *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974).

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

4. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985).

the assignment of committee seats in the House of Representatives,<sup>5</sup> the accuracy of the *Congressional Record*,<sup>6</sup> and an assortment of statutory enactments.<sup>7</sup> The United States Court of Appeals for the District of Columbia Circuit has heard most of these congressional-plaintiff cases.<sup>8</sup>

The problem the courts face when a congressman seeks their aid in declaring invalid or enjoining some governmental action is that in doing so they may encourage the circumvention of the basic constitutional requirements for the enactment and execution of laws. A legislator, for example, might endeavor to persuade a court to strike down as unconstitutional, rather than his colleagues to amend or repeal, a statute that he dislikes. If the court complies, it has enabled the legislator to by-pass the hurdles of bicameralism and presentment,<sup>9</sup> which are supposed to safeguard the legislative process.<sup>10</sup> Similarly, a congressman's suit to compel the proper execution of a statute resembles the exercise of a legislative veto of a particularly troublesome kind, since it does not require even unicameral backing, let alone presidential approval.<sup>11</sup>

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5. *Vander Jagt v. O'Neill*, 699 F.2d 1166 (D.C. Cir. 1982), *cert. denied*, 464 U.S. 823 (1983).

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

7. *E.g.*, *Humphrey v. Baker*, 848 F.2d 211 (D.C. Cir.) (ascertainment clause and delegation-doctrine challenge to the Federal Salary Act of 1967, 2 U.S.C. §§ 351-61 (1988)), *cert. denied*, 109 S. Ct. 491 (1988); *Melcher v. Federal Open Mkt. Comm.*, 836 F.2d 561 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 2034 (1988) (appointments clause challenge to the Federal Reserve Act, 12 U.S.C. §§ 221 *et seq.* (1988)); *Moore v. United States House of Representatives*, 733 F.2d 946 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985) (origination clause challenge to the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324 (1982); *Riegle v. Federal Open Mkt. Comm.*, 656 F.2d 873 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981) (appointments clause challenge to the Federal Reserve Act, 12 U.S.C. §§ 221 *et seq.* (1988)).

8. *See supra* notes 1-7.

9. U.S. CONST. art. I, § 1 (two houses of Congress); *id.* at § 7, cl. 2 (presentment of bills to the President).

10. Thus, when Senator Riegle complained that the Federal Reserve Act procedures for election of members of the Federal Open Market Committee deprived him of his right to vote his advice and consent concerning the appointments, the court stated: "It 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." *Riegle*, 656 F.2d at 882. *See infra* text accompanying notes 35-57.

11. *Cf. INS v. Chadha*, 462 U.S. 919 (1983) (invalidating, on separation-of-powers grounds, the one-house legislative-veto provision in § 244(a)(1) of the Immigration and Nationality Act, 8 U.S.C. § 244(a)(1) (1988)); Bloch, *Orphaned Rules in the Administrative State: The Fairness Doctrine and Other Orphaned Progeny of Interactive Deregulation*, 76 GEO. L.J. 59, 115 (1987) (The effect of informal pressure on agencies by congressmen seeking to retain a rule that the agency is ready to dispense with or modify "is not substantially different from that of the formal legislative veto condemned in *Chadha*.").

The D.C. Circuit sought in the early cases to limit the access of congressional plaintiffs to judicial relief through the use of existing doctrines derived from Article III. In *Mitchell v. Laird*,<sup>12</sup> for example, it dismissed under the political-question doctrine the claim brought by thirteen congressmen against the President that the United States military involvement in Indochina violated the war powers clause. The *Mitchell* court reasoned that even if the continued hostilities were illegal, the President had the duty to end them only as quickly as other vital national interests would permit.<sup>13</sup> Whether the President was in fact attempting to end the hostilities was a question, however, that the court deemed itself incompetent to decide.<sup>14</sup>

Other D.C. Circuit congressional-plaintiff cases turned on standing.<sup>15</sup> The court developed the principle that only congressmen who complained of action that constituted "a disenfranchisement, a complete nullification or withdrawal of a voting opportunity," based on "an objective standard in the Constitution," would satisfy the injury-in-fact requirement of the standing analysis.<sup>16</sup> Complaints of mere "diminution in a legislator's effectiveness,"<sup>17</sup> through actions such as the denial of information or the failure to execute a law, and which could be remedied through the legislative process, were deemed insufficient injury to confer standing.<sup>18</sup>

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12. 488 F.2d 611 (D.C. Cir. 1973).

13. *Id.* at 616.

14. *Id.* Other courts also used the political-question doctrine to dismiss challenges to the Vietnam War. *See, e.g., Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 963 (1974); *Drinan v. Nixon*, 364 F. Supp. 854 (D. Mass. 1973); *Gravel v. Laird*, 347 F. Supp. 7 (D.D.C. 1972).

15. *See, e.g., Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir.) (setting out a test for congressional standing and finding that the plaintiffs satisfied that test), *vacated on other grounds*, 444 U.S. 996 (1979); *Reuss v. Balles*, 584 F.2d 461 (D.C. Cir.) (dismissed for lack of standing), *cert. denied*, 439 U.S. 997 (1978); *Harrington v. Bush*, 553 F.2d 190 (D.C. Cir. 1977) (same); *Metcalf v. National Petroleum Council*, 553 F.2d 176 (D.C. Cir. 1977) (same); *see also Public Citizen v. Sampson*, 515 F.2d 1018 (D.C. Cir. 1975) (mem.) (affirming without opinion the district court's dismissal for lack of standing), *aff'g* 379 F. Supp. 662 (D.D.C. 1974); *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974) (reaching the merits after determining the congressional-plaintiff issue in favor of plaintiffs under the doctrine of standing).

16. *Goldwater*, 617 F.2d at 702. In *Goldwater*, the court conferred standing on congressmen who "plead[ed] an objective standard in the Constitution as giving them a right to vote on treaty termination," and who "allege[d] disenfranchisement in the context of a specific measure, *i.e.*, the proposed termination of the Mutual Defense Treaty" with Taiwan. *Id.*

17. *Id.*

18. *Id.*

In a 1981 article, Carl McGowan, then Chief Judge of the D.C. Circuit, suggested a new approach.<sup>19</sup> Arguing that none of the existing doctrines adequately addressed the separation-of-powers concerns inherent in congressional-plaintiff suits, he proposed instead that courts address these concerns separately from Article III inquiries, in the exercise of their "discretion . . . to grant or to withhold injunctive or declaratory relief."<sup>20</sup> The key to exercising this "equitable discretion" in a principled way was to deny relief whenever a legislator "could get substantial relief from his fellow legislators,"<sup>21</sup> the same standard, that is, that had emerged from the earlier cases decided under the standing doctrine.<sup>22</sup> This standard, Chief Judge McGowan argued, would ensure the judicial involvement necessary to the smooth functioning of the constitutional system of government, as when an entire house of Congress enlists the court's aid in resolving a dispute with the Executive.<sup>23</sup> Unless the courts could intervene in such a situation, Congress would have to resort to obstructionist maneuvers, such as refusing to vote appropriations, or else be left with no remedy at all.<sup>24</sup>

The equitable-discretion doctrine became part of the law of the D.C. Circuit later that same year<sup>25</sup> and it has been applied many times since,<sup>26</sup> but the Supreme Court has neither approved nor disapproved it.<sup>27</sup> Within a year of its adoption, the equitable

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19. McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241 (1981).

20. *Id.* at 262; cf. Henkin, *Is There a "Political Question" Doctrine?* 85 YALE L.J. 597, 617-22 (1976) (arguing that some political-question cases should have been dismissed for want of equity and that separation-of-powers considerations could inform the equity analysis); Note, *Congressional Access to the Federal Courts*, 90 HARV. L. REV. 1632 (1977) [hereinafter *Congressional Note*] (suggesting such an approach to individual congressmen's *statutory* claims, but that the courts address individual congressmen's *constitutional* claims under the political-question doctrine and reach the merits of suits brought by Congress as a whole).

21. McGowan, *supra* note 19, at 263.

22. See *supra* text accompanying notes 17-18.

23. McGowan, *supra* note 19, at 263-64.

24. *Id.* at 264.

25. See *Riegle v. Federal Open Mkt. Comm.*, 656 F.2d 873 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981).

26. See *Humphrey v. Baker*, 848 F.2d 211 (D.C. Cir.), *cert. denied*, 109 S.Ct. 491 (1988); *Melcher v. Federal Open Mkt. Comm.*, 836 F.2d 561 (D.C. Cir. 1987), *cert. denied*, 108 S.Ct. 2034 (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); *Crockett v. Reagan*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984); *Vander Jagt v. O'Neill*, 699 F.2d 1166 (D.C. Cir. 1982), *cert. denied*, 464 U.S. 823 (1983).

27. Indeed, the Supreme Court has heard only three congressional-plaintiff cases in

discretion doctrine had provoked vehement disapproval from one member of the court<sup>28</sup> whose camp was soon joined by another.<sup>29</sup> That the time has arrived for re-examining equitable discretion in the light of experience is evident from the two most recent applications of the doctrine, in which all members of the deciding panels expressed their "concern" about it, but felt compelled to continue to apply it until either the Supreme Court or the Circuit *en banc* decides they should do otherwise.<sup>30</sup>

Part I of this Note critically plots the course of the equitable-discretion doctrine from its first enthusiastic application to the present mood of doubt.<sup>31</sup> Part II discusses whether equitable discretion has changed the D.C. Circuit's analysis or merely confused it.<sup>32</sup> Part III shows the limited usefulness of equitable discretion and suggests that the courts deny standing to all congressional plaintiffs.<sup>33</sup> Part IV analyzes equitable discretion in the context of the classic Bickel-Gunther debate and concludes that it is too unprincipled a device to be retained.<sup>34</sup>

## I. THE CASES

The D.C. Circuit adopted equitable discretion as a means of deciding when to reach the merits of congressional-plaintiff suits in *Riegle v. Federal Open Market Committee*.<sup>35</sup> *Riegle* involved Senator Donald Riegle's challenge to the procedures in the Federal Reserve Act (FRA) for the selection of the five members of

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recent years. None of these cases expressed any opinion about the lower court's analysis of the congressional-plaintiff problem. See *Burke v. Barnes*, 479 U.S. 361 (1987) (D.C. Circuit's decision on the merits, which had conferred standing on a group of congressional plaintiffs, dismissed as moot, because the statute at issue had expired by its own terms since the earlier decision); *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (On direct appeal from the D.C. District Court, the issue of the congressional plaintiffs' standing was not addressed, because the private plaintiffs clearly qualified for standing.); *Goldwater v. Carter*, 444 U.S. 996 (1979) (Without mentioning congressional standing, upon which the D.C. Circuit had relied in reaching the merits, four justices voted to dismiss the congressional-plaintiff suit as a political question and one concurred on grounds of ripeness.).

28. See *Vander Jagt*, 699 F.2d at 1177-85 (Bork, J., concurring). Judge Bork later expressed his disapproval at greater length in *Barnes v. Kline*, 759 F.2d 21, 41-71 (D.C. Cir. 1984) (Bork, J., dissenting), *vacated as moot sub nom. Burke v. Barnes*, 479 U.S. 361 (1987).

