HOW THE HOUSE SUES

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The House of Representatives is suing, more than ever before. But how does the House actually initiate lawsuits? For decades, the House authorized litigation through full chamber votes. Yet recently the House has delegated to its Bipartisan Legal Advisory Group ("BLAG")—a five-member body composed of the Speaker, Majority Leader and Whip, and Minority Leader and Whip—authority to initiate suit on the House's behalf. That delegation raises novel questions at the intersection of Articles I and III, and all of the House's currently-pending, BLAG-initiated suits rest on its legality. It is also entirely unstudied.

This Article is the first to analyze the history, practice, and lawfulness of the House's delegation of litigating authority to BLAG. It finds BLAG is likely constitutional under Article I's Rulemaking Clause. And in any event, it concludes that BLAG's constitutionality may pose a nonjusticiable political question. In so doing, this Article aims to open a dialogue over this critical, overlooked actor in American public law.

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I. INTRODUCTION

The House of Representatives is suing, more than ever before. Consider three of its recent claims:

- On April 5, 2019, the House sued Treasury Secretary Steven Mnuchin to prevent various executive departments from spending money to build a border wall.[1]
- On July 2, 2019, the House sued the Treasury Department and the Internal Revenue Service ("IRS") to enforce subpoenas for President Donald Trump's tax returns.[2]
- And on November 26, 2019, the House sued Attorney General William Barr and Commerce Secretary Wilbur Ross for refusing to produce documents regarding the Trump Administration's effort to add a citizenship question to the 2020 Census.[3]

These cases are hardly alone. The House is filing suit "at a tempo never seen before," which experts have called "like nothing else in history."[4] And there's every reason to believe the trend will continue, or even intensify.[5]

1. *See* Complaint ¶¶ 1–7, U.S. House of Representatives v. Mnuchin, 37 F. Supp. 3d 8 (D.D.C. 2019) (No. 19-cv-00969), *aff'd in part, rev'd in part*, 976 F.3d 1 (D.C. Cir. 2020) [hereinafter Mnuchin Complaint].

2. *See* Complaint ¶¶ 1–9, Comm. on Ways & Means, U.S. House of Representatives v. Dep't of the Treasury (D.D.C. July 2, 2019) (No. 1:19-cv-01974) [hereinafter Ways & Means Complaint].

3. *See* Complaint ¶¶ 1–13, Comm. on Oversight & Gov't Reform, U.S. House of Representatives v. Barr (D.D.C. Nov. 26, 2019) (No. 1:19-cv-03557) [hereinafter Barr Complaint].

4. Charlie Savage & Nicholas Fandos, *The House v. Trump: Stymied Lawmakers Increasingly Battle in the Courts*, N.Y. TIMES (Aug. 13, 2019), https://www.nytimes.com/2019/08/13/us/politics/trump-house-lawsuits.html [https://perma.cc/8GCT-YTWZ] (quoting Professor Charles Tiefer, former Acting General Counsel of the House).

5. *See* Catie Edmondson & Luke Broadwater, *Rallying Behind Trump, Most House Republicans Joined Failed Lawsuit*, N.Y. TIMES (Dec. 11, 2020), https://www.nytimes.com/2020/12/11/us/politics/republicans-trump-election-lawsuit.html [https://perma.cc/9YR9-26N7]; Jacqueline Thomsen, *House Isn't Giving Up Its Trump Lawsuits, Even as Impeachment Over Ukraine Ramps Up*, NAT'L L.J. (Sept. 27, 2019, 6:29 PM), https://www.law.com/nationallawjournal/2019/09/27/house-isnt-giving-up-its-trump-lawsuits-even-as-impeachment-over-ukraine-ramps-up/ [https://perma.cc/9AMV-TQ9R].

