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Do Seven Members of Congress have Article III Standing to Sue the Executive Branch?: Why the D.C. Circuit's Divided Decision in Maloney v. Murphy was Wrongly Decided in Light of Two Prior District Court Decisions and Historical Separation of Powers Jurisprudence

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DO SEVEN MEMBERS OF CONGRESS HAVE ARTICLE III STANDING TO SUE THE EXECUTIVE BRANCH?: WHY THE D.C. CIRCUIT'S DIVIDED DECISION IN *MALONEY V. MURPHY* WAS WRONGLY DECIDED IN LIGHT OF TWO PRIOR DISTRICT COURT DECISIONS AND HISTORICAL SEPARATION-OF-POWERS JURISPRUDENCE

Bradford C. Mank[1]

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1. James Helmer, Jr. Professor of Law, University of Cincinnati College of Law, P.O. Box 210040, University of Cincinnati, Cincinnati, Ohio 45221-0040, Telephone 513-556-0094, Fax 513-556-1236, e-mail: brad.mank@uc.edu. The discussion of standing in Parts I, II and III relies upon my earlier standing articles: (1) Bradford Mank, *The Supreme Court Acknowledges Congress' Authority to Confer Informational Standing in* Spokeo, Inc. v. Robins, 94 WASH. U.L. REV. 1377 (2017) [hereinafter *Informational Standing in Spokeo*]; (2) Bradford Mank, *Does a House of Congress Have Standing over Appropriations?: The House of Representatives Challenges the Affordable Care Act*, 19 U. PA. J. CONST. L. 141 (2016) [hereinafter *Standing over Appropriations?*]; and (3) Bradford Mank, *Informational Standing After* Summers, 39 B.C. ENV'T AFFS. L. REV. 1 (2011) [hereinafter *Informational Standing*]. I thank my colleague Michael Solimine for his always penetrating comments on standing doctrine, federal courts and social science theory. All errors or omissions are my responsibility.

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ABSTRACT

The D.C. Circuit's divided decision in Maloney v. Murphy *granting standing to minority party members of the House Oversight Committee appears questionable in light of two prior district court decisions in* Waxman *and* Cummings *that had denied standing in similar circumstances. Most importantly,* Maloney *is inconsistent with Supreme Court precedent regarding standing for individual members of Congress. In* Raines v. Byrd, *the Supreme Court held that individual members of Congress generally do not have standing to enforce institutional congressional interests such as whether a statute is constitutional, but that one or both Houses of Congress must sue as an institution. The* Maloney *decision inappropriately applied a cognizable personal standing injury theory to the case to incorrectly find standing when the case should have been governed by* Raines' *institutional injury rule allowing only a House or Houses of Congress to sue the Executive Branch, and the court should have denied standing. There are fundamental separation-of-powers concerns about federal courts intervening in disputes brought by legislators against the Executive Branch, and, as a result, courts properly take a narrow view of Article III standing in such cases. However, a House of Congress could sue to enforce a subpoena for such information, or an individual Member of Congress could bring a FOIA request. The* Maloney *majority opinion is cleverly argued, but it lacks the nuance and attention to historical practice in separation-of-powers cases in District Judge Mehta's* Cummings *decision, which* Maloney *unfortunately reversed. This article seeks to expose the weaknesses in the standing theory in the* Maloney *decision, and, to prevent a flood of suits by small numbers of congressional members that could lead to excessive judicial involvement in*

political disputes between the Executive Branch and aggrieved individual members of Congress. Additionally, even if Maloney *was correctly decided at the time, the Supreme Court's subsequent* TransUnion LLC v. Ramirez *decision, 141 S. Ct. 2190 (2021), raises serious doubts by requiring proof of adverse effects for informational injuries that the* Maloney *plaintiffs might not have been able to prove.*

INTRODUCTION

In late 2020, the Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") in a divided two to one opinion in *Maloney v. Murphy*[2] became the first federal court of appeals to substantively address the Article III standing of members of Congress pursuant to 5 U.S.C. § 2954,[3] which was enacted in 1928 and authorizes at least seven members of the Committee on Government Operations of the House of Representatives or five members of the Senate Committee on Governmental Affairs to require a federal agency to "submit any information requested of it relating to any matter within the jurisdiction of the committee."[4] The *Maloney* court reversed the decision below by U.S. District Court Judge Amit P. Mehta, who was appointed by President Obama,[5] in *Cummings v. Murphy*.[6] The D.C. Circuit's divided decision granting standing to minority party members of the House Oversight Committee appears questionable in light of two prior district court decisions that had denied standing in similar circumstances.[7]

Two district court decisions prior to *Maloney* had concluded that § 2954 does not give members of Congress Article III standing to sue in

2. 984 F.3d 50 (D.C. Cir. 2020).
3. An Executive agency, on request of the Committee on Government Operations of the House of Representatives, or of any seven members thereof, or on request of the Committee on Governmental Affairs of the Senate, or any five members thereof, shall submit any information requested of it relating to any matter within the jurisdiction of the committee.

29 U.S.C. § 2954.

4. *Id.*; *Maloney*, 984 F.3d at 54–56.
5. *District Court Judge Amit P. Mehta*, U.S. DIST. CT.: DIST. OF D.C., https://www.dcd.uscourts.gov/content/district-judge-amit-p-mehta (last visited Mar. 3, 2022); *President Obama Nominated Allison Dale Burroughs and Amit Priyavadan Mehta to Serve on the United States District Courts*, DON411.COM (July 31, 2014), https://don411.com/president-obama-nominated-allison-dale-burroughs-and-amit-priyavadan-mehta-to-serve-on-the-united-states-district-courts/.
6. 321 F. Supp. 3d 92 (D.D.C. 2018), *rev'd sub nom.* Maloney v. Murphy, 984 F.3d 50 (D.C. Cir. 2020).
7. *See infra* Part IV.

light of applicable Supreme Court precedent regarding legislative standing.[8] First, the *Cummings* decision had denied Article III standing to Representative Elijah Cummings and seven other members of the House Oversight Committee because (1) applicable Supreme Court precedent suggested that the plaintiffs had an unenforceable institutional injury that only a House of Congress could enforce rather than an appropriate personal standing injury, (2) the failure of the plaintiffs to obtain approval from the entire House of Representatives, and (3) the availability of alternative remedies such as the entire House approving the enforcement of a subpoena.[9] The District Court in *Cummings* had relied on a prior decision by U.S. District Court Judge Margaret M. Morrow, who was appointed by President Clinton,[10] in *Waxman v. Thompson*,[11] which held that eighteen members of the United States House of Representatives who served on the House Committee on Government Reform did not have Article III standing under § 2954 because individual members of Congress generally do not have standing under applicable Supreme Court precedent to sue to enforce official congressional interests, but only a House of Congress or both Houses of Congress may enforce an institutional interest such as issuing a subpoena to obtain documents.[12] In light of the *Cummings* and *Waxman* decisions, the *Maloney* decision appears to be questionable.[13]

Most importantly, *Maloney* is inconsistent with Supreme Court precedent regarding standing for individual members of Congress.[14] In *Raines v. Byrd*,[15] the Supreme Court held that individual members of Congress generally do not have standing to enforce institutional congressional interests such as whether a statute is constitutional, but that one or both Houses of Congress must sue as an institution.[16] By

8. *Cummings*, 321 F. Supp. 3d at 113; Waxman v. Thompson, No. 04-3467, 2006 WL 8432224, at *6–12 (C.D. Cal. July 24, 2006).

9. *Cummings*, 321 F. Supp. 3d at 113–18.

10. *Morrow, Margaret M.*, FED. JUD. CTR., https://www.fjc.gov/history/judges/morrow-margaret-m (last visited Mar. 3, 2022).

11. *Waxman*, 2006 WL 8432224, at *1.

12. *Id.* at *6–12.

13. *See infra* Part IV.

14. *See* Raines v. Byrd, 521 U.S. 811, 829–30 (1997).

15. *Id.*.

16. *Id.* at 829–30. Two recent D.C. Circuit cases have held that one House of Congress sometimes has standing to sue the Executive Branch, but the courts also noted that some types of congressional suits require both Houses of Congress. U.S. House of Representatives v. Mnuchin, 976 F.3d 1, 13 (D.C. Cir. 2020) ("When the injury alleged is to the Congress as a whole, one chamber does not have standing to litigate. When the injury is to the distinct prerogatives of a single chamber, that chamber does have standing to assert the injury."); Comm. on the Judiciary of the U.S. House of Representatives v. McGahn, 968 F.3d 755, 778

contrast, in *Powell v. McCormack*,[17] the Court held that a member of Congress had a personal injury and had standing to sue about being denied his seat in Congress and a resulting loss of salary.[18] In *Maloney*, the majority analogized the denial of information to the congressional plaintiffs as similar to *Powell* and therefore found a cognizable personal standing injury,[19] but Judge Ginsburg in dissent argued that the case involved an institutional interest like *Raines* and was not similar to the personal injury in *Powell*.[20]

Neither *Raines* nor *Powell* addressed informational injuries.[21] Accordingly, Judge Millett's determination in *Maloney* that informational injuries to members of Congress are more like the personal injuries in *Powell* is not clearly contrary to *Raines*.[22] Judge Mehta in *Cummings* acknowledged that the informational injuries to members of the House Committee on Government Reform were more personal and particularized than those raised by the congressional plaintiffs over the enactment of legislation in *Raines*.[23] But he reasoned that the plaintiff members of Congress were fundamentally asserting an institutional injury as in *Raines* because their need for such information depended upon their status as members of Congress and the House Oversight Committee and not upon personal needs such as receiving their congressional salary, like in *Powell*.[24] Finally, Judge Mehta provided examples of a historical practice of resolving informational disputes between Congress and the Executive Branch by having an entire House of Congress issue a subpoena to obtain requested information rather than having members of Congress filing suit in federal court.[25] The line between personal injuries and institutional injuries is not always clear for members of Congress, but Judge Mehta's analysis of the facts was more nuanced, and his adherence to Supreme Court precedent was more faithful, than the *Maloney* decision even if the latter decision was not obviously wrong.[26]

(D.C. Cir. 2020) (en banc) (holding that the House of Representatives has standing to enforce a subpoena not involving the joinder of the Senate).

17. 395 U.S. 486 (1969).
18. *Id.* at 512–14.
19. Maloney v. Murphy, 984 F.3d 50, 65–66 (D.C. Cir. 2020).
20. *See id.* at 70–76 (Ginsburg, J., dissenting).
21. *See infra* Part III.A.2.
22. *See Maloney*, 984 F.3d at 62–70.
23. *See* Cummings v. Murphy, 321 F. Supp. 3d 92, 112–13 (D.D.C. 2018), *rev'd sub nom.* Maloney v. Murphy, 984 F.3d 50 (D.C. Cir. 2020).
24. *See id.* at 108–13.
25. *Id.* at 113–17.
26. *See infra* Parts IV, Conclusion.

The facts of *Maloney* involve then-President Donald Trump's lease of the Old Post Office in Washington, D.C. for a hotel and a congressional request by eight Members of Congress for information about that lease from the U.S. General Services Administration ("GSA").[27] As a matter of policy, the Trump administration should have released the information to the congressional plaintiffs, and the Trump White House did not try to defend the GSA's failure to do so.[28] But the specific facts involving former President Trump should not cloud the legal issue of whether § 2954 gives seven or more members of the U.S. House or five members of Senate Committees on Oversight and Reform Article III standing in federal courts to sue if a federal agency refuses a request for information from these members of Congress.[29] Both the district court judges in the *Cummings* and *Waxman* decisions, Judges Mehta and Morrow respectively, were appointed by Democratic presidents, but each appropriately ruled against Democratic members of Congress in their cases and in favor of Republican presidents because of separation-of-powers concerns.[30] Judges Mehta and Morrow each concluded that seven members of the House or five members of the Senate may *not* sue under § 2954 in light of the *Raines* decision, but that only the entire House may sue to enforce a subpoena, or else individual members of Congress may seek information like any citizen under one of several statutes.[31] This article seeks to expose the weaknesses in the standing theory in the *Maloney* decision and to prevent a flood of suits by small numbers of congressional members that could lead to excessive judicial involvement in political disputes between the Executive Branch and aggrieved individual members of Congress.

Additionally, even if *Maloney* was correctly decided at the time, the Supreme Court's subsequent decision in *TransUnion LLC v. Ramirez*[32] raises serious doubts by requiring proof of "adverse effects" for informational injuries that the *Maloney* plaintiffs might not have been able to prove as private individuals.[33] Justice Kavanaugh's majority opinion in *TransUnion* suggested that the Court might apply a less strict proof of harm standard to "cases involv[ing] denial of information subject to public-disclosure or sunshine laws that entitle all members of the

27. *See Maloney*, 984 F.3d at 56–57.
28. *See infra* Conclusion.
29. *See* 29 U.S.C. § 2954; *infra* Part IV.
30. *See infra* Part IV.
31. *See infra* Part IV.
32. 141 S. Ct. 2190 (2021).
33. *See id.* at 2214 (quoting Trichell v. Midland Credit Mgmt., Inc., 964 F.3d 990, 1004 (11th Cir. 2020)) ("An 'asserted informational injury that causes no adverse effects cannot satisfy Article III.'").

public to certain information."[34] However, § 2954, like the Fair Credit Reporting Act ("FCRA")[35] statute at issue in *TransUnion*, is not "such a public-disclosure law" because only members of Congress, and not the public at large, may sue pursuant to § 2954.[36]

Part I will briefly explain the fundamentals of Article III standing.[37] Part II will explain the basics of informational injury as a prelude to understanding the interactions of informational standing and congressional standing in Part IV.[38] Part III will address cases limiting the standing of individual members of Congress to either a House of Congress or the entire Congress as an institution.[39] Part IV will show that the district court decisions in *Cummings* and *Waxman* were correct to hold that several members of Congress do not have Article III standing under § 2954 to sue a federal agency that denies standing under that statute, and, accordingly, that the majority opinion in *Maloney* was wrongly decided.[40] This article will conclude that suits under § 2954 are not essential to congressional oversight of the Executive Branch because a House of Congress may issue a subpoena for such information[41] or an individual member could file a request under the Freedom of Information Act ("FOIA")[42] if members of the House or Senate Oversight Committees cannot sue under § 2954.[43]

34. *Id.*

35. 15 U.S.C. § 1681.

36. *TransUnion*, 141 S. Ct. at 2214. *Compare id.* ("*Akins* and *Public Citizen* do not control here [because] . . . those cases involved denial of information subject to public-disclosure or sunshine laws that entitle all members of the public to certain information."), *with* 29 U.S.C. § 2954 (establishing right to information from Executive only for congressional members of certain oversight committees).

37. *See infra* Part I.

38. *See infra* Part II.

39. *See infra* Part III.

40. *See infra* Part IV.

41. Comm. on the Judiciary of the U.S. House of Representatives v. McGahn, 968 F.3d 755, 778 (D.C. Cir. 2020) (en banc) (holding House of Representatives has standing to enforce a subpoena not involving the joinder of the Senate).