29. See *Moore*, 733 F.2d at 956-65 (Scalia, J., concurring).

30. See *infra* text accompanying notes 162-74.

31. See *infra* notes 35-174 and accompanying text.

32. See *infra* notes 175-96 and accompanying text.

33. See *infra* notes 197-228 and accompanying text.

34. See *infra* notes 229-52 and accompanying text.

35. 656 F.2d 873 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981).

the Federal Open Market Committee (FOMC) whom the boards of directors of the Federal Reserve Banks elect. The Senator from Michigan complained that these five members were "Officers of the United States" whose selection, like that of the other seven, should conform with the Appointments Clause, and he alleged an injury to "his constitutional right to vote in determining the advice and consent of the Senate to [their] appointment."<sup>36</sup>

The D.C. Circuit, relying heavily on Chief Judge McGowan's article,<sup>37</sup> claimed that existing doctrines were incapable of resolving the separation-of-powers problems peculiar to congressional-plaintiff suits.<sup>38</sup> The court said that its standing analysis, until now its favorite means of dismissing these suits, had incorporated contradictory principles and had led to doctrinal inconsistencies.<sup>39</sup> The court had developed in earlier cases a requirement that congressional plaintiffs lack any form of relief from their fellow legislators before it would grant them standing.<sup>40</sup> Since private plaintiffs are entitled to their day in court regardless of whether nonjudicial remedies are available to them,<sup>41</sup> this requirement contradicted other judicial statements that congressional plaintiffs and private plaintiffs were to receive equal treatment in the standing analysis. The court also found that the collegial-remedy standard had been inconsistently applied, because standing had been granted in at least two cases in which the *Riegle* court believed that a collegial remedy did exist.<sup>42</sup>

The *Riegle* court felt that the other doctrines commonly used to dispose of congressional-plaintiff suits, political question and ripeness, were not "sufficiently catholic in formulation or flexible in application to resolve the prudential issues arising in congressional-plaintiff cases."<sup>43</sup> The court did not mention, however, that

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36. *Id.* at 877.

37. McGowan, *supra* note 19.

38. *Riegle*, 656 F.2d at 879-81.

39. *Id.* at 879-80.

40. The *Riegle* court found this collegial-remedy principle in, e.g., *Harrington v. Bush*, 553 F.2d 190, 212-14 (D.C. Cir. 1977) (congressman denied standing to challenge CIA practices, in part because his ability to cure the alleged injury by voting on future legislative measures remained unimpaired). See *Riegle*, 656 F.2d at 877, 879-80.

41. *Id.* at 877-79.

42. *Id.* at 879-80 (citing *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir.), *vacated on other grounds*, 444 U.S. 996 (1979) (challenge to President's termination of a treaty without seeking the advice and consent of the Senate), and *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974) (challenge to allegedly illegal pocket veto)).

43. *Id.* at 881.

"prudential considerations" are one of the three inquiries that make up political-question analysis.<sup>44</sup> Instead, it supported its rejection of the political-question doctrine as not sufficiently "flexible" by focusing on just one formulation of the doctrine: whether the issue has been committed by the text of the Constitution to one of the political branches.<sup>45</sup> The court also failed to mention that "prudential considerations" motivated Justice Powell's vote in *Goldwater v. Carter* to dismiss as not *ripe* the dispute in that case between a few congressmen and the executive branch, where the two branches had not reached a "constitutional impasse."<sup>46</sup> Finally, the court ignored the prudential component of the *standing* inquiry.<sup>47</sup>

Dissatisfied nonetheless with existing doctrines as means of resolving when to hear congressional-plaintiff suits, the *Riegle* court announced its solution to be the adoption of a new doctrine of "circumscribed equitable discretion,"<sup>48</sup> that is, in McGowan's formulation, the application of "the courts' traditional discretion to grant or withhold equitable relief."<sup>49</sup> The new standard would lead to dismissal whenever, as in this case, a "[congressional] plaintiff has standing but could get legislative redress and a similar action could be brought by a private plaintiff."<sup>50</sup> The requirement of the availability of a private plaintiff was intended to prevent "non-frivolous claims of unconstitutional action [from] go[ing] unreviewed by a court,"<sup>51</sup> but arguably this addition to

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44. See *Goldwater*, 444 U.S. at 998 (Powell, J., concurring) (deriving a three-part test from the various formulations of the doctrine listed in *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

45. See *Riegle*, 656 F.2d at 880-81. But see *Goldwater*, 444 U.S. at 998 (Powell, J., concurring) (The textual-commitment inquiry is but one of three inquiries subsumed into the political-question doctrine. A court must also ask whether "resolution of the question demand[s] that a court move beyond areas of judicial expertise" and whether "prudential considerations counsel against judicial intervention.").

46. *Goldwater*, 444 U.S. at 997.

47. The prudential component of the standing inquiry is discussed in *Allen v. Wright*, 468 U.S. 737, 751 (1984) and *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

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

49. McGowan, *supra* note 19, at 244.

50. *Riegle*, 656 F.2d at 882.

51. *Id.* This addition to the collegial-remedy test formulated by McGowan, *supra* note 19, at 263, may also be explained as an attempt to justify reaching the merits in *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974). The *Riegle* court admitted that Congress could have redressed Senator Edward Kennedy's complaint about a pocket veto by reintroducing the legislation. *Riegle*, 656 F.2d at 880. McGowan thought it was an "extremely close question" whether under his collegial-remedy test the court should have decided Senator Kennedy's claim. McGowan, *supra* note 19, at 265; see also *Barnes v.*



the test was mere *dictum*.<sup>52</sup> The opinion focuses on the fact that Senator Riegle could get relief by persuading his colleagues to amend the FRA, rather than on whether private plaintiffs could assert a similar claim.<sup>53</sup>

The *Riegle* opinion is less than satisfactory. The court eliminated from its standing inquiry the requirement that collegial remedies be exhausted, because it disapproved the unequal treatment of congressional and private plaintiffs.<sup>54</sup> In its place, the court substituted a separate hurdle, applicable only to congressional plaintiffs, which demanded that they resort to the same "self-help"<sup>55</sup> that had formerly been a prerequisite to standing. Furthermore, the court added the new requirement that non-congressional plaintiffs be unlikely to attain standing.<sup>56</sup> And the court did not question the results reached in any of its previous cases,<sup>57</sup> or explain how the same standard recast as a separate hurdle would lead to any less inconsistent results in the future.

Equitable discretion did not supplant all other doctrines and become the only test for dismissal of congressional-plaintiff suits. The next two such cases decided by the D.C. Circuit did not even mention the new doctrine. Of the three claims brought by congressmen and private plaintiffs in *Metzenbaum v. Federal Energy Regulatory Commission* (FERC),<sup>58</sup> the court dismissed one under the political-question doctrine, one under the ripeness doctrine, and the third on the merits. In *American Federation of Government Employees v. Pierce*,<sup>59</sup> the complaint of a congressman and private plaintiffs was heard and lost on the merits on the basis of standing conferred on the congressman.

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Kline, 759 F.2d 21, 70 (D.C. Cir. 1984) (Bork, J., dissenting) (noting that an equitable-discretion doctrine based solely on the availability of a collegial remedy would have barred Senator Kennedy's suit), *vacated as moot sub nom.* Burke v. Barnes, 479 U.S. 361 (1987).

52. See *Humphrey v. Baker*, 848 F.2d 211, 213 n.3, 214 (D.C. Cir.), *cert. denied*, 109 S.Ct. 491 (1988); *Melcher v. Federal Open Mkt. Comm.*, 836 F.2d 561, 565 & n.3 (D.C.Cir. 1987), *cert. denied*, 108 S.Ct. 2034 (1988); *Gregg v. Barrett*, 771 F.2d 539, 544 (D.C. Cir. 1985).

53. See *Riegle*, 656 F.2d at 882.

54. *Id.* at 879.

55. McGowan, *supra* note 19, at 254.

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

57. McGowan, *supra* note 19, at 265-66, on the other hand, questioned whether under his standard the court should have reached the merits in *Goldwater v. Carter*, 617 F.2d 697 (D.C.Cir.), *vacated on other grounds*, 444 U.S. 996 (1979), or *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974). See *supra* note 51.

58. 675 F.2d 1282 (D.C. Cir. 1982).

59. 697 F.2d 303 (D.C. Cir. 1982) (*per curiam*).

*Metzenbaum* involved a challenge by congressmen of both houses, private organizations, states and state officials to the validity of legislation concerning the Alaska natural-gas pipeline and of a FERC order issued pursuant to the legislation.<sup>60</sup> The plaintiffs alleged: (1) that the legislation had been passed in violation of previously enacted parliamentary rules contained in the Alaskan Natural Gas Transportation Act, (2) that its substance violated the fifth amendment rights of natural-gas consumers to reasonable rates, and (3) that the FERC order had been improperly issued without the notice and comment procedures required by the Administrative Procedure Act (APA).<sup>61</sup>

The court did not discuss congressional standing or equitable discretion, either because the presence of so many private plaintiffs with standing made those inquiries superfluous,<sup>62</sup> or because the opinion was expedited in order to meet a statutory deadline.<sup>63</sup> The court dismissed the first claim under the political-question doctrine.<sup>64</sup> It noted that the power to determine congressional rules of proceedings is textually committed to the legislative branch and that no exception should be made in this case in which only *congressmen's* rights were jeopardized.<sup>65</sup> In any case, "prudential considerations" counselled against the court's showing a lack of respect to the legislative branch by adjudging Congress's interpretation of its own rules.<sup>66</sup> The court found that the fifth amendment claims were not ripe for decision, because they boiled down to "claims that the statute is *capable* of unconstitutional application."<sup>67</sup> Finally, the court proceeded to the merits of the third claim and decided that the FERC order was a "nondiscretionary act[] required by" the statute<sup>68</sup> and therefore was exempted from notice and comment requirements by Section 553(b)(B) of the

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60. *Metzenbaum*, 675 F.2d at 1284.

61. *Id.*

62. *Cf. Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (noting that it was unnecessary to reach the issue of the congressmen's standing, because individual, private plaintiffs clearly had standing).

63. *See Metzenbaum*, 675 F.2d at 1286.

64. *Id.* at 1287.

65. *Metzenbaum*, 675 F.2d at 1287.

66. *Id.* at 1287-88. *But cf. Vander Jagt v. O'Neill*, 699 F.2d 1166, 1173 n.16, 1174-75 (D.C. Cir. 1982) (relying on the same "prudential considerations" in the name of equitable discretion that the *Metzenbaum* court relied on in the name of political question.), *cert. denied*, 464 U.S. 823 (1983).

67. *Id.* at 1289 (emphasis added).

68. *Id.* at 1291.