But how does the House actually initiate lawsuits? Until 2015, the House sued by voting as a full chamber to authorize litigation.[6] But that year the House changed its rules to allow a five-member group called the Bipartisan Legal Advisory Group—BLAG for short—to initiate lawsuits on the chamber's behalf.[7] Comprised of the Speaker, Majority Leader and Whip, and Minority Leader and Whip, BLAG today "speaks for, and articulates the institutional position of, the House in all litigation matters."[8] Indeed, pursuant to a June 2019 resolution, the House maintains that a vote of BLAG to authorize suit "is the equivalent of a vote of the full House of Representatives" for the purposes of initiating litigation.[9] As a result, in none of the three cases mentioned above did the full House vote to sue: BLAG launched each lawsuit on the House's behalf with 3–2, party-line votes.[10]

But is the House's delegation of litigating authority constitutional? And is the question even justiciable? The executive branch has contested the delegation's legality in court. It argues that a vote of BLAG "is not adequate for constitutional purposes" because "[j]ust as the House could not by resolution delegate to a subset of its members the authority to pass legislation," so too "it cannot provide the BLAG blanket, pre-emptive authority to file whatever litigation it might devise."[11] The House responds that the Constitution's Rulemaking Clause[12] allows the House to empower BLAG to make litigation decisions, just as it allows the House to create other committees and assign them duties.[13] To hold otherwise, argues the House, would "undermine the House's constitutionally mandated right to create its own Rules."[14]

The question of whether BLAG may constitutionally authorize lawsuits on the House's behalf raises novel issues at the intersection of Articles I and III. It is foundational to every BLAG-initiated lawsuit the House is currently pursuing.[15] And it is to date entirely unstudied.

6. *See, e.g.*, Comm. on Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53, 63 (D.D.C. 2008) (noting House passed H. Res. 980 to authorize committee to initiate civil action); Comm. on Oversight & Gov't Reform v. Holder, 979 F. Supp. 2d 1, 21 (D.D.C. 2013) (noting the House twice authorized suit).

7. *See* H.R. Res. 5, 114th Cong. (2015). Though perhaps ambiguous whether the 2015 rules allowed BLAG to initiate suit or just to articulate the chamber's position in existing litigation, the House's 2019 resolution clarified that BLAG now has the power to initiate suit. *See also* text accompanying notes 58–71.

8. H.R. Res. 5, 114th Cong. (2015).

9. H.R. Res. 430, 116th Cong. (2019). As discussed below, the resolution left ambiguous whether it applied to subpoena enforcement; but a 2019 resolution clarified that BLAG had authority to initiate litigation on any topic. *See* discussion *infra* Section II.A.2.

10. *See* Mnuchin Complaint, *supra* note 1, ¶ 56; Ways & Means Complaint, *supra* note 2, ¶ 98; Barr Complaint, *supra* note 3, ¶ 29.

11. Motion to Dismiss at 26–27, Comm. on Ways & Means, U.S. House of Representatives v. U.S. Dep't of the Treasury (D.D.C. Sept. 6, 2019) (No. 1:19-cv-01975-TNM) [hereinafter U.S. Dep't of the Treasury Motion to Dismiss].

12. U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.").

13. *See* Brief in Opposition to Motion to Dismiss at 32, Comm. on Ways & Means, U.S. House of Representatives v. U.S. Dep't of the Treasury (D.D.C. Sept. 23, 2019) (No. 1:19-cv-01974-TNM).

14. *Id.* at 33.

15. That is to say, nearly all of the House's current litigation. As one exception, in the same resolution empowering BLAG to authorize litigation, the House also expressly authorized enforcing a subpoena against

This Article is the first to identify and examine these questions. Principally, it asks, can the House constitutionally allow BLAG to initiate litigation on the chamber's behalf? And relatedly, is that delegation justiciable? It finds that the delegation likely represents a proper exercise of the House's Article I, Section 5 power to "determine the Rules of its Proceedings."[16] And on similar analysis, it concludes that courts should in the alternative find the delegation poses an unreviewable political question. This Article rebuts charges that BLAG may not constitutionally authorize suit on behalf of the chamber: the practice both passes constitutional muster and lies outside the province of the courts.