42. 5 U.S.C. § 552.

43. *Compare Maloney*, 984 F.3d at 62 (government acknowledged right of individual members of Congress to obtain information under FOIA), *with id.* at 75 (Ginsburg, J., dissenting) (discussing subpoena authority of a House of Congress).

I. ARTICLE III CONSTITUTIONAL STANDING[44]

The U.S. Constitution vests limited powers in each of the three branches of the federal government.[45] The Constitution provides that Congress has enumerated "legislative Powers,"[46] the President possesses "[t]he executive Power,"[47] and the federal courts exercise "[t]he judicial Power of the United States."[48] The Article III standing doctrine places limits on the types of cases that federal courts may hear based upon these separation-of-powers principles, and serves to prevent the Judicial Branch from usurping the authority of the other two branches, the Executive and Legislative, which are often referred to as the political branches.[49]

While the Constitution does not explicitly require that plaintiffs have Article III standing to file suit in federal courts, the Supreme Court has implied limitations on the authority of federal judges to hear suits, based on the Constitution's Article III restriction of judicial decisions to "Cases" and "Controversies," to ensure that a plaintiff has a genuine interest and stake in a case and to prevent judicial intrusion on the authority of the political branches.[50] A plaintiff has the burden of establishing that their

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44. The discussion of standing in Parts I, II and III relies upon my earlier standing articles: (1) *Informational Standing in Spokeo*, *supra* note 1; (2) *Standing over Appropriations?*, *supra* note 1; and (3) *Informational Standing*, *supra* note 1.

45. Spokeo, Inc. v. Robins, 578 U.S. 330, 337 (2016).

46. U.S. CONST. art. I, § 1.

47. U.S. CONST. art. II, § 1, cl. 1.

48. U.S. CONST. art. III, § 1.

49. *See Spokeo*, 578 U.S. at 337; DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 341 (2006); Lujan v. Defs. of Wildlife, 504 U.S. 555, 559–60 (1992).

50. U.S. CONST. art. III, § 2.

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – *[*between a State and Citizens of another State; –*]* . . . between Citizens of different States, – between Citizens of the same State claiming Lands under Grants of different States, [and between a State, or the Citizens thereof, – and foreign States, Citizens or Subjects.]

Id. at cl. 1; *Spokeo*, 578 U.S. at 337–38; Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408 (2013); *DaimlerChrysler*, 547 U.S. at 339–41 (explaining why Supreme Court infers that case and controversy requirement under Article III necessitates standing limitations); *Informational Standing in Spokeo*, *supra* note 1, at 1380; *see generally* Michael E. Solimine, *Congress, Separation of Powers, and Standing*, 59 CASE W. RSRV. L. REV. 1023, 1036–38 (2009) (discussing debate over whether the Constitution implicitly requires standing to sue).

suit is an appropriate "[c]ase" or "[c]ontroversy" that a federal court may hear.[51]

The Supreme Court has defined a three-part Article III standing test that requires a plaintiff to demonstrate: (1) a concrete and particularized injury; (2) that the injury is fairly traceable to the challenged action of the defendant; and (3) that it must be likely that the injury can be redressed by a favorable federal court decision.[52] A plaintiff has the burden of establishing all three parts of the standing test for each form of judicial remedy or relief sought.[53] A federal court must dismiss a case without deciding the merits of the case if the plaintiff fails to meet the constitutional Article III standing test.[54]

II. INFORMATIONAL STANDING

The majority opinion in *Maloney* concluded that the "agency's failure to provide information to which the Requesters are statutorily entitled is a quintessential form of concrete and particularized injury within the meaning of Article III."[55] The court then explained that the "Supreme Court has repeatedly held that informational injuries satisfy the injury-in-fact requirement."[56] Accordingly, the *Maloney* majority opinion held that the congressional requestors had suffered a *personal* informational injury akin to the personal injury in *Powell*, in which the Supreme Court had granted a member of Congress Article III standing to sue.[57] The U.S. government on behalf of the GSA acknowledged that a federal agency's denial of information that a plaintiff is entitled to under a statute such as FOIA generally creates an informational injury that establishes an injury sufficient for Article III standing.[58] However, the GSA argued that, in light of the *Raines* decision, a federal agency's refusal to give legislators information pursuant to § 2954 does not create an informational injury or Article III standing because a statute may not

51. *Clapper*, 568 U.S. at 408 (2013); Raines v. Byrd, 521 U.S. 811, 818 (1997).

52. Virginia House of Delegates v. Bethune-Hill, 139 S. Ct. 1945, 1950 (2019); Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992); *Informational Standing*, *supra* note 1, at 9.

53. *DaimlerChrysler*, 547 U.S. at 351–52; Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc., 528 U.S. 167, 185 (2000) ("[A] plaintiff must demonstrate standing separately for each form of relief sought."); *Informational Standing in Spokeo*, *supra* note 1, at 1381.

54. *See DaimlerChrysler*, 547 U.S. at 340–43; *Friends of the Earth*, 528 U.S. at 180 ("[W]e have an obligation to assure ourselves that [petitioner] had Article III standing at the outset of the litigation."); *Informational Standing in Spokeo*, *supra* note 1, at 1381.

55. Maloney v. Murphy, 984 F.3d 50, 59 (D.C. Cir. 2020).

56. *Id.*

57. *Id.* at 62–70.

58. *Id.* at 62.

give individual legislators special rights to information, only a House of Congress or the entire Congress as an institution.[59]

Even though the government conceded in the *Maloney* case that individual members of Congress suffer a cognizable informational injury if a federal agency denies them information pursuant to a statute such as FOIA,[60] it will be helpful to review Supreme Court decisions establishing that informational injuries may create Article III standing in some circumstances.[61] For example, in his dissenting opinion in *Maloney*, Judge Ginsburg acknowledged that the plaintiff members of Congress had suffered a concrete harm when the GSA denied them requested information about the Trump hotel project.[62] However, Judge Ginsburg argued that their injury was not "particularized" as required by the Supreme Court's decision in *Spokeo, Inc. v. Robins*[63] because they had not suffered a personal injury, but only the House as an institution.[64] Accordingly, it is important to understand when informational injuries are concrete *and* particularized.[65]

A. Public Citizen *and* Akins

1. *Public Citizen v. United States Department of Justice*

In 1989, the Supreme Court in *Public Citizen v. U.S. Department of Justice*[66] held that the government's denial of information that the public is entitled to by statute may constitute a sufficient injury for Article III standing.[67] Agreeing with decisions that have recognized informational standing under the Freedom of Information Act, the Court determined that the plaintiffs had standing to seek information pursuant to the Federal Advisory Committee Act's ("FACA")[68] statutory mandates.[69] Additionally, the Court rejected the American Bar Association's ("ABA") argument that the plaintiffs did not have standing because they alleged

59. *Id.* at 62–63; *see also id.* at 70–76 (Ginsburg, J., dissenting).

60. *See id.* at 62 (majority opinion).

61. *See infra* Part II.A–C.

62. *See Maloney*, 984 F.3d at 71 (Ginsburg, J., dissenting).

63. *See id.* at 71.

64. *See id.* at 71–76.

65. *See infra* Part II.B.

66. 491 U.S. 440 (1989).

67. *Id.* at 449–50; *Informational Standing in Spokeo*, *supra* note 1, at 1383; *Informational Standing*, *supra* note 1, at 15–16. Justice Scalia took no part in the Court's consideration of the case or its decision. *See Public Citizen*, 491 U.S. at 442.

68. 5 U.S.C. app. § 1.

69. *Public Citizen*, 491 U.S. at 449; *Informational Standing in Spokeo*, *supra* note 1, at 1383; *Informational Standing*, *supra* note 1, at 16.

a generalized grievance shared by many other citizens, observing that "the fact that numerous citizens might request the same information under the Freedom of Information Act" does not deprive a plaintiff of an informational injury and Article III standing.[70]

2. Akins

In 1998, the Supreme Court in *FEC v. Akins*[71] held that informational injuries resulting from the government's denial of information to plaintiffs that a statute requires to be made available to the public at large are possibly sufficient for Article III standing.[72] The *Akins* Court addressed whether plaintiff voters had standing to challenge a Federal Election Commission decision that a lobbying group, the American Israeli Political Action Committee ("AIPAC"), was not a "political committee" within the definition of the Federal Election Campaign Act of 1971 ("FECA"),[73] and, therefore, was not required to disclose its donors, contributions, or expenditures pursuant to that statute.[74] FECA "imposes extensive recordkeeping and disclosure requirements upon groups that fall within the Act's definition of a 'political committee.'"[75]

The *Akins* Court held that the plaintiff voters had suffered a "concrete and particular" injury in fact sufficient for Article III standing because they were deprived of their statutory right to receive designated "information [which] would help them . . . to evaluate candidates for public office," even though many other voters shared the same informational injury as the plaintiffs.[76] The decision determined that the government's denial of information to the plaintiff voters for which the Act required public disclosure was a constitutionally sufficient "genuine 'injury in fact.'"[77] The Court clarified, "The "'injury in fact' that respondents have suffered consists of their inability to obtain

70. *Public Citizen*, 491 U.S. at 449–50; *Informational Standing in Spokeo, supra* note 1, at 1384; *Informational Standing*, *supra* note 1, at 16.

71. 524 U.S. 11 (1998).

72. *Id.* at 21–25; *Informational Standing in Spokeo*, *supra* note 1, at 1384; *Informational Standing*, *supra* note 1, at 17–20.

73. 2 U.S.C. §§ 431–56 (FECA has been recodified as 52 U.S.C. §§ 30101–26).

74. *Akins*, 524 U.S. at 13–18; *Informational Standing in Spokeo*, *supra* note 1, at 1384; *Informational Standing*, *supra* note 1, at 17–18.

75. *Akins*, 524 U.S. at 14–15 (summarizing 2 U.S.C. §§ 432–34).

76. *Id.* at 21–25; *Informational Standing in Spokeo*, *supra* note 1, at 1385; *Informational Standing*, *supra* note 1, at 17–20.

77. *Akins*, 524 U.S. at 21; *Informational Standing in Spokeo*, *supra* note 1, at 1385; *Informational Standing*, *supra* note 1, at 18.

information . . . the statute requires that AIPAC make [such information] public."[78]

Additionally, *Akins* specifically concluded that the deprivation of information that the plaintiffs could use "to evaluate candidates for public office" constituted a "concrete and particular" injury.[79] The Court found that the fact that "an injury [that] is widely shared . . . does not, by itself, automatically disqualify an interest for Article III purposes. Such an interest, *where sufficiently concrete*, may count as an 'injury in fact.'"[80] Thus, the *Akins* decision elucidated that courts should not deny standing solely because large numbers of persons have the same or similar injuries, so long as those injuries are concrete.[81] Moreover, the *Akins* decision emphasized that courts should give important weight to Congress' intent with respect to statutory rights definitions when determining whether a statutory injury is concrete or abstract.[82] By contrast, Justice Scalia wrote a dissenting opinion contending that the voter plaintiffs did not have standing because their injury was common to the public at large and, accordingly, they did not have a particularized injury essential for standing.[83] The majority opinion in *Maloney* interpreted *Public Citizen* and *Akins* as clearly supporting the plaintiffs' argument that a federal agency's denial of information to members of Congress pursuant to § 2954 constitutes a concrete and particularized injury sufficient for Article III standing.[84]

B. Spokeo *Reaffirms Informational Standing*

In 2016, the Supreme Court in *Spokeo* addressed what constitutes sufficient informational injury for Article III standing.[85] The *Spokeo* Court held that a plaintiff alleging an injury in violation of a federal statute must show not only a concrete injury, but also a particularized one to satisfy the standing requirement of an injury-in-fact.[86] By

78. *Akins*, 524 U.S. at 21.
79. *Id.*; *Informational Standing in Spokeo*, *supra* note 1, at 1385; *Informational Standing*, *supra* note 1, at 18.
80. *Akins*, 524 U.S. at 24 (emphasis added); *Informational Standing in Spokeo*, *supra* note 1, at 1385; *Informational Standing*, *supra* note 1, at 19.
81. *Informational Standing in Spokeo*, *supra* note 1, at 1386; *Informational Standing*, *supra* note 1, at 19–20.
82. *Akins*, 524 U.S. at 24–25; *Informational Standing in Spokeo*, *supra* note 1, at 1386; *Informational Standing*, *supra* note 1, at 19–20.
83. *Akins*, 524 U.S. at 33–37 (Scalia, J., dissenting); *Informational Standing in Spokeo*, *supra* note 1, at 1385; *Informational Standing*, *supra* note 1, at 21.
84. *See* United States v. Maloney, 984 F.3d 50, 59–61 (D.C. Cir. 2020).
85. Spokeo, Inc. v. Robins, 578 U.S. 330, 338–42 (2016).
86. *Id.* at 334, 339–40, 342–43.

contrast, Justice Ginsburg's dissenting opinion would have treated the terms "concrete" and "particularized" as synonymous and not requiring separate tests.[87] An important question is whether the *Spokeo* Court's distinction between concrete and particularized injuries supports Senior Circuit Judge Ginsburg's dissenting opinion in *Maloney*, which argued that the plaintiff members of Congress had suffered a concrete harm, but not a particularized injury, when the GSA denied them requested information under § 2954 because their injury was an institutional injury, one to their oversight duties, rather than a personal injury.[88]

The Supreme Court in *Spokeo* agreed with and quoted the definition of a particularized standing injury from its 1992 decision in *Lujan v. Defenders of Wildlife*: "[f]or an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.'"[89] In *Spokeo*, the plaintiff had clearly suffered from a personal and therefore particularized injury, but the question was whether the alleged injury was a concrete injury or a mere abstract injury.[90] The Supreme Court in *Spokeo* agreed with the Ninth Circuit's decision that the plaintiff, Robins, had alleged an injury to his personal interests given how the defendant Spokeo, Inc. had mishandled his personal credit information and, therefore, that the plaintiff had properly alleged a particularized standing injury.[91] However, the Supreme Court remanded the case back to the Ninth Circuit because the court of appeals had only found that Robins had suffered from an individualized or particularized injury, and had failed to consider whether the plaintiff also had a concrete injury.[92]

The *Spokeo* decision explained that "[a] 'concrete' injury must be '*de facto*'; that is, it must actually exist."[93] The Court further explicated, "[w]hen we have used the adjective 'concrete,' we have meant to convey the usual meaning of the term—'real,' and not 'abstract.'"[94] Thus, the *Spokeo* Court articulated that "[c]oncreteness, therefore, is quite different from particularization."[95] Additionally, the Court clarified that the "risk of real harm" can satisfy the concreteness standing test, and, as an example, observed that tort victims may recover "even if their harms