APA.<sup>69</sup>

In *Pierce*, Housing and Urban Development (HUD) employees, their union and Congressman Martin Sabo, a member of the House Appropriations Committee, sued the Secretary of HUD. They claimed that the Secretary's proposed reduction-in-force violated a provision of the HUD Appropriation Act prohibiting the use of any funds "to plan, design, implement or administer any reorganization . . . without the prior approval of the Committees on Appropriations."<sup>70</sup> The D.C. Circuit expressly "pretermitt[ed]" the question whether the district court was the appropriate forum for the employees' complaint.<sup>71</sup> It did decide, however, two issues of legislator standing. Relying on *Harrington v. Bush*,<sup>72</sup> the court decided that Congressman Sabo did not have standing to sue as a member of the House, because his interest as a legislator in the proper execution of the laws was no different from that of any citizen and was therefore too "generalized."<sup>73</sup> Relying, however, on *Kennedy v. Sampson*,<sup>74</sup> and analogizing the situation to *Goldwater v. Carter*,<sup>75</sup> the D.C. Circuit Court decided that the congressman did have standing as a member of the House Appropriations Committee, because "[t]he Secretary's actions injured him by depriving him of that specific statutory right to participate in the legislative process . . . unique to members of the Appropriations Committees."<sup>76</sup> Proceeding to the merits, the court found the approval clause unconstitutional, struck down the legislative provision in its entirety and lifted the district court's injunction on the reduction-in-force.<sup>77</sup> The court did not mention the equitable-dis-

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69. See *Metzenbaum v. Federal Energy Regulatory Commission*, 675 F.2d 1282, 1291 (D.C. Cir. 1982) (citing 5 U.S.C. §§ 553(b)(B) (1988)).

70. *American Fed'n of Gov't Employees v. Pierce*, 697 F.2d 303, 304 (D.C. Cir. 1982) (per curiam) (quoting Department of Housing and Urban Development - Independent Agencies Appropriation Act of 1983, Pub. L. No. 97-272, 96 Stat. 1160, 1164 (1982) (codified at 36 U.S.C. §§ 121b-122a (1988))).

71. *Pierce*, 697 F.2d at 304.

72. 553 F.2d 190 (D.C. Cir. 1977) (denying a congressman standing to challenge CIA activities for exceeding the Agency's statutory authority and CIA use of funding and reporting provisions for impairing his interests as a legislator).

73. *Pierce*, 697 F.2d at 305.

74. 511 F.2d 430, 433 (D.C. Cir. 1974) (granting a senator standing to challenge an allegedly illegal pocket veto, which "nullified" his vote on the specific bill at issue).

75. 617 F.2d 697, 702-03 (D.C. Cir.) (granting senators standing to challenge the President's termination of a treaty without seeking their advice and consent, since termination nullified their opportunity to vote), *vacated on other grounds*, 444 U.S. 996 (1979).

76. *Pierce*, 697 F.2d at 305 (footnote omitted).

77. *Id.* at 305-08.

cretion doctrine. Moreover, it based its standing analysis on cases that the *Riegle* court described as inconsistent.<sup>78</sup> The unsatisfactory rationale of *Pierce* may be explained, however, by the fact that its opinion was expedited.<sup>79</sup>

The first case to rely on *Riegle* was *Vander Jagt v. O'Neill*.<sup>80</sup> In that case, fourteen Republican Representatives brought various constitutional claims against, among others, the Democratic leadership of the House. Suing in various capacities, including as members of the House and of their respective committees, as individual voters and as representatives of all voters in districts represented by Republicans,<sup>81</sup> they alleged that the Democrats had given them fewer committee assignments than they were proportionately owed.<sup>82</sup>

*Vander Jagt* laid the groundwork for the D.C. Circuit's two divergent views of congressional-plaintiff cases. The first view is that of Judge Gordon, writing for the majority, who was concerned that the court "not deny [its] jurisdiction" over claims of unconstitutional legislative rule-making.<sup>83</sup> In this way, the court would not be hindered from intervening in the future when faced with egregiously discriminatory rule-making, such as that which had led other courts to censure legislatures for unconstitutionally excluding or expelling a member.<sup>84</sup> The majority was also convinced that separation-of-powers issues do not belong in the standing inquiry.<sup>85</sup> Judge Gordon, rejecting any distinction for standing purposes between the nullification of a legislator's vote and the diminution in a legislator's influence (The *Goldwater* standard<sup>86</sup>),

78. See *supra* notes 39-42 and accompanying text (*Harrington*, on the one hand, inconsistent with *Kennedy* and *Goldwater*, on the other).

79. See *Pierce* at 309 (Wald and Mikva, JJ., statement advocating rehearing *en banc*); *Barnes v. Kline*, 759 F.2d 21, 45 n.2 (D.C. Cir. 1984) (Bork, J., dissenting) (Judge Bork explaining his prior inconsistent stance in *Pierce* as due, in part, to "the emergency nature of [that] appeal."), *vacated as moot sub nom.* *Burke v. Barnes*, 479 U.S. 361 (1987).

80. 699 F.2d 1166 (D.C. Cir. 1982), *cert. denied*, 464 U.S. 823 (1983).

81. *Id.* at 1167 n.1.

82. *Id.* at 1167.

83. *Id.* at 1170.

84. *Id.* (citing cases).

85. *Id.* at 1169. *But see* *Allen v. Wright*, 468 U.S. 737, 752 (1984) ("[T]he law of Article III standing is built on a single basic idea - the idea of separation of powers."); *Barnes v. Kline*, 759 F.2d 21, 51-52 (D.C. Cir. 1984) (Bork, J., dissenting) (declaring the position untenable, after *Allen*, that separation-of-powers considerations do not belong in the standing inquiry), *vacated as moot sub nom.* *Burke v. Barnes*, 479 U.S. 361 (1987).

86. *Goldwater v. Carter*, 617 F.2d 697, 702 (D.C. Cir.), *vacated on other grounds*,

because of *Riegle*,<sup>87</sup> found the standing requirement satisfied by the plaintiffs' allegations of dilution of their political power as legislators and as voters.<sup>88</sup> The majority also rejected a political-question solution, because it doubted "the intelligibility of the 'textually committed' aspect of the . . . doctrine."<sup>89</sup> Instead, the court exercised its "remedial discretion" to dismiss the congressmen's suit.<sup>90</sup>

The *Vander Jagt* court did more, however, than just change the name of the doctrine from "equitable" to "remedial" discretion.<sup>91</sup> In a footnote, it apparently substituted for *Riegle*'s two-part test a standard of "broad discretion" bounded only by "reasonableness."<sup>92</sup> Because the plaintiffs sued both as legislators and as private citizens,<sup>93</sup> the court concluded that the simple *Riegle* analysis did not apply.<sup>94</sup> The majority did not state that the plaintiffs' claims as private citizens were not properly before them. It hardly mentioned the availability of an in-house remedy, while admitting that the presence of a private claim "strengthened the[] argument for judicial review."<sup>95</sup> Instead, the court justified the exercise of its discretion to dismiss all the claims before it with the bare conclusion that it would be "disastrously intrusive" and "startlingly unattractive" for the court to tell Congress how to make committee assignments.<sup>96</sup>

Judge Bork's concurrence<sup>97</sup> contrasts sharply with the majority's approach and represents the second view of congressional-plaintiff cases. Judge Bork saw the separation-of-powers concerns

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444 U.S. 996 (1979); see *supra* notes 16-18 and accompanying text.

87. See *Riegle*, 656 F.2d at 880 (questioning the *Goldwater* distinction because even in that case, which granted standing, "collegial remedies existed"); *Vander Jagt*, 699 F.2d at 1168 (stating that *Riegle* "discarded" the distinction).

88. *Vander Jagt*, 699 F.2d at 1168.

89. *Id.* at 1173.

90. *Id.* at 1175-77.

91. See *id.* at 1175 n.25 ("Our shift from the phrase 'equitable discretion' to 'remedial discretion' indicates only that our appellants sought both injunctive and declaratory relief, unlike *Riegle*'s.").

92. *Id.* at 1175 n.24.

93. See *id.* at 1169 n.4.

94. *Id.* at 1175 n.24.

95. *Id.* at 1169 n.4.

96. *Id.* at 1176. It would appear that, by dismissing all of the claims under equitable discretion, the court was extending the applicability of the doctrine beyond congressional-plaintiffs to private plaintiffs as well. But see *Gregg v. Barrett*, 771 F.2d 539, 546 (D.C. Cir. 1985) (rejecting the argument that *Vander Jagt* compels such an extension); *infra* text accompanying notes 155-61.

97. *Vander Jagt*, 699 F.2d at 1176-85 (Bork, J., concurring).

implicated by congressional-plaintiff suits as a jurisdictional matter, prohibiting the court from acting, rather than a matter of judicial discretion to assure "that non-frivolous claims of unconstitutional action would [not] go unreviewed by a court."<sup>98</sup> He questioned *Riegle's* premise that the Supreme Court believed that separation-of-powers issues do not belong in the standing inquiry and argued that this position was even more clearly untenable in light of language in the Supreme Court's decision in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*<sup>99</sup> Judge Bork called for a return to the standard established in *Goldwater v. Carter*, which would deny standing to legislators unless they could show a "nullification" of their vote.<sup>100</sup> He felt that anything less would not rise to the level of injury in fact.<sup>101</sup>

By the time the next congressional-plaintiff case reached the D.C. Circuit, two members of the panel that heard it apparently had come to a solid understanding of the equitable-discretion doctrine. As a result, the doctrine was invoked in *Crockett v. Reagan*<sup>102</sup> with little explanation and no attempt to respond to the difficulties raised by *Vander Jagt*. In *Crockett*, twenty-nine congressmen sued the President, claiming that the United States presence in and military aid to El Salvador violated the war powers clause, the War Powers Resolution and the Foreign Assistance Act of 1961 ("FAA").<sup>103</sup> Without analysis, the circuit court af-

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98. *Riegle v. Federal Open Mkt. Comm.*, 656 F.2d 873, 882 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981), *quoted in Vander Jagt v. O'Neill*, 699 F.2d 1166, 1183 (D.C. Cir. 1982) (Bork, J., concurring), *cert. denied*, 464 U.S. 823 (1983).

99. 454 U.S. 464 (1982), *discussed in Vander Jagt*, 699 F.2d at 1179-81 (Bork, J., concurring).

100. 617 F.2d 697, 702 (D.C. Cir.), *vacated on other grounds*, 444 U.S. 996 (1979), *discussed in Vander Jagt*, 699 F.2d at 1180-81 (Bork, J., concurring).

101. *Vander Jagt*, 699 F.2d at 1180-81 (Bork, J., concurring). Judge Bork later rejected the notion of congressional standing altogether, even for legislators who allege a "nullification" of their vote. *See Barnes v. Kline*, 759 F.2d 21, 68 n.18 (D.C. Cir. 1984) (Bork, J., dissenting), *vacated as moot sub nom. Burke v. Barnes*, 479 U.S. 361 (1987); *infra* text accompanying note 143. For a discussion of Judge Bork's views about standing, see generally Polsby, *Analysis of Judge Robert H. Bork's Opinions on Standing*, 9 CARDOZO L. REV. 175 (1987) (Judge Bork's opinion on the issue of standing is rooted in jurisdictional limits rather than discretionary limits on judicial authority).

102. 720 F.2d 1355 (D.C. Cir. 1983) (*per curiam*), *cert. denied*, 467 U.S. 1251 (1984).