The analysis proceeds in two Parts. Part II charts BLAG's history and discusses the legal stakes. It begins by exploring the untold history of the group's development, illuminating the rise of this powerful, under-analyzed entity in American public law. It then discusses the legal importance of BLAG authorization. In nearly all legislative suits, including all of the House's current claims, plaintiffs need authorization from the House to maintain standing—leaving vitally important the mechanism by which the House authorizes suit.

Part III tackles the substantive question itself. It maps the legal landscape within which BLAG operates and explores the range of other, comparable ways the modern House delegates authority to sub-components inside and outside the chamber. In so doing, it concludes BLAG likely represents a proper delegation within the mainstream of current House practice. And normatively, that makes sense: despite separation of powers concerns, the House should be able to structure itself to provide for expeditious, representative decision-making. Finally, this Part also considers whether courts are constitutionally authorized to pass judgment on the House's internal delegation and finds that the BLAG delegation issue likely represents a nonjusticiable political question. A brief conclusion follows.

A note on scope. For clarity and in deference to the reader's patience, this Article considers only the House's litigating authority—the Senate by statute may initiate suit only pursuant to a full chamber vote.[17] The Article also considers only BLAG's authority to initiate new litigation; whether or not it may authorize intervention in existing litigation remains a separate (if related) question. Finally, this Article does not wade into the debate over the legality or propriety of Congress suing to defend federal statutes.[18] It focuses instead on the narrower question: how the House sues.

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former White House Counsel Don McGahn; BLAG's legality is thus not an issue in that suit. *See* H.R. Res. 430, 116th Cong. (2019).

16. U.S. CONST. art. I, § 5, cl. 2.

17. *See* 2 U.S.C. § 288b(b). Different rules govern when the Senate may act to defend its committees or members, or otherwise intervene in existing litigation. *See generally id.* The Senate is also in court far less frequently than the House: the Senate's 2016 civil contempt claim against Backpage.com was the first such Senate legal action in more than twenty years. *See* PERMANENT SUBCOMMITTEE ON INVESTIGATIONS, BACKPAGE.COM'S KNOWING FACILITATION OF ONLINE SEX TRAFFICKING 1 (2017), https://www.hsgac.senate.gov/imo/media/doc/Backpage%20Report%202017.01.10%20FINAL.pdf [https://perma.cc/JNS7-Y7KG].

18. *Compare* Amanda Frost, *Congress in Court*, 59 UCLA L. REV. 914, 919–20 (2012) (arguing congressional defense of federal statutes is legal and often desirable), *with* Tara Leigh Grove & Neal Devins, *Congress's*

II. BACKGROUND

How did BLAG come to be, and why does its authorization matter? Section II.A charts BLAG's development over the past half-century, from an informal coalition to a highly powerful organ of the House. Drawing on that history, it then untangles the legislative framework within which BLAG operates today.

Section II.B next illustrates the legal relevance of whether or not the House has formally authorized suit. Symbolic power aside, this Section shows that formal authorization from the House is all but necessary for the chamber's lawsuits to survive today's standing analysis. For that reason, the validity of the House's delegation to BLAG plays a critical role in the House's current and future lawsuits—if that delegation is unlawful, courts likely cannot hear the House's claims.

A. BLAG

The Bipartisan Legal Advisory Group has slowly risen over the past three decades to occupy a central role in the House's litigating decisions. Despite its importance, however, the group remains wholly unexamined in academic literature. Indeed, the group has almost no public presence at all: the House website even lacks basic information about the group, including its membership, legal positions, and court filings.[19] This Section surveys the history of BLAG, before discussing its current litigating authority and legal challenges to the group.[20]

1. History

The House first established the Bipartisan Legal Advisory Group in 1993, as part of a broader administrative reorganization.[21] But BLAG's informal roots trace back a decade earlier. Following the House's 1983 intervention in *INS v. Chadha*,[22] the five members of House leadership in 1984 began intervening in litigation on the chamber's behalf as the self-styled "Bipartisan Leadership Group of the House of Representatives."[23] Without any formal authorization from the House, those five members in *In re Benny*[24] claimed authority to take

(Limited) Power to Represent Itself in Court, 99 CORNELL L. REV. 571, 573–74 (2014) (arguing congressional defense of federal statutes violates constitutional norms, except in the case of subpoena enforcement).