87. *See id.* at 351–52 (Ginsburg, J., dissenting).
88. *See Maloney*, 984 F.3d at 71–76 (Ginsburg, J., dissenting).
89. *Spokeo*, 578 U.S. at 339 (affirmatively quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 n.1 (1992)).
90. *Id.* at 333–37, 339–40.
91. *Id.* at 333–41; *Informational Standing in Spokeo*, *supra* note 1, at 1388.
92. *Spokeo*, 578 U.S. at 334, 343; *Informational Standing in Spokeo*, *supra* note 1, at 1388.
93. *Spokeo*, 578 U.S. at 340; *Informational Standing in Spokeo*, *supra* note 1, at 1388.
94. *Spokeo*, 578 U.S. at 340; *Informational Standing in Spokeo*, *supra* note 1, at 1388.
95. *Spokeo*, 578 U.S. at 340; *Informational Standing in Spokeo*, *supra* note 1, at 1388.

may be difficult to prove or measure."[96] However, Justice Alito's majority opinion further elucidated the standing test by observing that a reporting inaccuracy that does not constitute a "material risk of harm" and, like an "incorrect zip code," is not a concrete injury.[97]

Significantly, the *Spokeo* Court considered the government's violation of a statute granting public access to government-held information to be a concrete injury that may in some cases allow a plaintiff to establish Article III standing without proof of additional harm.[98] The *Spokeo* Court declared, "[j]ust as the common law permitted suit in such instances, the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact. In other words, a plaintiff . . . need not allege any *additional* harm beyond the one Congress has identified."[99] Justice Alito's majority opinion then relied upon *Akins* and *Public Citizen* to support the Court's finding that a plaintiff in some circumstances may suffer a concrete injury from the violation of a procedural right without proving additional harm.[100] As this author clarified, "Congress has a significant role in defining intangible injuries for Article III standing beyond what was considered an injury under the American or English common law."[101] However, whether Congress can define injuries under § 2954 for members of Congress raises separation-of-powers issues that are different from the intangible injuries discussed in the *Spokeo* decision.[102]

As will be discussed in Part IV, the majority opinion in *Maloney* interpreted the *Spokeo* decision as supporting its determination that the congressional plaintiffs had suffered from both a concrete injury and a personal, particularized injury.[103] By contrast, Judge Ginsburg in his dissenting opinion in *Maloney* argued that the plaintiffs had suffered a concrete injury from the denial of information, but that the injury was not personal or particularized because it was an institutionalized injury to the entire House.[104] The issue of whether the injury to the congressional plaintiffs in *Maloney* was personal and particularized, or

96. *Spokeo*, 578 U.S. at 341; *Informational Standing in Spokeo*, *supra* note 1, at 1388.

97. *Spokeo*, 578 U.S. at 342; *Informational Standing in Spokeo*, *supra* note 1, at 1388.

98. *Spokeo*, 578 U.S. at 341–42 (citing FEC v. Akins, 524 U.S. 11, 20–25 (1998); Public Citizen v. Dep't of Just., 491 U.S. 440, 449 (1989)); *Informational Standing in Spokeo*, *supra* note 1, at 1388.

99. *Spokeo*, 578 U.S. at 342; *Informational Standing in Spokeo*, *supra* note 1, at 1388.

100. *Spokeo*, 578 U.S. at 342 (citing *Akins*, 524 U.S. at 20–25; *Public Citizen*, 491 U.S. at 449); *Informational Standing in Spokeo*, *supra* note 1, at 1388–89.

101. *Informational Standing in Spokeo*, *supra* note 1, at 1389; *see also Spokeo*, 578 U.S. at 340–42.

102. *See infra* Part IV.

103. *See* United States v. Maloney, 984 F.3d 50, 50, 61 (D.C. Cir. 2020); *infra* Part IV.

104. *See Maloney*, 984 F.3d at 50, 71–76 (Ginsburg, J., dissenting); *infra* Part IV.

institutional and not particularized, depends on the Supreme Court's congressional standing cases, which are discussed in Part III.[105]

C. TransUnion LLC *Requires Proof of Adverse Effects for Informational Injuries*

About six months after the D.C. Circuit decided *Maloney* in December 2020,[106] the Supreme Court in June 2021 decided *TransUnion LLC v. Ramirez*[107] in a divided five to four decision.[108] The *TransUnion* case did not overrule the *Spokeo* decision, but it arguably narrowed or limited the Court's approach to informational standing in the view of the four dissenting justices: Justices Thomas, Breyer, Sotomayor and Kagan.[109] The Supreme Court's *TransUnion* decision does not clearly contradict the *Maloney* decision, but Judge Millett's broad approach to informational standing is much more similar to the dissenting opinions in *TransUnion* than Justice Kavanaugh's majority opinion and, therefore, it is reasonable to question *Maloney's* value as precedent in light of *TransUnion*.[110]

In *TransUnion*, the defendant TransUnion's credit reporting service had falsely identified 8,185 individuals as potentially being on the U.S. Treasury Department's Office of Foreign Assets Control ("OFAC") list of terrorists, drug traffickers, and other serious criminals.[111] The 8,185 individuals brought a class action suit[112] pursuant to The Fair Credit Reporting Act,[113] which regulates the consumer reporting agencies that compile and disseminate personal information about consumers, and authorizes lawsuits and damages for certain violations of the Act.[114] The parties stipulated prior to trial that only 1,853 class members had their misleading credit reports containing OFAC alerts provided to third parties during the relevant time period in the suit and that the credit files of the other 6,332 class members were not provided to third parties during the relevant time period.[115] The district court ruled that all class

105. *See infra* Part III.
106. *See generally Maloney*, 984 F.3d 50.
107. TransUnion LLC v. Ramirez, 141 S. Ct. 2190 (2021).
108. *See generally id.*
109. *Id.* at 2214–25 (Thomas, J., dissenting) (joined by Breyer, Sotomayor & Kagan, JJ.); *id.* at 2225–26 (Kagan, J., dissenting) (joined by Breyer & Sotomayor, JJ.).
110. *See infra* Parts II.C, IV.C.
111. *TransUnion*, 141 S. Ct. at 2200–02, 2207–09.
112. *Id.*
113. 15 U.S.C. §§ 1681, 1681a–1681x.
114. *Id.* §§ 1681, 1681a–1681x.
115. *TransUnion*, 141 S. Ct. at 2208–09.

members had Article III standing for their statutory claims.[116] The jury returned a verdict for the plaintiffs and awarded each class member statutory damages and punitive damages.[117] A divided panel of the Ninth Circuit affirmed that all 8,185 class members had standing as to all three claims, but somewhat reduced the damages awarded by the jury and approved a class damages award of about $40 million.[118]

The Supreme Court reversed the Ninth Circuit Court of Appeals decision by holding that those 6,332 class members whose false information was not reported to third parties "have not demonstrated concrete [reputational] harm and thus lack Article III standing to sue on the reasonable-procedures claim."[119] The Court had "no trouble concluding that the 1,853 class members suffered a concrete harm that qualifies as an injury in fact" because they suffered informational harm akin to the tort of defamation by being labeled as terrorists or criminals to third parties.[120] Justice Kavanaugh's majority opinion read the *Spokeo* decision as requiring a plaintiff to suffer from a concrete injury in order to have Article III standing.[121] The 6,332 class members whose false information was not reported to third parties did not suffer a concrete injury necessary for Article III standing even if TransUnion LLC's handling of their information was poor and exposed them to significant risk because they did not suffer an actual material injury.[122] By contrast, Justice Thomas's dissenting opinion in *TransUnion* argued that the 6,332 class members had suffered from a concrete injury because the *Spokeo* decision counseled federal courts to defer to the definition of injury established by Congress in the relevant statute, the FCRA in this case, rather than the Court's common law assessment of what is actionable defamation.[123]

In *TransUnion*, the United States acting as *amicus curiae* "separately assert[ed] that the plaintiffs suffered a concrete

116. *Id.* at 2213 n.8.
117. *Id.* at 2202.
118. *Id.*
119. *Id.* at 2200.
120. *Id.* at 2209.
121. *Id.* at 2210–14.
122. *Id.*
123. *Id.* at 2214–25 (Thomas, J., dissenting); Noah Feldman, *Supreme Court Blocks Congress on the Right to Sue*, BLOOMBERG L. (June 25, 2021, 12:43 PM), https://www.bloomberg.com/opinion/articles/2021-06-25/supreme-court-liberal-justices-join-clarence-thomas-on-lawsuit-ruling-dissent (arguing that *TransUnion* gave the Supreme Court, and not Congress, authority to decide what is a proper Article III standing injury, and thereby limited the authority of "Congress to confer rights on individuals by law and then give them the authority to sue in federal court to enforce those rights.").

'informational injury'" under *Akins* and *Public Citizen*.[124] The Court rejected the government's informational injury argument because the *TransUnion* plaintiffs had received the information they requested, as *Akins* and *Public Citizen* requires, but the *TransUnion* plaintiffs' compliant instead made a different argument that the information was false or in a different format than requested.[125] The United States' argument that the *TransUnion* plaintiffs suffered from a concrete "informational injury" under *Akins* and *Public Citizen* is relevant to the continuing validity of *Maloney* because Judge Millett relied heavily on the *Akins* and *Public Citizen* cases in deciding that the congressional plaintiffs in her case had Article III standing.[126] The *Maloney* plaintiffs arguably had a stronger "informational injury" argument than the *TransUnion* plaintiffs because the congressional plaintiffs did not receive the information they had requested from the GSA.[127]

However, the *TransUnion* decision contains additional language about plaintiffs proving adverse harms to establish Article III standing that could undermine future congressional plaintiffs that sue pursuant to § 2954. Justice Kavanaugh's majority opinion stated that the *Akins* and *Public Citizen* cases "involved denial of information subject to public-disclosure or sunshine laws that entitle all members of the public to certain information. This case does not involve such a public-disclosure law."[128] This language in the *TransUnion* decision could hurt future congressional plaintiffs suing under § 2954 because that statute is not a public disclosure statute and, therefore, Judge Millett in *Maloney* was arguably wrong to rely on the *Akins* and *Public Citizen* cases in finding that the plaintiffs in her case had standing.[129] The *TransUnion* decision requires plaintiffs to identify "'downstream consequences' from failing to receive the required information" and to demonstrate "adverse effects" to satisfy Article III.[130] The problem for the congressional plaintiffs in *Maloney* and future congressional plaintiffs suing pursuant to § 2954 is that it would be easy for such plaintiffs to prove that the denial of

124. *TransUnion*, 141 S. Ct. at 2214.
125. *Id.*
126. *See infra* Part IV.C.
127. *See infra* Part IV.C.
128. *TransUnion*, 141 S. Ct. at 2214.
129. *See infra* Part IV.C (explaining Judge Millett's decision in *Maloney*). *Compare TransUnion*, 141 S. Ct. at 2214 (explaining that "*Akins* and *Public Citizen* do not control here" because "those cases involved denial of information subject to public-disclosure or sunshine laws that entitle all members of the public to certain information"), *with* 29 U.S.C. § 2954 (establishing right to information from Executive only for congressional members of certain oversight committees).
130. *TransUnion*, 141 S. Ct. at 2214 (quoting Trichell v. Midland Credit Mgmt., Inc., 964 F.3d 990, 1004 (11th Cir. 2020)).

information from the Executive Branch harms their institutional congressional work, but *Raines* and *Powell* instead require individual Members of Congress to prove a personal injury because only a House or two Houses of Congress can assert institutional injuries.[131] It is far from clear that the Executive's denial of information to Members of Congress has the "downstream consequences" and "adverse effects" to their personal lives that the *TransUnion* decision requires for informational injuries.[132]

III. LEGISLATIVE STANDING

In suits involving individual members of Congress, a crucial issue in determining Article III standing is whether that member is suing to protect a personal interest or an institutional interest, either of a House of Congress or Congress as a whole.[133] Under Supreme Court precedent regarding congressional or legislative Article III standing, especially the *Raines* decision, individual members of Congress generally do not have standing when they are suing to defend the Legislative Branch's institutional powers; only Congress as a whole or a House of Congress has a plausible argument for institutional standing.[134] On the other

131. *See infra* Parts III, IV.
132. *TransUnion*, 141 S. Ct. at 2214.
133. *See infra* Part III.
134. *See infra* Part III; Raines v. Byrd, 521 U.S. 811 (1997). Several authors have argued in favor of congressional standing in different circumstances, although a few scholars generally disagree with congressional suits in federal courts and prefer that disputes between Congress and the Executive Branch be addressed through the political process alone. *See* Matthew I. Hall, *Making Sense of Legislative Standing*, 90 S. CAL. L. REV. 1, 44 (2016) ("Only the elimination of a concrete prerogative belonging to a legislative litigant provides a sufficient injury to support legislative standing for that litigant."); McKaye Neumeister, *Reviving the Power of the Purse: Appropriations Clause Litigation and National Security Law*, 127 YALE L.J. 2512, 2571 (2018) (supporting congressional standing to challenge spending without appropriations); *Standing over Appropriations?*, *supra* note 1, at 141, 144, 147–52 (favoring congressional standing to challenge spending without appropriations); Jonathan Remy Nash, *A Functional Theory of Congressional Standing*, 114 MICH. L. REV. 339, 339 (2015) (arguing congressional standing should depend on the extent that a particular executive action undermines legislative bargaining power). *But see* Tara Leigh Grove, *Government Standing and the Fallacy of Institutional Injury*, 167 U. PA. L. REV. 611, 663 (2019) (criticizing congressional standing because "[i]nstitutions have no greater interest in their constitutional powers and duties than any other member of society"); Vicki C. Jackson, *Congressional Standing to Sue: The Role of Courts and Congress in U.S. Constitutional Democracy*, 93 IND. L.J. 845, 893 (2018) ("[I]t is the better part of wisdom for courts to presume the good faith of other branches and to continue to structure standing law on the assumption that most controversies between the branches are best addressed through political mechanisms.").

hand, in *Powell v. McCormack*,[135] the Court concluded that a member of Congress had a personal Article III standing injury and could sue the House of Representatives after the House voted to deny his seat in Congress and his salary.[136] In *Maloney*, the central issue dividing the majority opinion and Judge Ginsburg's dissent was whether the GSA's denial of information to several Members of the House, who had requested such information under § 2954, constituted a personal injury, which the majority opinion held, or an institutional injury, which Judge Ginsburg argued in the dissent.[137] Accordingly, it is important to understand how courts have distinguished between institutional congressional suits and personal suits by members of Congress.[138]

A. *Early Legislative Standing Cases:* Coleman *and* Raines

1. Coleman v. Miller

In *Coleman v. Miller*,[139] the Supreme Court held that twenty Kansas state senators could seek a writ of mandamus against the Secretary of the Senate of the State of Kansas to contest whether the Kansas State Senate actually ratified the Child Labor Amendment to the U.S. Constitution.[140] Subsequent decisions, including *Raines*, have generally interpreted *Coleman* as an exceptional case in which individual members of a legislature may challenge an institutional decision of the legislature if other government actors have completely nullified their vote and there is no political recourse other than a lawsuit to rectify that nullification.[141] However, in the *Maloney* litigation, the congressional plaintiffs cited *Coleman* as supporting their claim that they had suffered a personal injury when the GSA denied their request for records pursuant to § 2954.[142] The district court in *Cummings* and Judge Ginsburg's