103. *Id.* at 1356. The FAA prohibits "security assistance . . . to any country the government of which engages in a consistent pattern of gross violations of . . . human rights," in the absence of presidential certification of "extraordinary circumstances." 22 U.S.C. § 2304(a)(2) (1988).

firmed the district court's dismissal of the war-powers claims under the political-question doctrine and the FAA claim under the equitable-discretion doctrine.<sup>104</sup> The difference between the two doctrines was not explained and is difficult to discern. This difficulty arises because, on the one hand, the court defined equitable discretion as a doctrine "which counsels judicial restraint where a congressional plaintiff's dispute is primarily with his or her fellow legislators."<sup>105</sup> On the other hand, it apparently derived its conclusion that the war-powers issue was a political question from the district court's finding "that Congress had taken no action which would suggest that it viewed our involvement in El Salvador as subject to the [War Powers Resolution]."<sup>106</sup> In other words, the court was unwilling to hear *either* the war-powers *or* the FAA claims because it thought the plaintiffs could in each case seek relief from their colleagues. The *Crockett* court did not address the question, raised by *Riegle*, of the likelihood that a private plaintiff would have standing to bring this claim. Judge Bork concurred in the result for essentially the same reasons that he did in *Vander Jagt*.<sup>107</sup>

In *Moore v. United States House of Representatives*,<sup>108</sup> the court reintroduced into the injury-in-fact part of the standing inquiry the distinction between the nullification of a legislator's vote and the diminution in the effectiveness of his role.<sup>109</sup> The *Moore* court held that a congressional plaintiff's injury was cognizable when he alleged that executive or legislative action had deprived him of a constitutionally protected interest in the process of enacting law; it distinguished "a generalized complaint that a legislator's effectiveness is diminished by . . . activities taking place outside the legislative forum."<sup>110</sup> In support of this proposition,

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104. *Crockett*, 720 F.2d at 1356-57, *aff'g* 558 F. Supp. (D.D.C. 1982).

105. *Id.* at 1357 (citing *Riegle v. Federal Open Mkt. Comm.*, 656 F.2d 873, 881 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981)) (The district court noted that because Congress had enacted the necessary appropriations and accepted the President's certifications, judicial resolution of the dispute would permit the plaintiffs to circumvent democratic processes. *See Crockett*, 558 F. Supp. at 902-03.).

106. *Crockett*, 720 F.2d at 1356-57 (citing *Crockett*, 558 F. Supp. at 899).

107. *See Crockett*, 720 F.2d at 1357 (Bork, J., concurring).

108. 733 F.2d 946 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985).

109. *Moore*, 733 F.2d at 951-52. The distinction between nullification and diminishment of voting power was rejected by the *Vander Jagt* majority on the authority of *Riegle v. Vander Jagt v. O'Neill*, 699 F.2d 1166, 1168-69 (D.C. Cir. 1982), *cert. denied*, 464 U.S. 823 (1983); *see supra* text accompanying notes 86-88.

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

the court contrasted *Kennedy* (pocket veto) with *Harrington* (CIA conduct) and *Pierce* (execution of a law).<sup>111</sup> The court thereby disregarded *Riegle*, which had adopted equitable discretion in part because it found this standard unworkable and inconsistently applied in *Kennedy* and *Harrington*.<sup>112</sup> The *Moore* plaintiffs satisfied the standing test, because they alleged a specific injury to their "rights to participate and vote on legislation in a manner defined by the Constitution."<sup>113</sup>

In *Moore*, eighteen Representatives complained that the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) had been passed in violation of the origination clause because, arguably, it had originated in the Senate.<sup>114</sup> The court returned to the *Riegle* guidelines and exercised its equitable discretion to dismiss the case on the ground that the congressmen could get relief from their colleagues in the form of the repeal of TEFRA.<sup>115</sup> The court also noted that private plaintiffs had been found to have standing to challenge TEFRA under the origination clause.<sup>116</sup> Judge (now Justice) Scalia concurred in the result, but disputed the majority's premise that federal legislators have a private right to the exercise of their official powers.<sup>117</sup> He conceded, however, that "[t]hey have a private right to the office itself . . . and to the emoluments of the office . . . but the powers of the office belong to the people and not to them."<sup>118</sup> Judge Scalia felt that congressional plaintiffs could not have standing to bring claims involving their "personal desires . . . to exercise their authority [because these were] not within the 'zone of interests' protected by the provisions of the Constitution and the laws conferring such authority . . . since the authority was conferred for the benefit not of the governors but of the governed."<sup>119</sup> He also expressed many of the same concerns about the equitable-discretion doctrine that Judge Bork had ex-

111. *Id.* at 951-52.

112. *See Riegle v. Federal Open Mkt. Comm.* 656 F.2d 873, 656 F.2d at 879-81 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981); *supra* notes 39-42 and accompanying text.

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

114. *Moore*, 733 F.2d at 948-49 (citing U.S. CONST. art. I, § 7, cl. 1 ("All Bills for raising revenue shall originate in the House of Representatives . . .")).

115. *Id.* at 956.

116. *Id.* (citing *Armstrong v. United States* (S.D. Cal. 2 September 1983) (mem.); *Frent v. United States*, 571 F.Supp. 739 (E.D. Mich. 1983); *appeal dismissed*, 734 F.2d 14 (6th Cir. 1984)).

117. *Moore*, 733 F.2d at 959-60 (Scalia, J., concurring).

118. *Id.* at 959 (Scalia, J., concurring) (citations omitted).

119. *Id.* at 960 (Scalia, J., concurring) (citations omitted).



pressed in his concurrences in *Vander Jagt* and *Crockett*.<sup>120</sup>

Moore's recognition of a distinction between nullifications and diminutions in influence enabled the court in *United Presbyterian Church in the U.S.A. v. Reagan*<sup>121</sup> to affirm for lack of standing a congressman's suit that the district court had dismissed under the equitable-discretion doctrine.<sup>122</sup> In *United Presbyterian*, various private organizations and individuals and one member of Congress challenged an Executive Order concerning intelligence activities. The court first dismissed the claims of the private plaintiffs under traditional standing analysis<sup>123</sup> and then addressed the question of congressional standing.<sup>124</sup> Representative Ronald Dellums alleged his injury to be that the President, by violating statutory limitations on intelligence activities, had diminished Dellums's power as a legislator.<sup>125</sup> The court analogized this injury to the injury alleged in *Harrington*, having noted that Moore had cited *Harrington* as a case in which congressional standing was justifiably denied.<sup>126</sup> Finding Representative Dellums's suit to be "indistinguishable"<sup>127</sup> from Representative Harrington's, who "claimed that certain activities of the Central Intelligence Agency were illegal, and that such unlawful conduct diminished his effectiveness as a legislator,"<sup>128</sup> the court held that Representative Dellums did not allege a sufficient injury to achieve standing. Both representatives had alleged a "generalized grievance" about governmental conduct, rather than an injury specific to them as legislatures.<sup>129</sup>

In only one case, *Barnes v. Kline*<sup>130</sup> have the proponents of the two, divergent theories of congressional-plaintiff cases dis-

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120. See *id.* at 961-65 (Scalia, J., concurring). On Judge Bork's concurrences, see *supra* text accompanying notes 97-101 and 107.

121. 738 F.2d 1375 (D.C. Cir. 1984).

122. *Id.* at 1381-82, *aff'g* 557 F. Supp. 61 (D.D.C. 1982). It is not surprising that the three-judge panel that decided *United Presbyterian* included both Judge Scalia and Judge Bork.

123. *United Presbyterian*, 738 F.2d at 1378-81.

124. *Id.* at 1381-82.

125. *Id.* at 1381.

126. *Id.* at 1382; see *supra* text accompanying notes 108-13.

127. *United Presbyterian*, 738 F.2d at 1382.

128. *Moore v. United States House of Representatives*, 733 F.2d 946, 951 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985), *quoted in* *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375, 1382 (D.C. Cir. 1984).

129. *United Presbyterian*, 738 F.2d at 1382.

130. 759 F.2d 21 (D.C. Cir. 1984), *vacated as moot sub nom. Burke v. Barnes*, 479 U.S. 361 (1987).

agreed on the result to be reached. This is explained by the fact that *Barnes* is also the only post-*Riegle* case in which the congressional plaintiffs have won on the merits.<sup>131</sup>

In *Barnes*, thirty-three representatives, joined by the Senate, the Speaker of the House and the bipartisan leadership of the House, challenged the constitutionality of a pocket veto attempted at the end of a legislative session of Congress.<sup>132</sup> The majority found, on the authority of *Kennedy v. Sampson*,<sup>133</sup> that the individual members as well as the Senate and leadership of the House had standing.<sup>134</sup> Without mentioning equitable discretion by name, the court proceeded to the merits, where it decided in favor of the plaintiffs.<sup>135</sup> The Supreme Court heard the case but dismissed it as moot, since the bill had by this time expired by its own terms.<sup>136</sup>

Judge McGowan, writing for the majority at the circuit-court level, based his decision to reach the merits on various ideas of separation of powers, couched in an assortment of doctrines.<sup>137</sup> Judge McGowan found that the *equitable-discretion* concern that the court not intervene to aid legislators "in overturning the results of the legislative process"<sup>138</sup> was not implicated, since this dispute was "solely with the Executive Branch."<sup>139</sup> He argued that a "constitutional impasse," which Justice Powell regarded in *Goldwater* as a prerequisite to the *ripeness* of a dispute between members of the legislative and executive branches, existed in this

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131. Only two other post-*Riegle*, congressional-plaintiff cases, *Metzenbaum v. Federal Energy Regulatory Comm'n*, 675 F.2d 1282 (D.C. Cir. 1982), and *American Federation of Government Employees v. Pierce*, 697 F.2d 303 (D.C. Cir. 1982) (per curiam), even reached the merits, but in those cases the congressional plaintiffs lost. See *supra* text accompanying notes 58-79.

132. *Barnes*, 759 F.2d at 23.

133. 511 F.2d 430 (D.C. Cir. 1974) (concluding that a senator had standing to challenge an *intrasession* pocket veto, which nullified his original vote on the bill).

134. *Barnes*, 759 F.2d at 25-26. For a discussion of the view that standing was appropriately granted in *Barnes*, see Note, *Congressional Standing and the Constitutionality of the Pocket Veto During Intercession Adjournments*, 59 TEMP. L.Q. 151 (1986) [hereinafter *Pocket Veto Note*].

135. *Barnes*, 759 F.2d at 30-41.

136. *Burke v. Barnes*, 479 U.S. 361, 363 (1987).

137. *Barnes*, 759 F.2d at 28. But see *Gregg v. Barrett*, 771 F.2d 539, 545 (D.C. Cir. 1985) (citing this passage as "confirm[ing] that the essential concern of the *equitable discretion* doctrine is that the court not interfere in matters which properly could, and should, be decided by appeal to one's fellow legislators.") (emphasis added).

138. *Barnes*, 759 F.2d at 28.