19. Some have called for greater transparency from BLAG. *See, e.g.*, DANIEL SCHUMAN, DEMAND PROGRESS, LEGISLATIVE LANGUAGE PROPOSALS FOR THE HOUSE RULES (2018), https://s3.amazonaws.com/demandprogress/reports/116th_Congress_House_Rules_Reform_Legislative_Language_2018-12-05.pdf [https://perma.cc/4GC3-87SR].

20. For an excellent broader history of congressional lawyering, see Rebecca Mae Salokar, *Representing Congress: Protecting Institutional and Individual Members' Rights in Court*, *in* CONGRESS AND THE POLITICS OF EMERGING RIGHTS 105 (Colton C. Campbell & John F. Stack, Jr., eds., 2002).

21. *See* H.R. Res. 5, 103d Cong. § 2 (1993).

22. 462 U.S. 919, 923–24 (1983). The full House voted to intervene in the case. H.R. Res. 49, 97th Cong. (1981).

23. *See In re* Benny, 44 B.R. 581, 583 (N.D. Cal. 1984), *aff'd in part, dismissed in part*, 791 F.2d 712, 714 (9th Cir. 1986). The group participated in litigation on its own behalf, not on behalf of the House.

24. *Id.* at 583; *see* H.R. Res. 5, 114th Cong. § 2(b) (2015) (explaining the Office of General Counsel will work at the direction of the Speaker, who will consult with the Bipartisan Legal Advisory Group).

litigating positions on behalf of the chamber.[25] And both the district court and the Ninth Circuit accepted them as interveners—not in their personal capacities, but on behalf of the House.[26] Between 1984 and 1993, this Bipartisan Leadership Group intervened on behalf of the House in at least ten other cases.[27] This Bipartisan Leadership Group was not created under any House rule: it seems that, following *Chadha*, the Speaker simply decided to begin intervening in its name, parties did not object, and courts accepted it.[28]

The House formally created the Bipartisan Legal Advisory Group in 1993, in adopting rules for the 103rd Congress.[29] The House simultaneously created the Office of the General Counsel to institutionalize the advisory role the House General Counsel had to that point played.[30] "The Office of General Counsel," declared the resolution, "shall function pursuant to the direction of the Speaker, who shall consult with a Bipartisan Legal Advisory Group, which shall include the majority and minority leaderships."[31] And therein BLAG was born.

Notably, a Republican (minority) substitute amendment proposed a different structure for the group. The amendment would have expanded BLAG to a nine-member group—adding the Chair and Ranking Members of the House Judiciary Committee, and two extra members appointed respectively by the Majority and Minority leaders.[32] It would also have required a full House vote to authorize entering an appearance in court unless BLAG unanimously approved the

25. *See* H.R. Res. 5, 114th Cong. § 2(b) (2015).

26. *See In re* Benny, 791 F.2d at 715 ("The United States Senate (the Senate), [and] the Speaker and Bipartisan Leadership Group of the House of Representatives (the House) . . . sought leave to intervene. . . . The court permitted the House and Senate to intervene."). The district court did not identify the Speaker and Bipartisan Leadership Group as litigating on behalf of the chamber as explicitly as the Ninth Circuit d*id. See In re* Benny, 44 B.R. at 583 ("The following parties moved this Court to intervene . . . the Speaker and Bipartisan Leadership Group of the House of Representatives . . . [with one exception] this Court permitted all applicant/intervenors to intervene.").