135. 395 U.S. 486 (1969).
136. *Id.* at 512–14.
137. *See infra* Part IV.C; *see also infra* Part IV.D. *Compare* Maloney v. Murphy, 984 F.3d 50, 59–70 (D.C. Cir. 2020), *with id.* at 70–76 (Ginsburg, J., dissenting).
138. *See infra* Part III.
139. 307 U.S. 433 (1939).
140. *Id.* at 456; *see also id.* at 438–46 (concluding that twenty Kansas state senators had a right to standing to have their vote counted and that the state court decision below nullified that right); *Standing over Appropriations?*, *supra* note 1, at 148–49.
141. *See Maloney*, 984 F.3d at 72 n.3 (D.C. Cir. 2020) (Ginsburg, J., dissenting); *see also* Waxman v. Thompson, No. 04-3467, 2006 WL 8432224, at *6–8 (C.D. Cal. July 24, 2006) (discussing cases that describe *Coleman* as a narrow exception by which individual members of a legislature may challenge an institutional decision); *infra* Part III.A.2 (discussing *Raines*' narrow interpretation of *Coleman*).
142. Cummings v. Murphy, 321 F. Supp. 3d 92, 108–09 (D.D.C. 2018), *rev'd sub nom.* Maloney v. Murphy, 984 F.3d 50 (D.C. Cir. 2020).

dissenting opinion in *Maloney* rejected the plaintiffs' contention that *Coleman* supported their claim of a standing injury,[143] but the *Maloney* majority cited *Coleman* with a "*cf*" citation, suggesting that the case mildly supported the plaintiffs' standing claims because "although asserting an institutional injury, [the *Coleman*] legislators had standing because their individual 'votes * * * ha[d] been overridden and virtually held for naught.'"[144]

In *Coleman*, there had been a tie vote of twenty to twenty in the Kansas Senate for the proposed constitutional amendment, and the Lieutenant Governor, the presiding officer of the Kansas Senate, had broken the tie by voting in favor of the amendment.[145] The twenty Kansas state senators who voted against the proposed amendment contended that amendments to the U.S. Constitution must be passed by state legislators only, and that state executive officials should not vote on proposed amendments even to resolve a tied legislative vote.[146] The Supreme Court of Kansas denied mandamus because the court determined on the merits that the amendment was validly enacted because the Lieutenant Governor of Kansas may cast the deciding vote on proposed amendments to the U.S. Constitution if there is a tie legislative vote in the Kansas Senate.[147]

After granting certiorari to review the decision of the Supreme Court of Kansas, the U.S. Supreme Court in *Coleman*, in an opinion by Chief Justice Charles Evans Hughes, determined that the twenty Kansas state senators had standing to sue because they had an interest in the "effectiveness of their votes" and whether their votes were "given effect" in a context in which their votes would have changed the result of the vote on the constitutional amendment, and, therefore, their votes had been effectively nullified.[148] Justice Hughes concluded:

143. *See Cummings*, 321 F. Supp. 3d. at 109–10; *see also Maloney*, 984 F.3d at 72 n.3 (Ginsburg, J., dissenting).

144. *Maloney*, 984 F.3d at 63 (quoting Coleman v. Miller, 307 U.S. 433, 438 (1939)).

145. *Coleman*, 307 U.S. at 436–38 (determining that the Supreme Court had jurisdiction because twenty state senators had standing to have their votes effectively counted); *Standing over Appropriations?*, *supra* note 1, at 148.

146. *Coleman*, 307 U.S. at 436. The Kansas House of Representatives subsequently voted to ratify the amendment and, therefore, the State of Kansas would have voted in favor of the proposed amendment to the U.S. Constitution if the Lieutenant Governor of Kansas could cast a deciding vote in the Kansas Senate in the event of a tied legislative vote. *See id.*; *Standing over Appropriations?*, *supra* note 1, at 148.

147. *Coleman*, 307 U.S. at 437; *Standing over Appropriations?*, *supra* note 1, at 148–49.

148. *Coleman*, 307 U.S. at 438 ("We find the cases cited in support of the contention, that petitioners lack an adequate interest to invoke our jurisdiction to review, to be inapplicable. Here, the plaintiffs include twenty senators, whose votes against ratification have been overridden and virtually held for naught although if they are right in their contentions their votes would have been sufficient to defeat ratification. We think that these senators have a

> [W]e find no departure from principle in recognizing in the instant case that at least the twenty senators whose votes, if their contention were sustained, would have been sufficient to defeat the resolution ratifying the proposed constitutional amendment, have an interest in the controversy which, treated by the state court as a basis for entertaining and deciding the federal questions, is sufficient to give the Court jurisdiction to review that decision.[149]

Significantly, the *Raines* decision, discussed below, suggested that the *Coleman* decision's recognition of standing for individual Kansas state senators was limited to a situation where the legislative plaintiffs were not challenging the Executive's implementation or interpretation of a statute, but rather whether the Lieutenant Governor of Kansas had interfered with the legislative process of the Kansas Senate to nullify their votes as a legislative body.[150]

2. *Raines v. Byrd*

In *Raines v. Byrd*,[151] the Supreme Court held that individual members of Congress usually do not have Article III standing to challenge institutional decisions of Congress such as the enactment of an allegedly unconstitutional statute.[152] The inability of individual members of Congress to challenge institutional legislative actions applied in *Raines* even though Congress in a statute attempted to grant standing to

plain, direct and adequate interest in maintaining the effectiveness of their votes. Petitioners come directly within the provisions of the statute governing our appellate jurisdiction. They have set up and claimed a right and privilege under the Constitution of the United States to have their votes given effect and the state court has denied that right and privilege."); *Standing over Appropriations?*, *supra* note 1, at 149.

149. *Coleman*, 307 U.S. at 446.

150. Raines v. Byrd, 521 U.S. 811, 823–25 (1997); *see also* Cummings v. Murphy, 321 F. Supp. 3d 92, 110 (D.D.C. 2018) (interpreting the *Coleman* and *Raines* decisions as limiting individual legislative standing to challenge institutional legislative action to circumstances like those in *Coleman* where there is complete vote nullification), *rev'd sub nom.* Maloney v. Murphy, 984 F.3d 50, 70 (D.C. Cir. 2020); U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53, 66–67 (D.D.C. 2015) (interpreting the *Coleman* and *Raines* decisions as above); Waxman v. Thompson, No. 04-3467, 2006 WL 8432224, at *6 (C.D. Cal. July 24, 2006) (interpreting the *Coleman* and *Raines* decisions as above); *Standing over Appropriations?*, *supra* note 1, at 149–50 (interpreting the *Coleman* and *Raines* decisions as above).

151. 521 U.S. 811 (1997).

152. *Standing over Appropriations?*, *supra* note 1, at 149–50 (summarizing the differentiation between the institutional injuries to Congress that do not give rise to standing by individual members of Congress and personal injuries to a legislator that may establish standing).

individual legislators to challenge the particular statute at issue in the case.[153] Rather, an individual legislator only has Article III standing if they can show they have suffered a "personal concrete injury" from a legislative action like any member of the public.[154]

In *Raines*, Senator Robert Byrd and several other members of Congress alleged that the Line Item Veto Act[155] "damaged the institution of Congress by unconstitutionally expanding the president's veto authority."[156] However, the Court rejected standing for their institutional claims because individual members of Congress may not sue based on "possible generalized harm to the legislature" as an institution when they failed to prove that "their claimed injury is personal, particularized, concrete, and otherwise judicially cognizable."[157] On the other hand, the *Raines* decision recognized that the Court in *Powell* had held that a member of Congress might be able to sue to defend his personal injury upon being denied his seat in Congress and congressional pay.[158] Additionally, the Court observed that "[w]e attach some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose their suit."[159]

The Court in *Raines* distinguished its decision in *Coleman* as an exceptional case in which individual legislators may challenge an institutional decision of a legislature in the rare circumstances where the individual legislators are arguably completely denied the right to cast an

153. *Raines*, 521 U.S. at 815–16; *see also Standing over Appropriations?*, *supra* note 1, at 149. The Line Item Veto Act provided that any member of Congress could assert a constitutional violation and sue for declaratory or injunctive relief to challenge the statute. *See* Line Item Veto Act, Pub. L. No. 104–30, § 3(a)(1), 110 Stat. 1200, 1211 (1996).

154. *Standing over Appropriations?*, *supra* note 1, at 149–50; *Raines*, 521 U.S. at 820–21, 829–30 (explaining that individual members of Congress usually only have standing for personal injuries to a legislator).

155. *See* Line Item Veto Act, Pub. L. No. 104–30, 110 Stat. 1200 (1996).

156. *Standing over Appropriations?*, *supra* note 1, at 149; *Raines*, 521 U.S. at 814–17.

157. *Standing over Appropriations?*, *supra* note 1, at 149–50 (quoting *Raines*, 521 U.S. at 820); *see also Raines*, 521 U.S. at 821, 830 (explaining that standing was inappropriate since the claim was not for a private personal injury to a member of Congress).

158. *Raines*, 521 U.S. at 820–21 (noting that the court in Powell v. McCormack, 395 U.S. 486, 496, 512–14 (1969), concluded that a member of Congress has standing to sue to challenge his disbarring from the House of Representatives and his loss of his legislative salary); *Standing over Appropriations?*, *supra* note 1, at 150 n.46.

159. *Standing over Appropriations?*, *supra* note 1, at 150 (quoting *Raines*, 521 U.S. at 829). The court in *Raines* reasoned that individual members of Congress do not have standing when a House of Congress has not voted to support their suit and appellees have not alleged any injury to personal interests. *Raines*, 521 U.S. at 829.

effective vote on a matter.[160] After discussing the facts and issues in *Coleman*, the *Raines* decision observed:

> It is obvious, then, that our holding in *Coleman* stands . . . for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.[161]

The *Raines* decision distinguished the result in *Coleman* by clarifying that the facts in its own case involved merely a possible dilution of legislative authority, but *Coleman* involved the distinct and more fundamental question of whether a purported legislative action created a valid legal act: "There is a vast difference between the level of vote nullification at issue in *Coleman* and the abstract dilution of institutional legislative power that is alleged here. To uphold standing here would require a drastic extension of *Coleman*. We are unwilling to take that step."[162] Furthermore, the *Raines* decision differentiated between the facts in its own case from those in *Coleman* by observing that "the institutional injury [the plaintiffs in *Raines*] allege is wholly abstract and widely dispersed (contra *Coleman*)."[163] Additionally, "the *Raines* decision justified the denial of standing for members of Congress on the grounds that Congress could simply repeal the disputed statute or exempt appropriations bills from its application" and individuals injured by the statute could raise constitutional challenges to it.[164]

The *Raines* decision normally bars suits by individual members of Congress who simply "allege that a statute has diminished the institutional authority of the legislative branch, especially where Congress may simply repeal a disputed statute."[165] Following the *Raines*

160. *Raines*, 521 U.S. at 823–26; *see also* Cummings v. Murphy, 321 F. Supp. 3d 92, 110 (D.D.C. 2018) (interpreting the *Coleman* and *Raines* decisions as limiting individual legislative standing to challenge institutional legislative action to cases like *Coleman* where there is complete vote nullification), *rev'd sub nom.* Maloney v. Murphy, 984 F.3d 50 (D.C. Cir. 2020); U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53, 66–67 (D.D.C. 2015) (same); Waxman v. Thompson, No. 04-3467, 2006 WL 8432224, at *6–7 (C.D. Cal. Jul. 24, 2006) (same); *Standing over Appropriations?*, *supra* note 1, at 149–51 (same).

161. *Standing over Appropriations?*, *supra* note 1, at 150 (quoting *Raines*, 521 U.S. at 823 (footnote omitted)); *see also id.* at 150 n.50.

162. *Id.* at 150–51 (quoting *Raines*, 521 U.S. at 826).

163. *Raines*, 521 U.S. at 829; *Standing over Appropriations?*, *supra* note 1, at 150–51 (quoting *Raines*, 521 U.S. at 829).

164. *Standing over Appropriations?*, *supra* note 1, at 151; *Raines*, 521 U.S. at 829–30.

165. *Standing over Appropriations?*, *supra* note 1, at 151.

decision, lower courts have generally rejected suits by individual legislators that allege that an executive official has improperly implemented a law.[166] As an example, in *Russell v. DeJongh*,[167] the Third Circuit denied standing to an individual legislator who alleged that the governor of the Virgin Islands made improper judicial appointments because the Virgin Islands' "[l]egislature was free to confirm, reject, or defer voting on the Governor's nominees," and, therefore, there was no convincing justification in light of the *Raines* decision to authorize a legislative member to sue in an Article III federal court when the political process could provide an effective remedy.[168] As is discussed in Part IV, the district court in *Cummings* and Judge Ginsburg's dissenting opinion in *Maloney* read the *Raines* decision as supporting the denial of standing in suits by legislators who seek information that was withheld by a federal agency pursuant to § 2954 because a House of Congress could remedy the violation by issuing a subpoena,[169] but the majority decision in *Maloney* distinguished the facts in its case from *Raines* on the grounds that a federal agency causes a personal injury to members of Congress when the agency denies information sought under that statute.[170]

B. Recent Legislative Standing Cases: Arizona State Legislature *and* Virginia House of Delegates

1. *Arizona State Legislature v. Arizona Independent Redistricting Commission*

In 2015, the Supreme Court in *Arizona State Legislature v. Arizona Independent Redistricting Commission*[171] recognized institutional standing for an entire state legislature, but reaffirmed the continuing importance of *Raines* in generally barring standing in cases in which

166. *See* Campbell v. Clinton, 203 F.3d 19, 20–24 (D.C. Cir. 2000) (citing *Raines* for the principle of denying legislative standing for individual members of Congress, in a case alleging that the President violated the War Powers Act, because members have a legislative remedy and thus do not need to sue in federal court); *Standing over Appropriations?*, *supra* note 1, at 151–52 n.58; *see also* Chenoweth v. Clinton, 181 F.3d 112, 113–17 (D.C. Cir. 1999) (invoking *Raines*' denial of legislative standing for individual members of Congress in a case alleging that the President's executive order for the protection of rivers exceeded his authority and diminished congressional authority).

167. 491 F.3d 130 (3d Cir. 2007).

168. *Id.* at 131–36; *Standing over Appropriations?*, *supra* note 1, at 151–52 (quoting *Russell*, 491 F.3d at 136).

169. *See infra* Part IV; *see also* Cummings v. Murphy, 321 F. Supp. 3d 92, 106–10 (D.D.C. 2018), *rev'd sub nom.* Maloney v. Murphy, 984 F.3d 50 (D.C. Cir. 2020); *Maloney*, 984 F.3d at 70 (Ginsburg, J., dissenting).

170. *See infra* Part IV; *Maloney*, 984 F.3d at 65–67.