139. *Id.*

case.<sup>140</sup> Finally, he noted that to decide this case involving a particular pocket veto and the "[d]eprivation of a constitutionally mandated process of enacting law" would not be to issue an *advisory opinion*.<sup>141</sup>

Judge Bork's long dissent urged the court "to renounce outright the whole notion of congressional standing."<sup>142</sup> He no longer would confer standing even in situations meeting the *Goldwater* "nullification" test.<sup>143</sup> He also denounced equitable discretion as a "lawless doctrine."<sup>144</sup>

The court dismissed its next two congressional-plaintiff suits under the standing and political-question doctrines, even though the district court in each case had relied on the equitable-discretion doctrine.<sup>145</sup> In *Southern Christian Leadership Conference v. Kelley*,<sup>146</sup> the court denied Senator Jesse Helms standing to challenge a judgment sealing records of FBI surveillance of Martin Luther King, Jr. The Senator claimed that the sealing deprived him of information necessary to guide his vote on the designation of King's birthday as a national holiday.<sup>147</sup> The court compared this claim to that of Representative Harrington, who alleged a right to information concerning CIA activities in order to guide his participation in the appropriations process.<sup>148</sup> The court followed the *Harrington* decision in determining that any denial of information had not "nullified" the Senator's vote and therefore was not an injury sufficient to confer standing.<sup>149</sup> The court also pointed out that the Senator had legislative remedies open to

140. *Id.*

141. *Id.* (quoting *Moore v. United States House of Representatives* 733 F.2d 946, 951 (D.C. Cir. 1984)). On advisory opinions, see generally E. CHERMERINSKY, *FEDERAL JURISDICTION* § 2.2 (1989) (arguing that the prohibition against advisory opinions lies at the heart of Article III's limitation on federal jurisdiction); Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002 (1924) (arguing that wise constitutional interpretation requires concrete facts).

142. *Barnes*, 759 F.2d at 41 (Bork, J., dissenting).

143. *Id.* at 68 n.18 (Bork, J., dissenting) (rejecting the position he took on this point in *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1180-82 (D.C. Cir. 1982) (Bork, J., concurring), *cert. denied*, 464 U.S. 823 (1983). See *supra* text accompanying note 100.)

144. *Id.* at 61 (Bork, J., dissenting).

145. This also occurred in *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375 (D.C. Cir. 1984) (district court dismissed congressional-plaintiff claim under equitable discretion; D.C. Circuit dismissed for lack of standing). See *supra* text accompanying notes 121-29.

146. 747 F.2d 777 (D.C. Cir. 1984) (per curiam).

147. *Id.* at 779-80.

148. *Id.* at 780 (citing *Harrington v. Bush*, 553 F.2d 190, 202-04 (D.C. Cir. 1977)).

149. *Id.*

him,<sup>150</sup> in essence resolving the equitable-discretion issue against him. Nevertheless, the court said that it did not need to reach that doctrine.<sup>151</sup> Then in *Sanchez-Espinoza v. Reagan*,<sup>152</sup> the court relied on the political-question doctrine, as applied in *Crockett*,<sup>153</sup> to dismiss congressional-plaintiff claims that American activities in Nicaragua violated the war powers clause.<sup>154</sup>

The court was faced in *Gregg v. Barrett*<sup>155</sup> with one of the uncertainties about the application of the equitable-discretion doctrine that were raised by the outcome of *Vander Jagt*.<sup>156</sup> In *Vander Jagt*, the court had dismissed all the claims under its equitable discretion,<sup>157</sup> although the congressional-plaintiffs had presented themselves in both official and private capacities.<sup>158</sup> *Gregg* involved a claim by both congressional and private plaintiffs that the *Congressional Record* does not accurately transcribe congressional floor debates, in violation of their first amendment rights.<sup>159</sup> The defendants requested that the court apply its equitable discretion to all of the plaintiffs in order to dismiss the entire complaint, but the court refused. The court applied the equitable-discretion doctrine only to the congressional plaintiffs, who could obtain relief through the legislative process,<sup>160</sup> while it dismissed the complaint as to the private plaintiffs for failure to state a cause of action.<sup>161</sup>

Two new aspects of equitable discretion have emerged in the two most recent congressional-plaintiff cases that discuss the is-

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150. *Id.*

151. *Id.* at 781 n.3.

152. 770 F.2d 202 (D.C. Cir. 1985).

153. *Crockett v. Reagan*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984); *see supra* text accompanying notes 102-07.

154. *Sanchez-Espinoza*, 770 F.2d at 210. Other plaintiffs and other claims were also before the court. These were: twelve Nicaraguan citizens (nine of them also Nicaraguan residents), bringing tort, fourth and fifth amendment claims; and two Florida residents suing to enjoin as a nuisance the maintenance of paramilitary camps near their homes. All were dismissed on other grounds. *Id.* at 206-10.

155. 771 F.2d 539 (D.C. Cir. 1985).

156. *Vander Jagt v. O'Neill*, 699 F.2d 1166 (D.C. Cir. 1982), *cert. denied*, 464 U.S. 823 (1983).

157. *Id.* at 1177.

158. *Id.* at 1167 n.1, 1168; *see also id.* at 1183-84 (Bork, J., concurring) (criticizing the majority for glossing over the public/private distinction). *See supra* text accompanying notes 93-96.

159. *Gregg*, 771 F.2d at 540.

160. *Id.* at 543-46.

161. *Id.* at 546-49.

sues in any detail.<sup>162</sup> First, the court has now expressly disapproved *Riegle's* suggestion that a court ought to reach the merits of congressmen's suits whenever "a private plaintiff would likely not qualify for standing."<sup>163</sup> Second, the majority opinions have begun to express doubts about the viability of the doctrine itself. In 1987, Senator John Melcher brought the same claim against the FOMC that Senator Riegle had.<sup>164</sup> He argued that because an intervening case had held that private plaintiffs do not have standing to challenge the constitutionality of the selection of the Reserve Bank members of the FOMC, the court would have to hear his suit.<sup>165</sup> The D.C. Circuit disagreed. It dismissed as "dicta" the relevant language in *Riegle*,<sup>166</sup> pointed out that this part of the *Riegle* test had never been "squarely" applied and indeed had been questioned before,<sup>167</sup> and that the availability of private plaintiffs was irrelevant to the separation-of-powers considerations on which equitable discretion is founded.<sup>168</sup> The court agreed nonetheless with the concurrence's "concern over whether the court-fashioned doctrine of equitable discretion 'is a viable doc-

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162. *Melcher v. Federal Open Market Committee*, 836 F.2d 561 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 2034 (1988); *Humphrey v. Baker*, 848 F.2d 211 (D.C. Cir. 1988), *cert. denied*, 109 S. Ct. 491 (1988).

The most recent congressional-plaintiff case to reach the D.C. Circuit does not address the doctrine of equitable discretion and relegates to a single footnote all discussion of the congressional plaintiffs. In *Dellums v. United States Nuclear Regulatory Comm'n*, 863 F.2d 968 (D.C. Cir. 1988), seven members of Congress, four private organizations and two private individuals petitioned for review of two Nuclear Regulatory Commission orders which they claimed violated the ban on imports of South African products. The court refused to confer standing on any of the plaintiffs. The court noted that "Members of Congress do not have standing in cases like this where the Members have not alleged an injury that is 'specific and cognizable,' arising out of an interest 'positively identified by the Constitution.'"<sup>163</sup> *Id.* at 970 n.1 (quoting *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375, 1381 (D.C. Cir. 1984) (quoting *Moore v. United States House of Representatives*, 733 F.2d 946, 951 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985))).

Another recent congressional-plaintiff case did not reach the D.C. Circuit. See *Helms v. Secretary of the Treasury*, 721 F. Supp. 1354, 1359 (D.D.C. 1989) (congressmen's challenge to the inclusion of Namibia as a target of anti-apartheid sanctions dismissed by the district court under the equitable-discretion doctrine, because it is "the law of this jurisdiction," although the court "[r]ecogniz[ed] that this doctrine has undergone some anomalous applications, and that the viability of this court-fashioned doctrine has been questioned").

163. *Riegle v. Federal Open Mkt. Comm.*, 656 F.2d 873, 882 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981).

164. See *supra* text accompanying notes 35-36.

165. *Melcher*, 836 F.2d at 562-63 (citing *Committee for Monetary Reform v. Board of Governors*, 766 F.2d 538 (D.C. Cir. 1985)).

166. *Id.* at 563.

167. *Id.* at 564 (quoting *Gregg v. Barrett*, 771 F.2d 539, 544) (D.C. Cir. 1985).

168. *Id.* at 564.

trine upon which to determine the fate of constitutional litigation.'"<sup>169</sup>

In 1988, in *Humphrey v. Baker*,<sup>170</sup> the court approved the *Melcher* court's rejection of the private-plaintiff part of the *Riegle* test<sup>171</sup> and reiterated its "concern" about the whole doctrine.<sup>172</sup> The court nonetheless used its equitable discretion to dismiss the attempt by Senator Gordon Humphrey and some of his colleagues in the House to challenge the constitutionality of the Federal Salary Act of 1967.<sup>173</sup> The court added, however, that even if it were not bound to apply equitable discretion here, these congressmen would lose on the merits.<sup>174</sup>

## II. SOMETHING OLD OR SOMETHING NEW?

This survey of the cases reveals that the equitable-discretion doctrine has had kinks since its very inception and that the problems surrounding congressional-plaintiff suits today are as knotty as ever, if not more so. In implementing equitable discretion, the *Riegle* court added two new elements to the court's approach to congressional plaintiffs: it suggested that the availability of private plaintiffs could justify the court's decision to throw congressmen out of court, and it made the question of whether to hear their suits one of judicial discretion rather than jurisdictional power.<sup>175</sup> *Riegle*, however, neither changed the court's analytical approach to congressional plaintiffs nor encouraged it to reach the merits of their cases.

Because the private-plaintiff part of the equitable-discretion test never took hold,<sup>176</sup> the basis for reaching the merits remains the same as it was before *Riegle*: the court still asks whether the complaining legislator could get relief in Congress. This test is no less problematic to apply under the new guise than it was under the old. The *Barnes* court considered as a threshold matter, just as the *Kennedy* court had, whether the plaintiffs could get redress from their colleagues concerning a challenged pocket veto.<sup>177</sup> *Ken-*

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169. *Id.* at 565 n.4 (quoting *id.* at 565 (Edwards, J., concurring)).

170. 848 F.2d 211 (D.C. Cir. 1988).

171. *Id.* at 213 n.3, 214.

172. *Id.* at 214.

173. *Id.* at 214-15.

174. *Id.* at 215-17.

175. See *supra* text accompanying notes 48-57.

176. See *supra* text accompanying notes 162-74.

177. See *Barnes v. Kline*, 759 F.2d 21, 28 (D.C. Cir. 1985), *vacated as moot sub*

*nedy* considered the issue in the context of the standing inquiry,<sup>178</sup> while *Barnes* considered it in the course of a post-standing analysis.<sup>179</sup> Both courts decided that the true dispute was with the Executive, and both proceeded to the merits, where they granted judgment to the congressional plaintiffs. The *Riegle* court was uneasy with characterizing *Kennedy* as a case in which a collegial remedy was unavailable.<sup>180</sup> It is difficult to believe that the *Riegle* court would have been any less uneasy about *Barnes*. For in both *Kennedy* and *Barnes*, the plaintiffs could have attempted to reenact the pocket-vetoed legislation.