27. *See* Adolph Coors Co. v. Brady, 944 F.2d 1543, 1545 (10th Cir. 1991); *In re* Koerner, 800 F.2d 1358, 1360 (5th Cir. 1986); North v. Walsh, 656 F. Supp. 414, 415 n.1 (D.D.C. 1987); Am. Fed'n of Gov't Emps. v. United States, 634 F. Supp. 336, 337 (D.D.C. 1986); Synar v. United States, 626 F. Supp. 1374, 1378–79 (D.D.C.), *aff'd sub nom.* Bowsher v. Synar, 478 U.S. 714, 736 (1986); Ameron, Inc. v. U.S. Army Corps of Eng'rs, 607 F. Supp. 962, 963 (D.N.J. 1985), *aff'd*, 809 F.2d 979, 998–99 (3d Cir. 1986); Barnes v. Carmen, 582 F. Supp. 163, 164 (D.D.C. 1984), *rev'd sub nom.* Barnes v. Kline, 759 F.2d 21, 22 (D.C. Cir. 1985), *rev'd as moot sub nom.* Burke v. Barnes, 479 U.S. 361, 362 (1987); *In re* Prod. Steel, Inc., 48 B.R. 841, 842 (M.D. Tenn. 1985); *In re* Moody, 46 B.R. 231, 233 (M.D.N.C. 1985); *In re* Tom Carter Enters., Inc., 44 B.R. 605, 606 (C.D. Cal. 1984).

28. *See* 113 CONG. REC. H13 (daily ed. Jan. 3, 2013) ("The House has articulated its institutional position in litigation matters through a five-member bipartisan leadership group since at least the early 1980s, although the formulation of the group's name has changed somewhat over time. Since 1993, the House rules formally have acknowledged and referred to the Bipartisan Legal Advisory Group as such."). In none of the above lawsuits did a defendant oppose the Bipartisan Leadership Group's intervention. *See supra* note 27.

29. H.R. Res. 5, 103d Cong. § 2 (1993).

30. *See* Paul von Zielbauer, *Little Office Becomes Big Player After Raid by the F.B.I.*, N.Y. TIMES (June 16, 2006), https://www.nytimes.com/2006/06/16/washington/16counsel.html [https://perma.cc/FWJ4-2GFC] (describing how the office began in the 1970s as a "low-level administrative post" and gradually took on greater authority). *See generally* Jen Patja Howell, *The Lawfare Podcast: Stan Brand on Congressional Subpoenas and Contempt*, LAWFARE (Jan. 29, 2019, 5:00 PM), https://www.lawfareblog.com/lawfare-podcast-stan-brand-congressional-subpoenas-and-contempt [https://perma.cc/7QC7-H4UD].

31. H.R. Res. 5, 103d Cong. § 2 (1993).

32. 103 CONG. REC. 68 (1993).

appearance.[33] BLAG would also have directly managed the Office of General Counsel: indeed, the group would even have had to authorize "[p]reparation of any legal memorandum or other item of legal research that requires more than 4 hours of preparation time."[34] That measure failed twice—as an amendment to a 1992 bill[35] and the 1993 rules[36]—and BLAG was instead created as a five-member, majority-vote body.[37]

Each subsequent Congress voted to retain BLAG in that form. When Newt Gingrich became Speaker in 1995, the House did not alter this structure, even as it sought to minimize the power of the House General Counsel.[38] In the late 1990s and early 2000s, BLAG filed amicus briefs in several major constitutional cases, including *Raines v. Byrd*.[39] The House General Counsel reported directly to the Speaker and was not organizationally accountable to BLAG.[40]