171. 135 S. Ct. 2652 (2015).

individual legislators seek to vindicate institutional interests.[172] The Arizona state legislature had challenged Proposition 106, a statewide citizen's initiative that assigned congressional redistricting authority to an independent commission instead of the legislature, on the grounds that the proposition violated the U.S. Constitution's Elections Clause,[173] which the Arizona state legislature claimed gives state legislatures "primary responsibility" over congressional redistricting decisions.[174] The Supreme Court held that the Arizona state legislature had standing to sue because Proposition 106 "strip[ped] the [l]egislature of its alleged prerogative to initiate redistricting," and, accordingly, that the legislature had asserted an adequate injury in fact for Article III standing.[175]

The *Arizona State Legislature* decision distinguished the *Raines* decision from the appropriate institutional standing in its case by pointing out *Raines*' narrow holding "that six individual Members of Congress lacked standing to challenge the Line Item Veto Act" and that "[t]he 'institutional injury' at issue, we reasoned, scarcely zeroed in on any individual Member."[176] Additionally, the *Arizona State Legislature* Court observed that there was "some importance to the fact that [the *Raines* plaintiffs had] not been authorized to represent their respective Houses of Congress."[177] Conversely, the Arizona legislature was "an institutional plaintiff asserting an institutional injury," and therefore quite different from the individual legislators attempting inappropriately to allege standing in *Raines*.[178]

The *Arizona State Legislature* opinion concluded that the *Coleman* decision, which had recognized standing for individual legislators to challenge an institutional decision, was "[c]loser to the mark" for the facts

172. *Id.* at 2663–64.

173. U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof. . . ."); *Arizona State Legislature*, 135 S. Ct. at 2658–59.

174. *Arizona State Legislature*, 135 S. Ct. at 2658–59, 2661–63; *Standing over Appropriations?*, *supra* note 1, at 158.

175. *Arizona State Legislature*, 135 S. Ct. at 2663; *Standing over Appropriations?*, *supra* note 1, at 158. On the merits, a divided Court determined that Proposition 106's creation of a state redistricting commission did not violate the Constitution's Elections Clause. *Arizona State Legislature*, 135 S. Ct. at 2671–77; *Standing over Appropriations?*, *supra* note 1, at 158 n.104.

176. *Arizona State Legislature*, 135 S. Ct. at 2664 (citing Raines v. Byrd, 521 U.S. 811, 821 (1997)); *Standing over Appropriations?*, *supra* note 1, at 158.

177. *Arizona State Legislature*, 135 S. Ct. at 2664 (quoting *Raines*, 521 U.S. at 829); *Standing over Appropriations?*, *supra* note 1, at 158–59.

178. *Arizona State Legislature*, 135 S. Ct. at 2664; *Standing over Appropriations?*, *supra* note 1, at 159.

in its case than the *Raines* decision.[179] The *Raines* decision had interpreted the *Coleman* decision as standing "for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified."[180] The *Arizona State Legislature* decision held that the Arizona state legislature had Article III standing because "Proposition 106, together with the Arizona Constitution's ban on efforts to undermine the purposes of an initiative, would 'completely nullif[y]' any vote by the legislature, now or 'in the future,' purporting to adopt a redistricting plan," and, accordingly, compared the facts in its case to those in *Coleman*.[181] The *Arizona State Legislature* decision explicitly evaded the question of whether Congress, a House of Congress, or a congressional committee has standing to sue the Executive Branch for circumscribing the authority of Congress: "The case before us does not touch or concern the question whether Congress has standing to bring a suit against the President. There is no federal analogue to Arizona's initiative power, and a suit between Congress and the President would raise separation-of-powers concerns absent here."[182]

The *Arizona State Legislature* decision has only limited relevance in deciding whether the majority opinion in *Maloney* was correct in recognizing standing in that case because federal separation-of-powers principles were absent in a case involving a state legislature.[183] First, the *Arizona State Legislature* opinion explicitly circumvented congressional standing issues and observed that congressional standing raises separation-of-powers concerns absent in its case involving only a state legislature.[184] Second, the authority of state legislatures to challenge voter initiatives is a question that does not arise for Congress because there is no process for federal voter initiatives.[185] By interpreting *Coleman* as allowing standing for members of Congress only where their votes are completely nullified,[186] the Court's opinion in *Arizona State Legislature* appears to be closer to Judge Ginsburg's dissenting opinion

179. *Arizona State Legislature*, 135 S. Ct. at 2665; *Standing over Appropriations?*, *supra* note 1, at 159.
180. *Arizona State Legislature*, 135 S. Ct. at 2665 (quoting *Raines*, 521 U.S. at 823); *Standing over Appropriations?*, *supra* note 1, at 159.
181. *Arizona State Legislature*, 135 S. Ct. at 2665 (quoting *Raines*, 521 U.S. at 823–24); *Standing over Appropriations?*, *supra* note 1, at 159.
182. *Arizona State Legislature*, 135 S. Ct. at 2665 n.12; *Standing over Appropriations?*, *supra* note 1, at 159.
183. *Arizona State Legislature*, 135 S. Ct. at 2665 n.12.
184. *Id.*
185. *Id.* ("There is no federal analogue to Arizona's initiative power . . . .").
186. *Id.* at 2665; *Standing over Appropriations?*, *supra* note 1, at 159.

in *Maloney*, or the court opinions in *Cummings* and *Waxman* in limiting the scope of the *Coleman* opinion to complete nullification cases.[187] The majority opinion in *Maloney* treated the *Arizona State Legislature* decision as an institutional injury case and did not cite the case as supporting its decision in favor of the congressional plaintiffs.[188]

2. *Virginia House Of Delegates v. Bethune-Hill*

In the most recent significant legislative standing case, the Supreme Court in its 2019 decision in *Virginia House of Delegates v. Bethune-Hill*[189] held that Virginia's House of Delegates, the lower house in Virginia's bicameral legislature, did not have Article III standing to represent the State's interests to appeal a three-judge federal district court's redistricting order in a racial gerrymandering case.[190] Virginia's Attorney General had declined to appeal the district court's redistricting order, but the House of Delegates sought to appeal nevertheless.[191] The *Virginia House of Delegates* decision concluded that the House of Delegates did not have standing to sue as the agent of the state because Virginia law clearly designated Virginia's Attorney General as having sole authority to represent the state in civil litigation, including decisions whether to appeal a case.[192]

According to the Supreme Court in *Virginia House of Delegates*, the fact that the House of Delegates was *not* the State's agent for civil litigation and shared authority over legislative redistricting with the Virginia Senate distinguished that case from the *Arizona State Legislature* decision.[193] In the latter case, the "Court recognized the standing of the Arizona House and Senate—*acting together*—to challenge a referendum that gave redistricting authority exclusively to an independent commission, thereby allegedly usurping the legislature's authority under the Federal Constitution over congressional

187. Maloney v. Murphy, 984 F.3d 50, 72 & n.3 (D.C. Cir. 2020) (Ginsburg, J., dissenting); Cummings v. Murphy, 321 F. Supp. 3d 92, 108–10 (D.D.C. 2018), *rev'd sub nom.* Maloney v. Murphy, 984 F.3d 50 (D.C. Cir. 2020); Waxman v. Thompson, No. CV 04-3467, 2006 WL 8432224, at *6–8 (C.D. Cal. July 24, 2006) (discussing cases that describe the *Coleman* decision as a narrow exception by which individual members of a legislature may challenge an institutional decision); *see supra* Part III.A.2 (discussing *Raines*' narrow interpretation of *Coleman*).

188. *Maloney*, 984 F.3d at 62–70 (characterizing the *Arizona State Legislature* decision as an institutional injury case and *Maloney* as involving a personal injury to members of Congress).

189. 139 S. Ct. 1945 (2019).

190. *Id.* at 1949–56.

191. *Id.* at 1950.

192. *Id.* at 1951–53.

193. *Id.* at 1953–54.

redistricting."[194] Citing the *Raines* decision, the majority opinion in *Virginia House of Delegates* observed: "[j]ust as individual members lack standing to assert the institutional interests of a legislature, a single House of a bicameral legislature lacks capacity to assert interests belonging to the legislature as a whole."[195] Judge Ginsburg's dissenting opinion in *Maloney* quoted this language from the *Virginia House of Delegates* decision to support his view that "individual members lack standing to assert the institutional interests of a legislature," and, therefore, that the eight members of the House who sued in *Maloney* did not have standing to represent the House as an institution to enforce § 2954.[196] Additionally, the *Virginia House of Delegates* decision determined that the *Coleman* decision did not help the Virginia House of Delegates plaintiffs because the Court agreed with the *Raines* decision that *Coleman* represented a narrow exception for legislative standing where the votes of individual members of a legislature are completely nullified.[197]

The Supreme Court's legislative standing decisions in *Coleman*, *Raines*, *Arizona State Legislature*, and *Virginia House of Delegates* were key precedent for the D.C. Circuit in *Maloney*.[198] On the whole, these four Supreme Court decisions narrowly defined when individual members of Congress have standing, but allowed a legislative house or both legislative houses great authority to have standing to represent the legislature or an entire state.[199] Part IV will address whether the informational injuries in *Maloney* are better characterized as personal or institutional injuries.[200] Furthermore, Part IV will examine whether members of the House or Senate Oversight Committee may have standing to sue to enforce § 2954, or instead must rely in an entire House of Congress to enforce a subpoena.[201]

194. *Id.*
195. *Id.* (footnote omitted) (citing Raines v. Byrd, 521 U.S. 811, 829 (1997)).
196. *See* Maloney v. Murphy, 984 F.3d 50, 70–71 (2020) (Ginsburg, J., dissenting) (quoting *Virginia House of Delegates*, 139 S. Ct. at 1953–54).
197. *Virginia House of Delegates*, 139 S. Ct. at 1954.
198. *See supra* Part III.
199. *See supra* Part III.
200. *See infra* Part IV.
201. *See infra* Part IV.

IV. THE *MALONEY* DECISION AND THE DISTRICT COURT DECISIONS IN *CUMMINGS* AND *WAXMAN*

A. Waxman v. Thompson

In a 2006 decision in *Waxman v. Thompson*,[202] Federal District Court Judge Margaret M. Morrow of the Central District of California held that individual members of the House Oversight Committee did not suffer a personal standing injury when their Seven Member Rule information request pursuant to § 2954 was denied by the Department of Health and Human Services ("HHS") and its constituent agencies, including the Centers for Medicare & Medicaid Services ("CMS").[203] Instead, the court concluded that the government's denial of information under the statute was an institutional injury for which individual members of Congress lacked standing to sue in light of *Raines*.[204] Judge Morrow suggested that the proper remedy for HHS' denial of information was for a congressional committee to issue a subpoena and then for the committee, after receiving approval for a suit from the entire House of Congress to cite the agency for contempt, to sue the agency if it refused to respond to the subpoena.[205]

Following the *Akins* and *Public Citizen* precedent discussed in Part I, the district court in *Waxman* concluded that a federal agency's refusal to provide information requested pursuant to a federal statutory mandate generally constitutes a standing injury in fact.[206] However, the government argued that § 2954 established an institutional right to information for Congress, and not a personal right of information for individual members of Congress such as the plaintiffs in the *Waxman* case.[207] The *Waxman* decision concluded that the informational injury in its case was more similar to the institutional standing issues in *Raines* than the personal standing issues in *Powell* because "[a]s in *Raines*, however, the right plaintiffs assert flows directly from the fact that they hold seats in Congress" rather than personal injuries.[208] Additionally, Judge Morrow observed that the plaintiffs had implicitly conceded that

202. No. 04-3467, 2006 WL 8432224 (C.D. Cal. July 24, 2006).
203. *Id.* at *1–3, *12.
204. *Id.* at *12.
205. *Id.* at *10–12; *see* Comm. on the Judiciary of the U.S. House of Representatives v. McGahn, 968 F.3d 755, 778 (D.C. Cir. 2020) (en banc) (holding the House of Representatives has standing to enforce a subpoena not involving the joinder of the Senate); Nash, *supra* note 134, at 373–75 (discussing the authority of Congress to subpoena information and to sue in federal courts to enforce a subpoena).
206. *Waxman*, 2006 WL 8432224, at *5–6.
207. *Id.* at *6.
208. *Id.* at *8.

they wanted the requested information for institutional legislative purposes as members of Congress, rather than as individuals, and so their case was closer to *Raines* than *Powell*, stating:

> Plaintiffs allege that defendant's failure to provide information impaired "their ability to assess whether legislation [was] needed" or whether a bill that had passed should be "revisit[ed]." They thus effectively concede that their request was in aid of the performance of their legislative duties rather than for any private purpose.[209]

Furthermore, the *Waxman* decision read the *Coleman* decision narrowly in light of *Raines* to allow individual members of Congress to sue regarding institutional injuries only where their votes are completely nullified and determined that the denial of information in its case did not meet that standard.[210]

The *Waxman* opinion observed that "no federal court appears to have addressed whether legislators who have a statutory right to information because they are members of a particular legislative committee have standing to sue when their request is refused."[211] Judge Morrow then declared that "[t]he most closely analogous case is *Walker v. Cheney*."[212] In *Walker*, a 2002 decision by the U.S. District Court for the District of Columbia, the court decided that the Comptroller General of the United States lacked Article III standing to sue to seek judicial enforcement of an information request issued to Vice President Cheney for information regarding the National Energy Policy Development Group ("NEPDG").[213] The Comptroller General is a Congressional agent who serves as head of then-entitled General Accounting Office ("GAO"),[214] which is an independent, non-partisan agency now called the Government Accountability Office that works for Congress.[215]

209. *Id.* (footnote omitted).
210. *Id.* at *7–8.
211. *Id.* at *9 (footnote omitted).
212. *Id.* (citing Walker v. Cheney, 230 F. Supp. 2d 51 (D.C. 2002)).
213. *Id.*
214. *Id.*
215. *About GAO*, U.S. GOV'T ACCOUNTABILITY OFF., https://www.gao.gov/about/ (last visited Mar. 3, 2022). In 2004, the name was changed from the General Accounting Office to the Government Accountability Office by the GAO Human Capital Reform Act to reflect that the GAO's auditors not only perform financial audits, but also conduct a broad range of performance audits, program evaluations, policy analyses, and legal opinions and decisions. GAO Human Capital Reform Act of 2004, Pub. L. No. 108-271, § 8, 118 Stat. 811, 814 (2004) (codified at 31 U.S.C. § 702); *Government Accountability Office: What's in a Name?*, GAOWATCHBLOG (Apr. 4, 2014), https://blog.gao.gov/2014/04/04/government-

In *Walker*, the district court determined that the Comptroller General did not have Article III standing to sue to obtain the information denied by NEPDG because his injury was "solely institutional" as an agent of Congress, rather than an actionable personal injury.[216] In his brief to the *Walker* court, the Comptroller General had acknowledged that the purpose of his information request was to serve Congress and that the statute he invoked as creating a right to the requested information was designed to serve congressional purposes.[217] If the Comptroller General retired, Judge Morrow reasoned, the now former Comptroller General would no longer have a claim because he had no personal interest in the information.[218] The *Walker* decision observed that a House of Congress or a congressional committee might have standing to sue to seek the requested information, but that no congressional subpoena had been issued to obtain the documents.[219] In *Waxman*, Judge Morrow analogized the congressional plaintiffs' request for information pursuant to § 2954 as similar to the Comptroller General's failed request for information in the *Walker* decision because both were institutional in nature and in neither case had a House of Congress issued a subpoena.[220] Accordingly, the *Waxman* decision denied Article III standing for the congressional plaintiffs because their request for information was merely institutional in purpose, and not a real personal injury, and because the plaintiffs had failed to ask their congressional committee to issue a subpoena or the House of Representatives to enforce a subpoena.[221]

B. Cummings

In *Cummings v. Murphy*,[222] Judge Mehta generally followed the *Waxman* decision in denying Article III standing to eight minority members of the House Oversight Committee because of historical precedent that the denial of information to individual members of Congress is an institutional injury that may only be enforced by Congress or at least one House of Congress.[223] Furthermore, the informational

accountability-office-whats-in-a-name/#:~:text=%E2%80%9CEffective%20July%207%2C %202004%2C,Reform%20Act%20of%202004%2C%20Pub.