Although *Barnes* raises the suspicion that equitable discretion is merely a new name for the old approach to congressional-plaintiff suits, the removal of the problem from jurisdictional analysis appears to be a significant change. Indeed, the *Vander Jagt* court thought it was "critical" for the court to hang on to jurisdiction, at least over suits involving a congressman's challenge to the assignment of committee seats.<sup>181</sup> In this way, the court's hands would not be tied when faced with the most egregious examples of congressional manipulation of the committee system.<sup>182</sup> To illustrate situations in which the court might need to intervene, the majority cited earlier cases in which the Supreme Court and one federal district court had decided the merits of a state or local legislator's claim that he had been unfairly excluded or expelled from his elected office.<sup>183</sup>

Others on the circuit have found more objective distinctions between the cases cited by the *Vander Jagt* majority and the cases in which they have thought jurisdiction was unavailable. They have pointed out that in the former cases, in which jurisdiction was conferred, the injury was a nullification of a legislator's vote, rather than the mere diminution in his influence;<sup>184</sup> the complaint

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*nom.* *Burke v. Barnes*, 479 U.S. 361 (1987); *Kennedy v. Sampson*, 511 F.2d 430, 435 n.17 (D.C. Cir. 1974).

178. See *supra* note 133 and accompanying text.

179. See *supra* text accompanying notes 137-41.

180. *Riegle v. Federal Open Mkt. Comm.*, 656 F.2d 873, 880 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981).

181. *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1170 (D.C. Cir. 1982), *cert. denied*, 464 U.S. 823 (1983).

182. *Id.*

183. *Id.* at 1170-71.

184. See *id.* at 1184-85 n.4 (Bork, J., concurring). Later, Judge Bork reached the conclusion that not even "nullifications" of a legislator's vote should satisfy the injury-in-fact analysis. See *Barnes v. Kline*, 759 F.2d 21, 68 n.18 (D.C. Cir. 1985) (Bork, J., dissent-

alleged the "right to the office itself" or to its emoluments, rather than to its powers;<sup>185</sup> and the plaintiff was a state or local legislator rather than a federal one.<sup>186</sup> Whether these are compelling distinctions or not, it is clear that the *Vander Jagt* majority also distinguished the cases they cited. After all, those cases were decided on the merits, while Congressman Vander Jagt's claim was not. Unfortunately, the majority's equitable-discretion test of whether the plaintiff's dispute was primarily with his fellow-legislators fails to distinguish between the earlier cases decided on the merits and the later ones dismissed under equitable discretion, since in all of them the legislator's complaint derived from his having been outvoted by his colleagues.

Two conclusions follow. On the one hand, the failure of "the availability of an in-house remedy" test to distinguish the cases in which judicial intervention is appropriate from those in which it is not suggests that the adoption of equitable discretion was unnecessary and ineffectual. On the other hand, the post-*Riegle* court's record of dismissals shows that the opposition camp's prophecies about the dire results of severing this standard from the jurisdictional inquiry have not been fulfilled.

Judge Bork argued in his *Barnes* dissent that recognizing jurisdiction in congressional-plaintiff cases constitutes a dangerous aggrandizement of judicial power.<sup>187</sup> He reasoned that unless the court denied jurisdiction to hear suits brought by congressmen over alleged injuries to their official powers, it might soon be asked to intervene in every sort of governmental dispute imaginable, brought by members of all branches of both state and the federal governments. Decisions like *Barnes* threatened to "so enhance the power of the courts as to make them the dominant branch of government."<sup>188</sup> What Judge Bork's parade of horrors ignores is that conferring standing, admitting ripeness, denying mootness and refusing to recognize a question as political do not guarantee judicial intervention when a congressional plaintiff is in-

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ing), *vacated as moot sub nom. Burke v. Barnes*, 479 U.S. 361 (1987); *supra* text accompanying note 143.

185. *Moore v. United States House of Representatives*, 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia, J., concurring), *cert. denied*, 469 U.S. 1106 (1985); *see Barnes*, 759 F.2d at 50 (Bork, J., dissenting) (quoting *Moore*, 733 F.2d at 959); *supra* text accompanying note 118.

186. *Moore*, 733 F.2d at 959 n.1 (Scalia, J., concurring).

187. *Barnes*, 759 F.2d at 42 (Bork, J., dissenting).

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



volved. Even if judges and executive-branch officials began flocking to the courts in great numbers to complain of injuries to the exercise of their official powers, the court would undoubtedly show the same reluctance to intervene as it has when legislators have enlisted its aid. Significantly, since the adoption of equitable discretion, the D.C. Circuit has granted relief in only one congressional-plaintiff case: *Barnes*.<sup>189</sup>

Although equitable discretion has not changed the analytical framework within which the court resolves congressional-plaintiff cases, and although the non-jurisdictional approach has not enhanced the control of the judiciary over the democratic process, the adoption of the new doctrine has created at least one additional cost. That cost is the D.C. District Court's confusion over which doctrine to apply to dismiss congressional-plaintiff claims. From *Riegle* onward, the D.C. Circuit has used the equitable-discretion doctrine to dismiss seven congressional claims;<sup>190</sup> it has denied standing in three;<sup>191</sup> it has dismissed another three as political questions,<sup>192</sup> one as unripe,<sup>193</sup> and it has reached the merits of three.<sup>194</sup> Often, the court has applied more than one doctrine within the same case.<sup>195</sup> In seven of the eleven congressional-plaintiff cases heard by the district court since *Riegle*, the D.C. Circuit has affirmed the lower court's holding, but has relied on a different doctrine from that relied on by the district court.<sup>196</sup> Never has

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189. See *supra* note 131 and accompanying text.

190. See *Humphrey v. Baker*, 848 F.2d 211 (D.C. Cir.), *cert. denied*, 109 S. Ct. 491 (1988); *Melcher v. Federal Open Mkt. Comm.*, 836 F.2d 561 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 2034 (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); *Crockett v. Reagan*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984); *Vander Jagt v. O'Neill*, 699 F.2d 1166 (D.C. Cir. 1982), *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).

191. See *Dellums v. United States Nuclear Regulatory Comm'n*, 863 F.2d 968 (D.C. Cir. 1988); *Southern Christian Leadership Conference v. Kelley*, 747 F.2d 777 (D.C. Cir. 1984) (*per curiam*); *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375 (D.C. Cir. 1984).

192. See *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985); *Crockett*, 720 F.2d at 1355; *Metzenbaum v. Federal Energy Regulatory Comm'n*, 675 F.2d 1282 (D.C. Cir. 1982).

193. See *Metzenbaum*, 675 F.2d 1282 (D.C. Cir. 1982).

194. See *Barnes*, 759 F.2d at 21; *American Fed'n of Gov't Employees v. Pierce*, 697 F.2d 303 (D.C. Cir. 1982) (*per curiam*); *Metzenbaum*, 675 F.2d 1282.

195. Notably in *Crockett*, for example. See *supra* text accompanying notes 103-06.

196. See *Humphrey v. Baker*, 848 F.2d 211 (D.C. Cir.), *cert. denied*, 109 S.Ct. 491 (1988); *Melcher v. Federal Open Mkt. Comm.*, 836 F.2d 561 (D.C. Cir. 1987), *cert. de-*

the appellate court clearly explained the differences it sees between the several doctrines in an effort to guide the lower court.

### III. THE CASE FOR STANDING

The persistence of the standing and political-question doctrines, and to a lesser extent ripeness and mootness, as means of dismissing congressional-plaintiff suits even after *Riegle* derives from the very limited usefulness of equitable discretion's "availability of an in-house remedy" test. The test requires the court to determine who the real defendant is: if the real defendant is someone within the legislative branch, then the court can apply equitable discretion to dismiss the complaint on the ground that the plaintiff's colleagues can right the wrong; if the defendant is a member of the executive branch, then the court must look to other doctrines for a way to avoid deciding the case. Thus, the court only uses equitable discretion to dismiss congressmen's challenges to in-house rule-making, as in *Vander Jagt*, and to legislation, as in *Moore* and in *Riegle*. Of all such challenges, only *Metzenbaum* was *not* dismissed under the equitable-discretion doctrine. That case may be explained by two facts: that its opinion was expedited to meet a statutory deadline and that many of its plaintiffs were non-congressional plaintiffs.<sup>197</sup> When congressmen have challenged executive or judicial action, the court has never invoked equitable discretion. It has either dismissed the claim under one of the traditional doctrines, such as standing in *United Presbyterian* and political question in *Sanchez*, or it has decided the issue on the merits, as it did in *Barnes* and *Pierce*.

This difference in treatment of challenges to legislative-branch action as contrasted with executive-branch action explains the peculiar juxtaposition of two different doctrines in *Crockett*.<sup>198</sup> The court in that case approved the District Court's dismissal of two challenges to the United States involvement in El Salvador: it approved the dismissal of the war-powers claim under the political-question doctrine and the FAA claim under the equitable-dis-

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nied, 108 S.Ct. 2034 (1988); *Gregg v. Barrett*, 771 F.2d 539 (D.C. Cir. 1985); *Southern Christian Leadership Conference v. Kelley*, 747 F.2d 777 (D.C. Cir. 1984) (per curiam); *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375 (D.C. Cir. 1984); *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. 1982), cert. denied, 464 U.S. 823 (1983).

197. See *supra* text accompanying notes 62-63.

198. See *supra* text accompanying notes 103-06.

cretion doctrine. The bifurcated analysis is consistent with the D.C. Circuit's different approaches to inter- and intra-branch disputes. The District Court saw the war-powers claim as raising the question of whether the Executive was exceeding its constitutional authority. It saw the FAA claim as alleging that Congress had not adhered to its own requirements in approving aid to El Salvador.<sup>199</sup> One might doubt, however, that there is much to distinguish the claims, given that both courts also thought it significant that Congress as a whole had taken no action to assert a war-powers violation.<sup>200</sup> One might view the war-powers claim, therefore, as a dispute primarily between the plaintiffs and their inactive colleagues, rather than between the plaintiffs and the executive branch. Viewed in this light, the war-powers claim appropriately would have been dismissed under equitable discretion. The court, however, has consistently treated claims that could be characterized as congressional failure to censure executive action differently from claims that Congress has acted illegally.

The *Riegle* court argued that the existing doctrines of standing, political question and ripeness were ill-suited to "articulating [its] prudential concerns in congressional plaintiff [*sic*] cases."<sup>201</sup> While the court's explanation of the inadequacies of each of the three doctrines was weak,<sup>202</sup> its exasperation with them is nonetheless understandable. Judicial and academic criticism of the Supreme Court's standing and political-question decisions has been considerable.<sup>203</sup> Only one Justice on the Supreme Court has advocated ripeness as a doctrine of broad usefulness in dealing with congressional-plaintiff cases.<sup>204</sup> Still, given the very limited appli-

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199. *Crockett v. Reagan*, 558 F. Supp. 893, 902 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984).

200. *Crockett*, 720 F.2d at 1356-57; *Crockett*, 558 F. Supp. at 899.

201. *Riegle v. Federal Open Mkt. Comm.*, 656 F.2d 873, 880 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981).

202. See *supra* text accompanying notes 37-47.

203. For criticism of the standing doctrine, see *Dellums v. United States Nuclear Regulatory Comm'n*, 863 F.2d 968, 971 (D.C. Cir. 1988) ("[T]he guidance discernible from decisions of the Supreme Court on standing is less than pellucid."); McGowan, *supra* note 19, at 252-56; Nichol, *Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635 (1985); Nichol, *Rethinking Standing*, 72 CALIF. L. REV. 68 n.3 (1984). For criticism of the political question-doctrine, see, Henkin, *Is There a "Political Question" Doctrine?* 85 YALE L.J. 597 (1976); Redish, *Judicial Review and the "Political Question,"* 79 NW. U.L. REV. 1031 (1985). But see Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97 (1988).