216. *Waxman*, 2006 WL 8432224, at *9–10.
217. *Id.* at *9.
218. *Id.*
219. *Id.* at *10.
220. *Id.* at *10–11.
221. *Id.* at *11–12.
222. 321 F. Supp. 3d 92 (D.D.C. 2018), *rev'd sub nom.* Maloney v. Murphy, 984 F.3d 50 (D.C. Cir. 2020).
223. *Id.* at 113–18.

injuries were not personal as to establish a basis for a lawsuit, therefore the failure of the plaintiffs to obtain approval from the entire House of Representatives to enforce a subpoena to obtain the requested documents was fatal to their suit.[224] The *Cummings* decision concluded that the Seven Member Rule in § 2954 is unenforceable by seven or more members of Congress, but that potentially an entire House of Congress might sue to enforce a subpoena,[225] or individual members of Congress may seek information like any citizen under one of several statutes.[226] Judge Mehta interpreted the *Coleman* and *Raines* decisions as limiting individual legislative standing to challenge institutional legislative action, especially in cases where there is complete vote nullification like that which occurred in *Coleman*.[227]

The *Cummings* opinion declared that "the outcome of the case in large part turn[ed] on application of the Supreme Court's decision in *Raines* . . . ."[228] Accordingly, Judge Mehta closely examined the *Raines* decision before considering each party's particular arguments.[229] For the *Cummings* court, a key aspect of the *Raines* opinion was the distinction between the "sufficiently personal" standing injuries in *Powell* and the institutional injuries in *Raines* because the plaintiffs in the latter case did not allege that they had lost something that they were personally entitled to, like the congressional seat at issue in *Powell*.[230] Additionally, the *Cummings* decision read *Raines* as limiting *Coleman* to cases of complete nullification of a legislator's vote.[231] Furthermore, Judge Mehta interpreted the *Raines* decision as concluding that historical practice was against allowing individual members of Congress to sue the Executive Branch.[232] The *Cummings* opinion concluded its discussion of the *Raines* decision as follows:

224. *Id.* at 116–17.

225. *Id.* at 114–17; *see* Comm. on the Judiciary of the U.S. House of Representatives v. McGahn, 968 F.3d 755, 778 (D.C. Cir. 2020) (en banc) (holding the House of Representatives has standing to enforce a subpoena not involving the joinder of the Senate); Nash, *supra* note 134, at 373–75 (discussing authority of Congress to subpoena information and to sue in federal courts to enforce a subpoena).

226. "GSA has announced, apparently for the first time in this litigation, that it will treat Plaintiffs' requests as if made under the Freedom of Information Act . . . ." *Cummings*, 321 F. Supp. 3d at 99 (discussing Supreme Court decisions allowing informational standing for individual citizens or voters).

227. *Id.* at 110.

228. *Id.* at 102.

229. *Id.* at 102–05.

230. *Id.* at 103 (citing Raines v. Byrd, 521 U.S. 811, 821 (1997)).

231. *Id.* at 104–05 (citing *Raines*, 521 U.S. at 823–26).

232. *Id.* at 105 (citing *Raines*, 521 U.S. at 826–28).

> To summarize, the following principles emerge from *Raines*. Individual Members of Congress generally do not have standing to vindicate the institutional interests of the house in which they serve. This means that Members of Congress may go to court to demand something to which they are privately entitled, but they cannot claim harm suffered solely in their official capacities as legislators that "damages all Members of Congress and both Houses of Congress equally[.]"[233]

Judge Mehta acknowledged that the informational injuries alleged by the congressional plaintiffs in this case differed somewhat from the facts in *Raines*, so he next addressed how the standing principles in *Raines* could be applied to the instant case.[234]

In *Cummings*, the congressional plaintiffs argued that their case fell "outside of *Raines*, because the informational injury they assert is sufficient to confer standing under the Supreme Court's decision in *Spokeo*."[235] The plaintiffs maintained that "the denial of information requested under section 2954 itself constitutes an injury in fact" in light of the Supreme Court's precedent regarding informational injuries.[236]

Judge Mehta in his *Cummings* opinion acknowledged that the Supreme Court's decisions in *Spokeo*, *Akins*, and *Public Citizen* had recognized that the government's denial of information that the public is authorized to receive pursuant to a statute may constitute a valid Article III informational injury for suits "*brought by private parties*,"[237] but concluded that *Raines*' distinction between personal and institutional injuries was more relevant for informational injury claims brought by government officials such as the congressional plaintiffs.[238] While the *Spokeo* decision "recognized that the deprivation of a statutory right to information can be a sufficiently personal, particularized, and concrete injury," the *Cummings* decision pointed out that "*Spokeo* also made clear that the mere denial of a statutory right does not automatically give rise to a cognizable injury in fact for purposes of Article III standing."[239] The *Spokeo* decision quoted *Raines* for the principle that Article III's

233. *Id.* (citations omitted) (first citing Powell v. McCormack, 395 U.S. 486 (1969); then quoting *Raines*, 521 U.S. at 821, 829; and then citing Arizona State Legislature v. AIRC, 135 S. Ct. 2652, 2664 (2015)).

234. *Id.* at 106–17 (discussing application of *Raines* to a case involving the denial of information by the Executive Branch to individual members of Congress).

235. *Id.* at 106.

236. *Id.*

237. *Id.* at 107.

238. *Id.* at 106–10 (discussing application of *Raines* to case involving the denial of information by the Executive Branch to individual members of Congress).

239. *Id.* at 106–07.

constitutional standing requirements cannot be waived simply by Congress "statutorily granting the right to sue to a plaintiff who would not otherwise have standing."[240] Accordingly, Judge Mehta determined "the mere fact that Plaintiffs here have been denied a statutory right to information conferred by the Seven Member Rule [in § 2954] cannot alone resolve the standing question."[241]

Additionally, the *Cummings* opinion concluded that the two "other Supreme Court decisions on which Plaintiffs rely—*Akins* and *Public Citizen*—do not compel a different result."[242] Judge Mehta explained that "[i]n both cases, the statutes at issue entitled members of the public, not Members of Congress, to request agency records," and that *Akins* and *Public Citizen* both involved "*private parties, not government officials*."[243] Because *Raines*' distinction between personal versus institutional injuries for plaintiffs who are members of Congress was inapplicable in *Akins* and *Public Citizen*, the *Cummings* decision concluded that the standing principles in *Raines* controlled the case.[244]

In the *Cummings* decision, Judge Mehta concluded that the congressional plaintiffs had alleged an institutional standing injury, not a personal injury.[245] He observed that the parties agreed that *Raines* "establishe[d] a binary rubric of potential injuries for purposes of assessing standing" between either personal or institutional injuries.[246] The sole defendant, the U.S. government, on behalf of the GSA Administrator, argued that the plaintiffs' suit for information was effectively institutional rather than personal because it was based upon the plaintiffs' roles as members of the House Oversight Committee and because the requested information would benefit the House as a whole.[247] Relying on *Raines*, the defendant contended that the plaintiffs would no longer have a right to the information if they retired tomorrow from Congress, and, therefore, that their suit was institutional in nature.[248]

The *Cummings* decision agreed with the defendant's arguments against standing under § 2954 and the *Waxman* decision, the only prior decision on the standing rights of congressional plaintiffs under § 2954, to conclude that the plaintiffs had not suffered from a personal injury as

240. *Id.* at 107 (quoting Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547–48 (2016)).
241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.* at 107–10.
246. *Id.* at 107.
247. *Id.*
248. *Id.*

defined in *Raines*.[249] Rather, the plaintiffs' informational injury from the GSA's denial of their § 2954 request was but an institutional standing injury because they sued solely in their capacity as members of Congress.[250] In their complaint, the plaintiffs had "tie[d] their injury directly to their constitutional duties as legislators" on the grounds that the GSA's denial of their information request impeded their duties on the House Oversight Committee and other legislative responsibilities.[251] Judge Mehta determined that the plaintiffs alleged an institutional standing injury in part because their suit would disappear if they were to retire from Congress or lose their seat.[252]

Furthermore, the *Cummings* decision rejected the plaintiffs' argument that they had personal injuries in light of either the *Powell* or *Coleman* decisions.[253] The *Cummings* plaintiffs argued that their injury from being denied information by the GSA was personal even if the informational right is suffered in their official capacities as legislators and thus not personal in the sense of being "private."[254] However, Judge Mehta concluded the plaintiffs' claims were not personal as defined by the *Raines* decision.[255] The *Raines* decision had distinguished between Adam Clayton Powell, Jr.'s personal and "private right" claim to his congressional seat in *Powell*, as opposed to the institutional claims in *Raines* that were based solely upon the plaintiffs' status as members of Congress.[256] Judge Mehta concluded that the congressional plaintiffs' claims were institutional, like in *Raines*, because their "rights under the Seven Member Rule derive solely from their membership in the House of Representatives and, even more specifically, their assignment to the House Oversight Committee. Again, if a Plaintiff here were to lose her seat, she likewise would lose all rights under the Seven Member Rule."[257]

The *Cummings* plaintiffs sought to distinguish *Raines* on the grounds that not all members of both Houses of Congress shared their information injury equally.[258] Judge Mehta acknowledged that the *Cummings* plaintiffs had suffered from informational injuries that were not the same as those of all members of Congress, and, therefore, that their

249. *Id.* at 108.
250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.* at 108–10.
254. *Id.* at 108 (quoting Pls.' Mem. at 27–28).
255. *Id.* at 108–09.
256. *Id.* at 109 (citations omitted).
257. *Id.*
258. *Id.*

injuries were "more particularized" than those in *Raines*.[259] However, he pointed out that the *Raines* Court had read the *Powell* decision as requiring a member of Congress to be singled out for unfavorable treatment different than other members, like Adam Clayton Powell, and that the *Cummings* plaintiffs had not suffered from some especially unfavorable treatment comparable to that of Adam Clayton Powell.[260] Furthermore, the *Cummings* court determined that the plaintiffs in its case had not been "'deprived of something to which they *personally* are entitled,' which would have made the injury 'more concrete,'" as the *Raines* decision had interpreted the *Powell* decision.[261] Additionally, *Raines* had limited the *Coleman* decision to cases in which a member of Congress asserts complete vote nullification, which was clearly not at issue in the *Cummings* decision.[262]

The *Cummings* decision agreed with the *Walker* decision denying standing to the U.S. Comptroller General, who is an agent of Congress.[263] Like the Comptroller General in *Walker*, the *Cummings* congressional plaintiffs had suffered from an institutional injury when they were denied information by a federal agency, rather than a personal injury, because they sought the information for their oversight duties rather than for some personal interest.[264] Accordingly, the *Cummings* court decided that the plaintiffs in the case had failed to prove an Article III standing injury because they "only allege[d] harm stemming from their official status as legislators, as opposed to injury suffered in their private capacities."[265]

Next, the *Cummings* decision examined whether the congressional plaintiffs could assert an institutional injury sufficient for Article III standing.[266] In contrast to Judge Morrow in the *Waxman* decision and Judge Ginsburg's dissenting opinion in *Maloney*, which had both limited *Coleman* to cases of complete nullification of a legislator's vote,[267] Judge Mehta was open to the possibility that individual legislators might be able to sue for institutional injuries beyond just complete vote nullification.[268] He observed, "*Raines* arguably left open the question

259. *Id.*
260. *Id.*
261. *Id.* (quoting Raines v. Byrd, 521 U.S. 811, 821 (1997)).
262. *Id.* at 110 (citing *Raines*, 521 U.S. at 823–24).
263. *Id.*
264. *Id.* (citations omitted).
265. *Id.*
266. *Id.*
267. Waxman v. Thompson, No. CV 04–3467, 2006 WL 8432224, at *7–8 (C.D. Cal. July 24, 2006); Maloney v. Murphy, 984 F.3d 50, 72 n.3 (D.C. Cir. 2020) (Ginsburg, J., dissenting), *rev'd sub nom.* Maloney v. Murphy, 984 F.3d 50 (D.C. Cir. 2020).
268. *Cummings*, 321 F. Supp. 3d at 111–12.

whether individual Members of Congress have standing to assert other types of institutional injuries outside the vote dilution context."[269]

The *Cummings* opinion then addressed whether a federal agency's denial of information to members of Congress who had requested it pursuant to § 2954 might be sufficient for standing.[270] Judge Mehta concluded that, "[t]he denial of a Seven Member Rule request, although not a personal injury, is a more particularized type of institutional injury than a general diminution of legislative power, such as the dilution of the efficacy of Congress members' votes," which was discussed in the *Raines* decision and affects every member of Congress equally.[271] The denial of Seven Member Rule requests affects only some members rather than all of them equally.[272] Furthermore, the *Cummings* court determined that "the rejection of a Seven Member Rule request is more concrete than, say, again, a claim of vote dilution," such as in *Raines*.[273] Finally, Judge Mehta declared that "the court finds that Plaintiffs have made a stronger case than the plaintiffs in *Raines* that they have suffered the type of institutional injury that could potentially establish Article III standing."[274] Accordingly, Judge Mehta was more open to congressional standing in cases involving a federal agency's denial of a Seven Member Rule request than Judge Morrow in the *Waxman* decision or Judge Ginsburg in his dissenting opinion in *Maloney*, who both limited institutional standing by individual members of Congress to cases like *Coleman* in which there is complete vote nullification.[275]

However, Judge Mehta ultimately denied standing in *Cummings* based upon (1) a historical practice of courts denying standing in similar legislative standing cases, (2) the failure of the entire House to authorize the plaintiffs' suit in *Cummings*, and (3) the availability of alternative remedies such as the entire House enforcing a subpoena to obtain the requested information.[276] First, the Supreme Court in *Raines* observed

269. *Id.* at 112.
270. *Id.*
271. *Id.*
272. *Id.*
273. *Id.*
274. *Id.* at 113.
275. *Compare id.* at 111–13, *with* Waxman v. Thompson, No. CV 04–3467, 2006 WL 8432224, at *7–8 (C.D. Cal. July 24, 2006), *and* Maloney v. Murphy, 984 F.3d 50, 72 n.3 (D.C. Cir. 2020) (Ginsburg, J., dissenting), *rev'd sub nom.* Maloney v. Murphy, 984 F.3d 50 (D.C. Cir. 2020).
276. *See Cummings*, 321 F. Supp. 3d at 113–17; Comm. on the Judiciary of the U.S. House of Representatives v. McGahn, 968 F.3d 755, 767–68 (D.C. Cir. 2020) (en banc) (holding that the House of Representatives has standing to enforce a subpoena not involving the joinder of the Senate); Nash, *supra* note 134, at 373–75 (discussing authority of Congress to subpoena information and to sue in federal courts to enforce a subpoena).

that, historically, when there were confrontations between one or both Houses of Congress and the Executive Branch, "no suit was brought on the basis of claimed injury to official authority or power."[277] Accordingly, in light of this statement from the *Raines* decision, the *Cummings* court observed that "Plaintiffs' suit therefore runs against the strong current of history."[278] The *Waxman* decision had rejected standing in a similar Seven Member Rule case because historically, most suits by Congress to obtain information have been through suits to enforce a subpoena supported by a House of Congress, rather than a suit by several members to enforce § 2954.[279]

Second, the *Raines* opinion put "some importance" on the failure of the plaintiffs in the case to obtain authorization from their respective Houses of Congress to bring a lawsuit against the Executive Branch, although *Raines* carefully avoided the contentious legal issue of whether such authorization automatically supports standing.[280] The *Cummings* decision noted: "[i]n this case, Plaintiffs did not secure approval from the full House before bringing suit—indeed, they did not even try to."[281] The congressional plaintiffs argued that § 2954 itself provided authorization for its suit, but Judge Mehta in *Cummings* pointed out that the statute did not contain a private right of action authorizing members of Congress to sue, and that *Raines* had rejected the idea that a general statutory authorization to sue was sufficient if members of Congress did not obtain explicit approval from one or both Houses of Congress for their suit.[282]

Finally, the *Cummings* court emphasized that the congressional plaintiffs had failed to pursue alternative remedies such as having the House Oversight Committee issue a subpoena, and then persuading the entire House to support a suit to enforce the subpoena even if getting broader support in the House of Representatives would have been difficult.[283] Because of the lack of historical examples to support standing in § 2954 Seven Member Rule suits, the plaintiffs' failure to obtain authorization for their suit from the entire House, and the failure of the plaintiffs to pursue alternative remedies, such as a subpoena, Judge Mehta in *Cummings* held that the plaintiffs lacked Article III standing to obtain judicial enforcement of their requests for information from the GSA under 5 U.S.C. § 2954, and, therefore, granted the defendant's

277. Raines v. Byrd, 521 U.S. 811, 826 (1997).
278. *Cummings*, 321 F. Supp. 3d at 113.
279. *Id.* at 113–14 (discussing *Waxman*, 2006 WL 8432224, at *16).
280. *Id.* at 114–16 (discussing *Raines*, 521 U.S. at 819–20, 829).
281. *Id.* at 116.
282. *Id.* at 116–17 n.9.
283. *Id.* at 117.

motion to dismiss.[284] Judge Mehta demonstrated a willingness to closely examine precedent and look at all sides of the dispute that unfortunately was not followed by the three-judge appellate panel that reviewed his decision in *Maloney*.[285]

C. Maloney

In *Maloney v. Murphy*,[286] the D.C. Circuit in a divided two to one decision reversed and remanded Judge Mehta's *Cummings* decision, and held that the congressional plaintiffs had suffered from a sufficient Article III standing injury to force judicial enforcement of their requests for information from the GSA pursuant to § 2954.[287] Relying on *Akins* and *Public Citizen*, Judge Millett's majority opinion in *Maloney* observed that "[t]he Supreme Court has repeatedly held that informational injuries satisfy the injury-in-fact requirement."[288] The *Maloney* decision then reasoned that "[t]he right to request information under Section 2954 is on all fours, for standing purposes, with the informational right conferred by those other statutes," such as FOIA.[289] Next, the court concluded that the GSA's withholding of requested information constituted "a concrete and particularized injury in fact for purposes of Article III standing."[290] However, the subsequent *TransUnion* decision limited *Akins* and *Public Citizen* to statutes authorizing disclosure to the public at large, and § 2954 is not a public disclosure statute because it is limited to certain members of Congress.[291] Accordingly, while Judge Millett's reading of *Akins* and *Public Citizen* may have been plausible at the time of her decision, her interpretation appears to be incompatible with the *TransUnion* decision's limitation of informational injuries to public disclosure statutes that apply to the public at large, rather than a narrow group of people.[292]

The *Maloney* decision addressed the GSA's argument that the usual rules for informational standing injuries do not apply when a statute like § 2954 provides information rights only to members of Congress.[293] The GSA acknowledged that the congressional plaintiffs could sue as

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284. *Id.* at 118.
285. *See infra* Part IV.C.
286. 984 F.3d 50 (D.C. Cir. 2020).
287. *Id.* at 54, 70.
288. *Id.* at 59.
289. *Id.* at 60–61.
290. *Id.* at 61.
291. *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2214 (2021); *supra* Part II.C.
292. *TransUnion*, 141 S. Ct. at 2214.
293. *Maloney*, 984 F.3d at 62.

members of the public under FOIA or similar statutes.[294] Judge Millett initially asserted that the fundamental standing analysis for congressional plaintiffs under § 2954 "is no different for standing purposes than if these same Requesters had filed a FOIA request for the same information."[295]

Nevertheless, the *Maloney* decision acknowledged that "[i]n addition, in analyzing the standing of legislators, cases have traditionally asked whether the asserted injury is 'institutional' or 'personal.'"[296] Judge Millett first observed, "[a]n institutional injury is one that belongs to the legislative body of which the legislator is a member."[297] Quoting the Supreme Court case *Virginia House of Delegates v. Bethune-Hill*,[298] she explicated that "[i]ndividual members lack standing to assert the institutional interests of a legislature."[299] Millett further explained that "[s]uch institutional injuries afflict the interests of the legislature as an entity; they do not have a distinct personal, particularized effect on individual legislators." [300] The *Maloney* opinion provided a lengthy and broad definition on the crucial issue of what constitutes a personal standing injury for a legislator:

> A personal injury, by contrast, refers to an injury suffered directly by the individual legislators to a right that they themselves individually hold. A personal injury to a legislator, for Article III purposes, is not limited to injuries suffered in a purely private capacity, wholly divorced from their occupation. Rather, in the context of legislator lawsuits, an injury is also "personal" if it harms the legal rights of the individual legislator, as distinct from injuries to the institution in which they work or to legislators as a body.[301]

The *Maloney* majority then explicitly criticized the GSA and Judge Ginsburg's dissenting opinion for proposing an overly broad definition of what constitutes an institutional injury, and implicitly rejected their attempt to narrow the definition of what constitutes a personal injury for a legislator.[302] Judge Millett concluded: "[t]he GSA's argument, like the

294. *Id.*
295. *Id.*
296. *Id.*
297. *Id.*
298. 139 S. Ct. 1945 (2019).
299. *Maloney*, 984 F.3d at 62.
300. *Id.*
301. *Id.*
302. *See id.* at 62–63.

Dissenting Opinion, fundamentally confuses those categories by adopting a sweeping definition of institutional injury that would cut out of Article III even those individualized and particularized injuries experienced by a single legislator alone."[303] However, the *Maloney* decision did not grapple with the more nuanced discussion of congressional institutional and personal injuries in Judge Mehta's district court decision.[304]

The *Maloney* court then disagreed with the GSA's interpretation of how the *Raines* decision had defined an "institutional injury."[305] Judge Millett distinguished the personal informational injuries suffered by the congressional plaintiffs from the "diffuse" institutional injury asserted by the *Raines* plaintiffs.[306] She wrote:

> The Requesters do not assert an injury to institutional powers or functions that "damages all Members of Congress and both Houses of Congress equally." The injury they claim—the denial of information to which they as individual legislators are statutorily entitled—befell them and only them. Section 2954 vested them specifically and particularly with the right to obtain information. The 34 other members of the Committee who never sought the information suffered no deprivation when it was withheld. Neither did the nearly 400 other Members of the House who were not on the Committee suffer any informational injury. Nor was the House (or Senate) itself harmed because the statutory right does not belong to those institutions.[307]

The *Maloney* decision compared the individualized and particularized injury to the congressional plaintiffs as being "the same as one suffered by a FOIA plaintiff."[308]

Judge Millett in *Maloney* explained that the congressional plaintiffs' injuries in her case were similar to the personal injury discussed in the *Powell* decision rather than the institutional injury discussed in *Raines*.[309] She rejected the GSA's argument that the plaintiffs' injury was institutional because it depended upon each holding their congressional seat.[310] The *Maloney* opinion declared, "[w]hile the *legal right* to request information under Section 2954 runs with Committee membership, the

303. *Id.* at 63.
304. *See supra* Part IV.B.
305. *See Maloney*, 984 F.3d at 62–63.
306. *Id.* at 63–64.
307. *Id.* at 64 (citations omitted) (quoting Raines v. Byrd, 521 U.S. 811, 821 (1997)).
308. *Id.*
309. *Id.* at 65.
310. *Id.*

injury arises from the asking and its rebuff, not from the seat itself."[311] The Court further explicated that a "personal" standing injury does not have to be a "private" injury.[312] Judge Millett wrote:

> In other words, for Article III purposes, the requirement that a legislator suffer a "personal" injury does not mean that the injury must be private. Instead, the requirement of a personal injury is a means of rigorously ensuring that the injury asserted is particularized and individualized to that legislator's own interests. That is, the injury must be one that "zeroes in on the individual," rather than an injury that "necessarily damages all Members of Congress and both Houses of Congress equally" or that runs with the institutional seat.[313]

She also rejected Judge Ginsburg's argument in his dissenting opinion that § 2954 provided only an institutional benefit for the House or Senate Oversight Committee rather than personal benefits for members of an oversight committee.[314] The *Maloney* majority opinion explained why § 2954 actually conferred personal benefits to committee members.[315] Judge Millett stated,

> [t]hat overlooks Section 2954's express conferral of its informational right on a minority of committee members. Committee tools like subpoenas, by contrast, require the majority's assent to be exercised. So Section 2954's plain terms invest the informational right in legislators, not the legislature. Which makes the deprivation of requested information an injury personal to the requesting legislators.[316]

However, both Judges Morrow and Mehta made stronger arguments in *Waxman* and *Cummings*, respectively, that the injuries to members of congressional oversight committees when they are denied information are really institutional injuries to their roles as members of Congress rather than truly personal injuries like the loss of salary in *Powell*.[317] Judge Mehta in *Cummings* skillfully analyzed *Raines* and *Powell* in

311. *Id.*
312. *Id.* at 65–66.
313. *Id.* at 66 (first quoting Kerr v. Hickenlooper, 824 F.3d 1207, 1216 (10th Cir. 2016); and then quoting Raines v. Byrd, 521 U.S. 811, 821 (1997)).
314. *Id.* at 66–67.
315. *Id.* at 67.
316. *Id.*
317. *See supra* Parts IV.A, IV.B.

recognizing that the informational injuries to members of the House Committee on Government Reform were more personal and particularized than those raised by the congressional plaintiffs over the enactment of legislation in *Raines*.[318] Nevertheless, he pointed out that the plaintiff members of Congress were asserting an institutional injury as in *Raines*, rather than a personal injury as in *Powell*, because the members' need for the requested information depended upon their roles as members of Congress and the House Oversight Committee, and not upon personal needs such as receiving their congressional salary like in *Powell*.[319] Furthermore, he showed that the historical practice of Congress was to resolve informational disputes by having an entire house of Congress issue a subpoena rather than having members of Congress file suit in federal court.[320]

Citing the *Raines* and *Arizona State Legislature* decisions, the *Maloney* decision acknowledged that "[w]hen called upon to adjudicate disputes between the Political Branches and their members, we apply the standing inquiry with special rigor."[321] However, the *Maloney* majority opinion too easily concluded that the congressional plaintiffs had met all standing requirements.[322] Judge Millett distinguished the *Raines* decision on the grounds that both Houses had actively opposed the suit in that case, but that "for what it is worth, the House of Representatives has never opposed the Requesters' suit, nor has the Senate."[323] Additionally, she reasoned that requiring members eligible to file § 2954 requests to obtain approval from the entire House or obtain a subpoena from the Oversight Committee would defeat the statute's purpose of protecting minority Member rights.[324] Furthermore, the *Maloney* decision rejected Judge Ginsburg's concern in his dissenting opinion about § 2954 being used to open the "floodgates" of legislative suits by pointing out that FOIA allowed every member of Congress "to seek similar information from Executive Branch agencies as was requested here, with no hint of such untoward results."[325]

The *Maloney* majority opinion placed more emphasis on protecting the authority of Congress than the *Waxman* decision, the *Cummings*

318. Cummings v. Murphy, 321 F. Supp. 3d 92, 112–13 (D.D.C. 2018), *rev'd sub nom. Maloney*, 984 F.3d 50.
319. *Cummings*, 321 F. Supp. 3d at 108–13.
320. *Id.* at 113–17.
321. *Maloney*, 984 F.3d at 68.
322. *Id.* at 68–70.
323. *Id.* at 68.
324. *Id.* at 68–69.
325. *Id.* at 69.

decision or Judge Ginsberg's dissenting opinion, which focused more on avoiding disputes between the political branches. Judge Millett wrote:

> The separation of powers, it must be remembered, is not a one-way street that runs to the aggrandizement of the Executive Branch. When the Political Branches duly enact a statute that confers a right, the impairment of which courts have long recognized to be an Article III injury, proper adherence to the limited constitutional role of the federal courts favors judicial respect for and recognition of that injury.[326]

While she has a point about the separation-of-powers not being a one-way street that runs to the aggrandizement of the Executive Branch, the *Raines* and *Arizona State Legislature* decisions, according to Judge Millett herself, appear to caution that courts should avoid recognizing standing in disputes between the political branches,[327] and those cases' narrow reading of legislative standing arguably applies even if the denial of standing might diminish the authority of Congress against the Executive Branch in some cases.[328] Furthermore, she appeared to miss the possible conclusion that it may be appropriate to read § 2954 narrowly because members can seek the same information pursuant to FOIA without raising the separation-of-powers concerns inherent in a § 2954 suit by a group of members that do not have authorization from the entire House to sue the Executive Branch.[329]

The *Maloney* decision concluded as follows:

> [W]e hold that the Requesters have asserted an informational injury that is sufficient for Article III standing. This decision resolves only the standing question decided by the district court. To the extent the GSA's argument or the district court's reasoning implicate the existence of a cause of action, the appropriate exercise of equitable discretion, or the merits of the Requesters' claims, those issues remain to be resolved by the district court in the first instance. The judgment of the district

326. *Id.* at 70.
327. *Id.* at 68.
328. *See supra* Part III.
329. *Maloney*, 984 F.3d at 62, 69 (recognizing the ability of members of Congress to seek information via FOIA rather than § 2954); *Cummings*, 321 F. Supp. 3d at 99, 106–07 (same).