204. See *Goldwater v. Carter*, 444 U.S. 996, 997-1002 (1979) (Powell, J., concur-

cation of equitable discretion (to intra-congressional conflicts alone), and the confusion it engenders, the argument is appealing for eliminating the new doctrine of equitable discretion and dismissing congressional-plaintiff suits under one of the old doctrines. The court, moreover, should not ignore the constitutionally based limits on its power merely because it finds them difficult to apply.<sup>205</sup>

The political-question doctrine, if it survives at all, surely applies to intra-branch disputes.<sup>206</sup> The problem for a court that accepts this limited role for the political-question doctrine can be framed as the determination of whether the congressional plaintiff's dispute is primarily with his fellow-legislators or with another branch of government. If the former, the court could then dismiss it as "political," with precisely the same effect as if it had applied equitable discretion. The court could also follow Justice Powell and dismiss the claim as unripe, since the equitable-discretion "availability of an in-house remedy" test closely resembles his test of whether Congress and the Executive have reached a "constitutional impasse."<sup>207</sup>

Professor Henkin's insightful treatment of the political-question cases suggests yet another way to do away with equitable discretion, at least as it has been applied in some cases. When the court dismisses congressional-plaintiff challenges to legislative rule-making, it may be holding, in effect, *on the merits*, that "the act complained of fell within the enumerated powers conferred upon the political branches by the Constitution . . . and . . . did [not] violate any right reserved to the petitioner by the Constitution."<sup>208</sup> Rule-making is certainly one of Congress's enumerated

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ring) ("The Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse.").

205. On this point, see *Barnes v. Kline*, 759 F.2d 21, 59 (D.C. Cir. 1985) (Bork, J., dissenting), *vacated as moot sub nom. Burke v. Barnes*, 479 U.S. 361 (1987).

206. See Wald, *Life on the District of Columbia Circuit: Literally and Figuratively Halfway Between the Capitol and the White House*, 72 MINN. L. REV. 1, 11 (1987) ("There have, of course, always been cases involving disputes within the other branches that courts have declined to hear. . . . For example, our court refused to decide a suit by Indiana Republicans seeking to compel the House of Representatives to seat their candidate . . . . We called it a classic political question. . . .") (citing *Morgan v. United States*, 801 F.2d 445 (D.C. Cir. 1986), *cert. denied*, 107 S.Ct. 1359 (1987)).

207. *Goldwater*, 444 U.S. at 997. See *supra* text accompanying note 46.

208. Henkin, *supra* note 203, at 606 (referring to dismissals under the political question doctrine).

powers<sup>209</sup> and language in the *Vander Jagt* and *Gregg* cases also supports the interpretation that those cases involved no constitutional violation of any rights of the congressional plaintiffs'. The *Vander Jagt* court said that its "decision today simply recognizes that if Congress should adopt internal procedures which 'ignore constitutional restraints or violate fundamental rights,' it is clear that we must provide remedial action."<sup>210</sup> Similarly, in *Gregg*,<sup>211</sup> the dismissal of the suit as to the private plaintiffs for failure to state a cause of action suggests that the suit could have been dismissed as to the congressional plaintiffs for the same reason.<sup>212</sup> The question of what rights the Constitution reserves to congressional plaintiffs is the crux of this approach.

In the final analysis, however, standing remains the most suitable doctrine for dismissing congressional-plaintiff cases. Because in some cases the court is clearly *refusing* to decide difficult questions on the merits,<sup>213</sup> Professor Henkin's theory does not have as broad an application as the standing doctrine.<sup>214</sup> Moreover, *Allen v. Wright*<sup>215</sup> has dispelled the D.C. Circuit's doubt that standing could address the separation-of-powers concerns inherent in congressional-plaintiff suits.<sup>216</sup> In *Allen*, the Supreme Court explicitly

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209. See U.S. CONST. art I, § 5, cl. 2.

210. *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1170 (D.C. Cir. 1982) (quoting *United States v. Ballin*, 144 U.S. 1, 5 (1892), *cert. denied*, 464 U.S. 823 (1983)). The *Vander Jagt* concurrence also seemed to look at the merits in concluding that standing did not exist. See *id.*, 699 F.2d at 1182 (D.C. Cir. 1982) (Bork, J., concurring) ("If providing a judicial remedy in [a case like *Kennedy* or *Goldwater*] might have a degree of intrusiveness about it, our concern should be lessened by the fact that the vote denied is a structural feature of our government, clearly assumed in . . . the Constitution, as equal legislative influence or committee membership is not."), *cert. denied*, 464 U.S. 823 (1983).

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

212. See *supra* text accompanying notes 159-61. Another case that leads one to suspect that the court's view of the merits sometimes underlies its dismissal on equitable-discretion grounds is *Humphrey v. Baker*, 848 F.2d 211 (D.C. Cir. 1988). *Humphrey* held that even if the court were not bound to dismiss the congressional-plaintiff claim under equitable discretion, the challenge to the Federal Salary Act failed on the merits. *Humphrey*, 848 F.2d at 215. See *supra* text accompanying notes 173-74.

213. Consider, for example, the appointment clause issue in *Riegle*, see *supra* text accompanying note 36, and the origination clause issue in *Moore*, see *supra* text accompanying note 114.

214. See *supra* text accompanying note 208.

215. 468 U.S. 737, *reh'g denied*, 468 U.S. 1250 (1984).

216. For the D.C. Circuit's doubts about the ability of standing to address separation-of-powers concerns, see *Moore v. United States House of Rep.*, 733 F.2d 946, 954 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985); *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1169-70 (D.C. Cir. 1982), *cert. denied*, 464 U.S. 823 (1983); *Riegle v. Federal Open Mkt. Comm.*, 656 F.2d 873, 878 n.5 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981). The

declared that the standing inquiry appropriately may address those concerns.<sup>217</sup> The D.C. Circuit, therefore, appropriately could consider them under the "prudential" component of the standing inquiry, rather than under equitable discretion.<sup>218</sup> Alternatively, the D.C. Circuit could deny standing to congressional plaintiffs under the injury-in-fact prong of the standing analysis.<sup>219</sup> Justice (then Judge) Scalia and Judge Bork have argued persuasively that elected federal officials have no private right to the exercise of their official powers, and therefore cannot gain standing when they claim impairment of their governmental powers.<sup>220</sup>

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D.C. Circuit reasoned in *Vander Jagt* that standing analysis could not incorporate separation-of-powers concerns for a number of reasons: the Supreme Court explicitly said so in *Flast v. Cohen*, 392 U.S. 83, 100-01 (1968); the Supreme Court vacated on grounds other than standing the D.C. Circuit's decision of the merits of *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir.), *vacated*, 444 U.S. 996 (1979); and Supreme Court decisions since *Flast* did not explicitly declare otherwise. *See Vander Jagt*, 699 F.2d at 1169-70. *But see id.* at 1180 (Bork, J., concurring) ("The [Supreme Court's] *Valley Forge* decision, which came after *Riegle*, demonstrates — conclusively, I believe — that the concept of standing continues to incorporate separation-of-powers considerations. The premise on which *Riegle* rested, therefore, is no longer valid."); *Moore*, 733 F.2d at 957 (Scalia, J., concurring) ("[T]he *Baker-Flast* approach to standing has been repudiated by later Supreme Court cases."); Scalia, *The Doctrine of Standing As an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881 (1983).

217. *Allen*, 468 U.S. at 752 (quoting *Flast*, 392 U.S. at 97) ("[S]tanding is built on a single basic idea - the idea of separation of powers. . . . [Q]uestions . . . relevant to the standing inquiry must be answered by reference to the Art. III notion that federal courts may exercise power . . . only when adjudication is 'consistent with a system of separated powers . . . .'"; *see Barnes v. Kline*, 759 F.2d 21, 51-52, 67-68 (D.C. Cir. 1985) (Bork, J., dissenting), *vacated as moot sub nom. Burke v. Barnes*, 479 U.S. 361 (1987). The *Barnes* majority recognized that *Allen* put separation of powers squarely into the standing inquiry, but refused to conclude that congressional plaintiffs never deserve standing. *Barnes*, 759 F.2d at 26-27; *see id.* at 28 n.14 (*Allen* "has nothing to do with 'governmental standing,' nor does the Court mention the subject."). *But see id.* at 52 n.9 (Bork, J., dissenting) (*Allen* compels the view that congressional plaintiffs have no judicially cognizable injury when they allege impairment of their governmental powers.).

218. *See Vander Jagt*, 699 F.2d at 1179 (Bork, J., concurring).

219. The standing inquiry contains a constitutional component, derived from the "cases and controversies" requirement, U.S. CONST. art. III, § 2, cl. 1, and a prudential component. The constitutional component is usually said to contain three elements: (1) injury in fact, (2) "fairly traceable" to the action of the defendant, and (3) "likely to be redressed" by the requested relief. *See, e.g., Allen*, 468 U.S. at 750-51; *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471-72 (1982).

220. Judge Scalia argued that "a proper understanding of the doctrine of separation of powers suggests that the personal desires of legislative and executive officers to exercise their authority are not within the 'zone of interests' protected by the provisions of the Constitution and laws conferring such authority." *Moore v. United States House of Representatives*, 733 F.2d 946, 960 (D.C. Cir. 1984) (Scalia, J., concurring) (emphasis added), *cert. denied*, 469 U.S. 1106 (1985). The requirement that a complaint fall within the zone

In a similar vein, Professor Nichol has suggested that the courts dismiss congressional-plaintiff cases "for lack of a judicially cognizable interest."<sup>221</sup> He argues that congressmen have no personal interest in the exercise of their legislative powers. Moreover, recognizing congressional standing inevitably would lead to recognizing standing in other government officials, thereby "markedly augment[ing] the scope of judicial authority."<sup>222</sup> Not only is standing inappropriate, it is also unnecessary, because "Congress . . . can protect its own interests."<sup>223</sup> Nichol's reluctance, however, to deny standing in a case in which Congress and the President have reached a "true impasse,"<sup>224</sup> is misguided. When no private plaintiff who has suffered a judicially cognizable injury is before the court, then the issue is not suitable for judicial resolution.<sup>225</sup> Courts, after all, exist to protect the rights of individuals<sup>226</sup> and not merely to vindicate every illegal act.<sup>227</sup> Moreover, the D.C. Circuit's difficulty in satisfactorily defining "true impasses"<sup>228</sup> may be due, in part, to judicial inability to determine

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of interests protected by the relevant law is one of the prudential considerations of standing. Judge Bork, however, argued that congressional plaintiffs do not meet the *injury-in-fact* requirement of standing, because impairment of governmental powers is not a judicially cognizable injury. *Barnes*, 759 F.2d at 52 n.9 (Bork, J., dissenting).