> court is reversed, and the case is remanded for further proceedings consistent with this opinion.[330]

D. Judge Ginsburg's Dissenting Opinion in Maloney

Judge Ginsburg in his dissenting opinion in *Maloney* correctly argued that the majority opinion "strains Supreme Court precedent to uphold the standing of Plaintiff-Members to assert the interests of the whole House."[331] Quoting *Virginia House of Delegates*,[332] Judge Ginsburg explained that the Supreme Court had stated that "individual members lack standing to assert the institutional interests of a legislature."[333] Judge Ginsburg contended that the plaintiff members in their complaint had alleged an institutional interest in their oversight duties as members of the House Oversight Committee, rather than a personal interest in the suit.[334] Thus, he concluded that the plaintiff members lacked standing to bring the case because they lacked the necessary personal injury.[335]

Judge Ginsburg explained that the Supreme Court had emphasized that separation-of-powers concerns were especially acute when legislators sue the Executive Branch and that individual legislators may not sue on behalf of a House or both Houses without approval from the entire body or bodies.[336] Because the plaintiff members had an institutional interest in obtaining information about the Trump leases for the Oversight Committee, rather than for their personal use, they could not properly assert personal standing even if § 2954 purported to give them such a right.[337] More appropriately, he maintained, the Committee should issue a subpoena for the information and then obtain the support of a majority of the House to file a suit to enforce the subpoena.[338] Judge Ginsburg concluded,

> [b]ecause the legislative power and the attendant power of investigation are committed to the House and not to its Members, a legislator does not suffer a personal injury when the denial of information he or she requested impedes the oversight and

330. *Maloney*, 984 F.3d at 70 (Ginsburg, J., dissenting).
331. *Id.*
332. 139 S. Ct. 1945 (2019).
333. *Maloney*, 984 F.3d at 71 (Ginsburg, J., dissenting).
334. *Id.*
335. *Id.*
336. *Id.* at 71–76.
337. *Id.*
338. *Id.* at 75–76.

> legislative responsibilities of the House. Accordingly, *I respectfully dissent.*[339]

The arguments against legislative standing for plaintiffs raising Seven Member Rule suits under § 2954 were similar in Judge Ginsburg's dissenting opinion in *Maloney* as in the district court opinions in *Waxman* and *Cummings*.[340] However, he tried to make the case more dramatic by announcing the potentially ruinous consequences of the majority opinion. Judge Ginsburg contended:

> The consequences of allowing a handful of members to enforce in court demands for Executive Branch documents without regard to the wishes of the House majority are sure to be ruinous. Judicial enforcement of requests under § 2954 will allow the minority party (or even an ideological fringe of the minority party) to distract and harass Executive agencies and their most senior officials; as the district court said, it would subject the Executive to "the caprice of a restless minority of Members." . . . [i]n the past this court has warned it would be hesitant to enforce a document demand made by "a wayward committee acting contrary to the will of the House." Today's ruling does more than that; it blazes a trail for judicial enforcement of requests made by an errant group of Members acting contrary to the will of their committee, the will of their party, and the will of the House.[341]

One might speculate that Judge Ginsburg's overly dramatic concluding language in *Maloney* was designed to catch the attention of the Supreme Court so that they would review the decision, although the case may become moot now that Donald Trump is no longer President. While the author mostly agrees with Judge Ginsburg's argument that historical precedent and the *Raines* decision's definition of institutional injuries counseled against granting the plaintiff members of Congress standing pursuant to § 2954, Judge Ginsburg's use of the word "ruinous" for such suits is histrionic.[342] Judge Millet had a point in rejecting his "floodgates" of litigation argument by observing that at least some of the

339. *Id.* at 76.
340. *See supra* Part IV.
341. *Maloney*, 984 F.3d at 75–76 (Ginsburg, J., dissenting) (citations omitted) (first quoting Cummings v. Murphy, 321 F. Supp. 3d 92, 115 (2018); then quoting United States v. AT&T, 551 F.2d 384, 391 (D.C. Cir. 1976); and then citing *Cummings*, 321 F. Supp. 3d at n.16).
342. *See supra* Part IV.D.

denied requests in the suit were susceptible to FOIA requests.[343] The truth about § 2954 suits lies more in the modulated decisions of Judge Morrow in *Waxman* or Judge Mehta in *Cummings* than with either Judge Millet or Judge Ginsburg in *Maloney*.

CONCLUSION

The D.C. Circuit's divided decision in *Maloney* recognizing standing for minority party members of the House Oversight Committee appears questionable in light of the *Waxman* and *Cummings* decisions, which had denied standing under similar circumstances.[344] Because the Supreme Court has never addressed whether the Executive Branch's denial of information to individual members of Congress is a personal injury, as in *Powell*, or an institutional injury, as in *Raines*, the *Maloney* decision is not obviously wrong in classifying such injuries as personal for members of Congress.[345] However, the *Waxman* and *Cummings* decisions appear to be more faithful to the Supreme Court's leading decision on legislative standing, *Raines*, in treating informational injuries to members of Congress as institutional because their requests for such information depend on their institutional status as members of Congress and their service on oversight committees.[346] Moreover, Judge Mehta demonstrated that historically Congress or a House of Congress has issued subpoenas to obtain information from the Executive Branch rather than having members of Congress file suit in federal court when the Executive Branch refused to hand over requested information to a congressional committee.[347] Additionally, the *Waxman* and *Cummings* decisions are more consistent with separation-of-powers principles suggesting that federal courts apply strict and narrow standing rules in cases involving disputes between the political branches.[348]

It is notable that both Judge Morrow and Judge Mehta in their § 2954 decisions denying standing were not affected by their probable political sympathies. In *Waxman*, the lead congressional plaintiff, Henry A. Waxman, was a member of the Democratic Party who had then served in

343. *See Maloney*, 984 F.3d at 69.
344. *See supra* Part IV.
345. *See Maloney*, 984 F.3d at 62–70.
346. *See supra* Part IV.
347. Cummings v. Murphy, 321 F. Supp. 3d 92, 113–17 (D.D.C. 2018), *rev'd sub nom.* Maloney v. Murphy, 984 F.3d 50 (D.C. Cir. 2020).
348. *See Cummings*, 321 F. Supp. 3d at 113–14 (citing Waxman v. Thompson, No. CV 04-3467, 2006 WL 8432224, at *16 (C.D. Cal. July 24, 2006)).

Congress for over twenty-five years since 1975[349] and was ranking minority member of the House Committee on Government Reform.[350] In 2004, the administration of President George W. Bush, a Republican president, denied the information to Waxman.[351] Judge Morrow was appointed by Democratic President Bill Clinton,[352] but she denied standing in the *Waxman* case, and ruled against a leading Democratic member of Congress, effectively in favor of a Republican President.[353] Similarly, Judge Mehta, a Barack Obama appointee,[354] in *Cummings* denied standing to Democratic Members of Congress who sought information against a Republican President whose GSA appeared to be very unfair in denying requested information because of precedent and historical practice.[355]

To promote the policy goal of transparent government operations, it may appear preferable to have federal courts recognize Article III standing when at least seven members of the Committee on Government Operations of the House of Representatives or five members of the Senate Committee on Governmental Affairs sue a federal agency that refuses to comply with § 2954's mandate that federal agencies "submit any information requested of it relating to any matter within the jurisdiction of the committee."[356] The GSA initially asserted that it did not have a legal duty, based upon a memorandum from the U.S. Office of Legal Counsel ("OLC"), to respond to information requests from individual members of Congress, including ranking minority members, except "'when those requests come from a committee, subcommittee, or chairman authorized to conduct oversight.'"[357] However, the White House soon reversed course in a letter to Republican Senator Charles Grassley, then serving as Chair of the Senate Committee on the Judiciary,[358] that asserted that the OLC memorandum did not state Trump administration

349. *Henry Waxman*, WIKIPEDIA, https://en.wikipedia.org/wiki/Henry_Waxman (last visited Mar. 3, 2022).

350. *Waxman*, 2006 WL 8432224, at *2.

351. *Id.* at *1–2; Frank Friedel & Hugh Sidey, *President George W. Bush*, THE WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/presidents/george-w-bush/ (last visited Mar. 3, 2022) (detailing President Bush's time in office from 2001 until 2009).

352. *Morrow, Margaret M.*, FED. JUD. CTR., https://www.fjc.gov/history/judges/morrow-margaret-m (last visited Mar. 3, 2022).

353. *Waxman*, 2006 WL 8432224, at *16.

354. *See supra* note 5 and accompanying text.

355. *See infra* Parts IV.B, Conclusion; Cummings v. Murphy, 321 F. Supp. 3d 92, 97–98 (D.D.C. 2018), *rev'd sub nom.* Maloney v. Murphy, 984 F.3d 50 (D.C. Cir. 2020).

356. 29 U.S.C. § 2954; *see Maloney*, 984 F.3d at 54–57 (discussing § 2954).

357. *Cummings*, 321 F. Supp. 3d at 99 (quoting letter from P. Brennan Hart, III, Assoc. Adm'r, Gen. Servs. Admin. (July 17, 2017)).

358. *About Grassley*, OFF. GOV'T WEBSITE FOR SENATOR CHUCK GRASSLEY, https://www.grassley.senate.gov/about/service (last visited Mar. 3, 2022).

policy, but rather that it was the administration's "'policy . . . to respect the rights of all individual Members, regardless of party affiliation, to request information about Executive branch policies and programs.'"[359] Yet, the GSA failed to produce any of the records requested by the plaintiffs in the *Cummings* (subsequently *Maloney*) litigation.[360] From the standpoint of courtesy or policy, it is hard to defend the GSA's denial of information to the congressional plaintiffs in that case.

There are good policy arguments that the Trump administration should have produced the information requested by the congressional plaintiffs in the *Cummings/Maloney* lawsuit, and the Trump White House itself acknowledged that it should have done so.[361] Nevertheless, there are fundamental separation-of-powers concerns about federal courts intervening in disputes brought by legislators against the Executive Branch or disputes between the political branches in general, and, as a result, courts properly take a narrow view of Article III standing in such cases.[362] Accordingly, the *Cummings* decision, the *Waxman* decision, and Judge Ginsburg's dissenting opinion in *Maloney* made strong arguments that individual members of Congress, or a petition by seven House Members or five Senators pursuant to § 2954, lack Article III standing to challenge a federal agency's denial of requested information in light of separation-of-powers concerns about the impropriety of federal courts intervening in disputes between the political branches. However, a House of Congress could sue to enforce a

359. *Cummings*, 321 F. Supp. 3d at 99 (quoting Pls.' Compl. at ¶ 29).
360. *Id.*; *see generally Maloney*, 984 F.3d at 50–76.
361. *See Cummings*, 321 F. Supp. 3d at 99 (quoting Pls.' Compl. at ¶ 29).
362. Raines v. Byrd, 521 U.S. 811, 819–21 (observing that courts apply strict standing rules in suits involving a dispute between the political branches); *Maloney*, 984 F.3d at 58–59, 68 (same); *Cummings*, 321 F. Supp. 3d at 101–02 (same); *see* Comm. on the Judiciary of the U.S. House of Representatives v. McGahn, 968 F.3d 755, 763, 769–72 (D.C. Cir. 2020) (en banc) (addressing standing issue with "rigor" in a case involving a conflict between Congress, a former Executive Branch official, and the Executive).

subpoena for such information,[363] or an individual member of Congress could bring a FOIA request.[364]

The *Maloney* majority opinion is cleverly argued, but it lacks the nuance and attention to historical practice in separation-of-powers cases found in Judge Mehta's *Cummings* decision, which *Maloney* unfortunately reversed.[365] The *Maloney* decision was well intentioned in seeking to correct an unfair decision by the GSA to deny requested information to the congressional plaintiffs, but the majority inappropriately treated an institutional standing issue as a personal standing injury.[366] The flawed approach to congressional standing in *Maloney* could trigger a flood of suits by small numbers of congressional members that could lead to excessive judicial involvement in political disputes between the Executive Branch and aggrieved individual members of Congress.[367] The district court decisions in *Cummings* and *Waxman* adopted a better approach to separation-of-powers disputes between Congress and the Executive Branch by following the institutional standing injury limitations in the Supreme Court's leading decision in *Raines*.[368]

Judge Millett's majority opinion in *Maloney* relied heavily on *Akins* and *Public Citizen* in determining that the congressional plaintiffs' informational injuries under § 2954 satisfied Article III's injury-in-fact requirement.[369] The *Maloney* decision treated their § 2954 information injuries as concrete and particularized injuries similar with the informational right conferred by those other statutes such as FOIA.[370] Even if her reasoning was plausible at that time, the subsequent *TransUnion* decision limited *Akins* and *Public Citizen* to statutes authorizing disclosure to the public at large, and § 2954 is not a public

363. *See Maloney*, 984 F.3d at 62 (GSA acknowledged the right of individual members of Congress to obtain information under FOIA); *id.* at 75 (Ginsburg, J., dissenting) (discussing subpoena authority of a House of Congress); *Cummings*, 321 F. Supp. 3d at 99, 114–17 (quoting letter from P. Brennan Hart, III, Assoc. Adm'r, Gen. Servs. Admin. (July 17, 2017)); Waxman v. Thompson, No. 04-3467, 2006 WL 8432224, at *10–12 (C.D. Cal. July 24, 2006); *McGahn*, 968 F.3d at 767, 778 (holding the House of Representatives has standing to enforce a subpoena not involving the joinder of the Senate); Nash, *supra* note 134, at 373–75 (discussing authority of Congress to subpoena information and to sue in federal courts to enforce a subpoena).

364. *Maloney*, 984 F.3d at 62 (GSA acknowledged right of individual Members of Congress to obtain information under FOIA); *Cummings*, 321 F. Supp. 3d at 99, 106–07 (discussing the right of individual members of the public to information under FOIA).

365. *See supra* Part IV.B–C.

366. *See supra* Part IV.C.

367. *See supra* Part IV.C.

368. *See supra* Part IV.B–C.

369. *See supra* Part IV.C.

370. Maloney v. Murphy, 984 F.3d 50, 60–61 (D.C. Cir. 2020).

disclosure statute because it is limited to certain members of Congress.[371] Thus, Judge Millett's interpretation of *Akins* and *Public Citizen* is arguably inconsistent with *TransUnion* and, therefore, the *Maloney* decision should have only limited precedential value in the future.[372]

371. *See supra* Part II.C.
372. *See supra* Part II.C.