221. Nichol, *Injury and the Disintegration of Article III*, 74 CALIF. L. REV. 1915, 1944 (1986). For other views on congressional standing, see Dessem, *Congressional Standing to Sue: Whose Vote Is This, Anyway?*, 62 NOTRE DAME L. REV. 1 (1986); Note, *The Justiciability of Congressional-Plaintiff Suits*, 82 COLUM. L. REV. 526 (1982); *Congressional Note*, *supra* note 20; Note, *The Burger Court's Unified Approach to Standing and Its Impact on Congressional Plaintiffs*, 60 NOTRE DAME L. REV. 1187 (1985); *Pocket Veto Note*, *supra* note 134; Comment, *Standing Versus Justiciability: Recent Developments in Participatory Suits Brought by Congressional Plaintiffs*, 1982 B.Y.U. L. REV. 371 (1982).

222. Nichol, *supra* note 221, at 1945.

223. *Id.*; see *Barnes v. Kline*, 759 F.2d 21, 41-71 (D.C. Cir. 1985) (Bork, J., dissenting), *vacated as moot sub nom. Burke v. Barnes*, 479 U.S. 361 (1987).

224. Nichol, *supra* note 221, at 1945 n.164 (giving, as a hypothetical example of such an impasse, the situation that would arise if Congress passed a resolution under the War Powers Act challenging the legality of some military action taken by the President).

225. In many cases, a private plaintiff *would* eventually be able to assert a judicially cognizable interest. See *Barnes*, 759 F.2d at 61 (Bork, J., dissenting). Such postponement of judicial involvement could be beneficial, in that it would allow "time for the real impact of laws and actions to become clear, thus making the constitutional inquiry less abstract and more focused." *Id.* at 54 (Bork, J., dissenting).

226. See *id.* at 52 (Bork, J., dissenting); Scalia, *supra* note 216, at 884 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803)).

227. See *Barnes*, 759 F.2d at 60 (Bork, J., dissenting); *Allen v. Wright*, 468 U.S. 737, 754-55, (1984).

228. Compare *Riegle v. Federal Open Mkt. Comm.*, 656 F.2d 873, 880 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981) (noting that a collegial remedy against a pocket veto was available to the plaintiff senator in *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir.

when battles between the political branches have become so irreconcilable as to justify third-branch interference.

#### IV. LACK OF PRINCIPLE

The fundamental problem with equitable discretion is not that it is just a new name for an old method of analysis and does not satisfactorily define when an in-house remedy should be deemed "available",<sup>229</sup> or that it threatens to enhance the court's power,<sup>230</sup> or that it promotes confusion,<sup>231</sup> or that it is not a cure-all.<sup>232</sup> The fundamental problem with equitable discretion is that it is "a lawless doctrine,"<sup>233</sup> without basis "upon which to determine the fate of constitutional litigation."<sup>234</sup>

Equitable discretion can be seen as a Bickellian "escape route" or "device"<sup>235</sup> for "deciding whether, when, and how much to adjudicate."<sup>236</sup> Chief Judge McGowan proposed equitable discretion as a mechanism for allowing the court to abstain from "impermissible judicial intrusion into the functions of a coordinate

1974), because he could "reintroduce the relevant legislation in the next session of Congress and . . . vote thereon") with *Barnes*, 759 F.2d at 28 (claiming "[t]here could be no clearer instance of 'a constitutional impasse,' " in another pocket-veto case in which Congress had also not attempted to reintroduce the allegedly pocket-vetoed legislation).

229. See *supra* text accompanying notes 176-80.

230. The cases are still almost always dismissed. See *supra* text accompanying notes 187-89.

231. See *supra* text accompanying notes 190-96.

232. See *supra* p. 1099.

233. *Barnes v. Kline*, 759 F.2d 21, 61 (D.C. Cir. 1985) (Bork, J., dissenting), vacated as moot sub nom. *Burke v. Barnes*, 479 U.S. 361 (1987).

234. *Melcher v. Federal Open Mkt. Comm.*, 836 F.2d 561, 565 (D.C. Cir. 1987) (Edwards, J., concurring), cert. denied, 480 U.S. 1042 (1988), quoted in *Melcher*, 836 F.2d at 565 n.4 (majority opinion), and *Humphrey v. Baker*, 848 F.2d 211, 214 (D.C. Cir.), cert. denied, 109 S. Ct. 491 (1988).

235. "[E]scape route" was Professor Gunther's phrase. Gunther, *The Subtle Vices of the "Passive Virtues" - A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 5 (1964). "[D]evice" was Professor Bickel's phrase. Bickel, *the Supreme Court 1960 Term - Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 42 (1961) (This article was the basis of Bickel's subsequent book, *A. BICKEL, THE LEAST DANGEROUS BRANCH* (2d ed. 1986)).

236. Bickel, *supra* note 235, at 79. Bickel and Gunther, *supra* note 235, were debating Supreme Court techniques for declining to decide cases, but their analyses appropriately can be extended to equitable discretion, whose application prevents adjudication by any Article III Court. See McGowan, *supra* note 19, at 252 n.4 (Gunther's comments are more applicable to Article III courts other than the Supreme Court because those courts lack the discretionary control over their dockets that the Supreme Court has by virtue of its *certiorari* jurisdiction). For the view that all federal courts should be permitted to exercise discretion in jurisdictional matters, so long as they do so openly and articulate their reasons, see Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985).



branch of government."<sup>237</sup> He was particularly concerned that a judgment in favor of a congressional plaintiff might "thwart[] Congress's will by allowing a plaintiff to circumvent the processes of democratic decision making."<sup>238</sup> Nevertheless, the court has also used equitable discretion so as not to "legitimate" congressional actions by giving judgment on the merits to the defendant and thereby declaring the action "not unconstitutional."<sup>239</sup>

A major jurisprudential difficulty with treating equitable discretion as an appropriate "escape route" stems from the fact that equitable discretion is divorced from jurisdictional considerations. Professor Wechsler argued that the *Marbury v. Madison* rationale for judicial review compels the view that the Court is powerless to refuse to decide cases in which jurisdiction exists.<sup>240</sup> Chief Justice Marshall himself stated: "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."<sup>241</sup> Professor Bickel, on the other hand, argued that the Supreme Court regularly does precisely that, and that it would be dangerous if the Court did not.<sup>242</sup> If the Supreme Court heeded "strict-constructionist compunctions" concerning its ability to decline to perform judicial review, he argued, the result would be either "rampant activism" or legitimation of legislation and executive action whenever the Court could not invalidate them according to some "neutral principle."<sup>243</sup>

Even if a court's discretion to decline review of certain cases were not irreconcilable with the very notion of judicial review, a

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237. McGowan, *supra* note 19, at 250.

238. *Id.* at 251; see *Riegle v. Federal Open Mkt. Comm.*, 656 F.2d 873, 881 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981).

239. Bickel, *supra* note 235, at 48 (Bickel's thesis is that "legitimation" of a statute or practice, *i.e.*, upholding it on the merits, has far greater political consequences than dismissal with the aid one of his "devices," because Supreme Court legitimation "can generate consent and may impart permanence" to a policy that was on its way out.). See the discussion of *Vander Jagt* and *Gregg*, *supra* text accompanying notes 208-12.

240. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 6 (1959) (arguing that because the Constitution creates a judicial obligation "to say what the law is," "there is no . . . escape from the judicial obligation, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)."), *quoted in* McGowan, *supra* note 19, at 252.

241. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821), *quoted in* Gunther, *supra* note 235, at 19.

242. See Bickel, *supra* note 235, at 43-47.

243. *Id.* at 47-48 (referring to Professor Wechsler, whose thesis is that the courts should not invalidate under the Constitution unless they can do so by "rest[ing] on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved." Wechsler, *supra* note 240, at 19.).

question remains as to whether the D.C. Circuit's doctrine of equitable discretion is "lawless" because it is not sufficiently principled. Professor Bickel thought that less-than-principled devices for the avoidance of adjudication are a necessary ingredient of principled constitutional adjudication.<sup>244</sup> Chief Judge McGowan, however, was determined that equitable discretion be so principled as to satisfy even Professor Gunther.<sup>245</sup> Professor Gunther's major criticism of Professor Bickel was that the unprincipled use of avoidance techniques is "a virulent variety of free-wheeling interventionism" whose result was the compromising of the very principles Professor Bickel sought to preserve.<sup>246</sup> Professor Gunther, therefore, would not flinch from "legitimizing" legislation and executive action when no appropriate avoidance technique, such as a non-constitutional ground for decision, *certiorari* jurisdiction or a constitutionally based jurisdictional ground, is available.<sup>247</sup>

Equitable discretion, despite Judge McGowan's protestations, cannot survive a Guntherian critique. It is a judge-made doctrine, not grounded in legislative or in constitutional authority. The malleability of the "availability of an in-house remedy" test<sup>248</sup> means that nothing contains this discretion. A court could all too easily look first at the merits of a congressional plaintiff's claim and decide whether a constitutional violation had occurred; if it thought no violation had occurred, it could characterize the dispute as in-house and dismiss under equitable discretion, as it did in *Humphrey*<sup>249</sup> or it could characterize the dispute as inter-branch and dismiss under another doctrine, such as political question, as it did with the war-powers claim in *Crockett*,<sup>250</sup> if it thought a violation had occurred, it could, as in *Barnes*, characterize the dispute as inter-branch and invalidate on the merits.<sup>251</sup> The D.C.

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244. Bickel, *supra* note 235, at 50-51.

245. See McGowan, *supra* note 19, at 252.

246. Gunther, *supra* note 235, at 25.

247. See *id.*

248. See *supra* text accompanying notes 176-80.

249. See *supra* note 212 and text accompanying notes 208-12.

250. See *supra* text accompanying notes 198-200.

251. See *supra* text accompanying notes 177-80. Such wide discretion to decide whether to hear congressional-plaintiff cases resembles the Supreme Court's *certiorari* jurisdiction, "which it took an act of Congress to create," *Barnes v. Kline*, 759 F.2d 21, 59 (D.C. Cir. 1985) (Bork, J., dissenting) *vacated as moot sub nom. Burke v. Barnes*, 479 U.S. 361 (1987), and which Bickel thought sometimes leads to denial of review for reasons which "necessarily involve the merits." Bickel, *supra* note 235, at 52; see also Gunther,

Circuit has allowed its "concern for non-interference in the legislative process"<sup>252</sup> to threaten its own credibility.

### CONCLUSION

Equitable discretion is not the solution to the problem of congressional plaintiffs. Nor is reaching the merits of their claims. The time has come for the D.C. Circuit to admit that it cannot uphold the principle of not meddling in the legislative process while at the same time clinging to jurisdiction to hear these suits. Equitable discretion is too unprincipled a means of deciding whether to exercise that jurisdiction. The solution is for the courts to deny congressmen standing, either on the ground that an injury to official, governmental powers is not judicially cognizable or because of prudential concerns about becoming an arm of the legislative branch. Neither individual congressmen nor even both houses of Congress acting together should be able to enlist the courts' aid in disputes with their own colleagues or with members of the executive branch. Congress and congressmen will have to be left to fight their own battles.

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*supra* note 235, at 13-14 (criticizing Bickel for advocating a merit-conscious approach to *certiorari*).

252. *Riegle v. Federal Open Mkt. Comm.*, 656 F.2d 873, 877 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981).