BLAG gained prominence in 2013 with its participation in *United States v. Windsor*.[41] In 2011, when the Obama administration decided it would no longer defend the Defense of Marriage Act ("DOMA"), BLAG voted 3–2 to direct the House General Counsel to defend the statute on the House's behalf.[42] Then in 2013, as the *Windsor* litigation was pending, the House passed a resolution to clarify that "[BLAG] continues to speak for, and articulate[s] the institutional position of, the House in all litigation matters in which it appears, including in *Windsor v. United States*."[43] In *Windsor*, Justice Kennedy's majority opinion did not explicitly consider whether BLAG would have had standing to challenge the district court's opinion—or indeed, whether BLAG spoke on behalf of the full House.[44] In dissent, however, Justice Alito made explicit his view that BLAG was litigating on behalf of the chamber.[45] The House "has authorized BLAG to represent its interests in this matter," wrote Justice Alito, citing the House resolution.[46] Given that the House had explicitly affirmed that BLAG "articulate[s] the institutional position of the House . . . in *Windsor v. United States*[,]"[47] Justice Alito would have found BLAG properly litigating on the House's behalf.

33. *Id.*; *see also* Salokar, *supra* note 20, at 119.

34. 103 CONG. REC. 68 (1993).

35. H.R. Res. 423, 102d Cong. (1992) (as rejected by Senate, May 5, 1992).

36. 103 CONG. REC. 64 (1993).

37. *See* von Zielbauer, *supra* note 30.

38. *See id.* (noting in particular that the Speaker moved the General Counsel's office back within the House clerk's office).

39. 521 U.S. 811, 818 n.2 (1997).

40. *See* Salokar, *supra* note 20, at 105, 110.

41. *See* 570 U.S. 744, 754 (2013).

42. JUDY SCHNEIDER & MICHAEL KOEMPEL, CONGRESSIONAL DESKBOOK: THE PRACTICAL AND COMPREHENSIVE GUIDE TO CONGRESS 139 (6th ed. 2012).

43. H.R. Res. 5, 113th Cong., § 4(a)(1)(B) (2013).

44. *See* United States v. Windsor, 570 U.S. 744, 749–75 (2013).

45. *Id.* at 804 (Alito, J., dissenting).

46. *Id.* at 804 n.2 (citing H.R. Res. 5, 113th Cong., § 4(a)(1)(B) (2013) ("[BLAG] continues to speak for, and articulates the institutional position of, the House in all litigation matters in which it appears, including in *Windsor v. United States*.")).

47. H.R. Res. 5, 113th Cong., § 4(a)(1)(B) (2013).

That dispute was a turning point for BLAG, thrusting the group into a highly public role representing the House's legal positions.

Yet BLAG's role remained limited to articulating the House's position in *existing* litigation, not in *initiating* litigation.[48] When the House formally authorized lawsuits on its behalf, it voted as a full chamber to do so.[49] As Section II.B discusses, the House during this period twice authorized suit to enforce subpoenas: in the 2008 case *Committee on Judiciary, U.S. House of Representatives v. Miers*,[50] and the 2013 case *Committee on Oversight & Government Reform v. Holder*.[51] Yet the House launched neither lawsuit through a BLAG vote.[52] It instead passed formal resolutions authorizing each committee to compel compliance with subpoenas through civil litigation.[53]

But no more. In a series of rule changes, subsequent Congresses reaffirmed and enlarged BLAG's power; and explicitly delegated it the authority to initiate litigation on the House's behalf.[54] It is from this history that the current BLAG emerges. It was not inevitable that this group would take on such a prominent role. Indeed, for many years, the House leadership simply articulated the House's litigating position by default, without objection.[55] When the group was created, it emerged from a contested process where various proposals were raised, debated, and voted on.[56] But it has evolved into the BLAG of today.

2. Today

BLAG is far more powerful today than ever before. The key innovation: rather than simply "consult" with the Speaker and the House's General Counsel, or articulate "the institutional position of the House in all litigation matters in which it appears," BLAG now has the authority to *initiate* litigation on behalf of the House—on all topics.[57] That sweeping power is the subject of this Article, and its statutory sources merit close examination.

The contemporary framework for BLAG was first articulated in 2015, as part of the process of adopting rules for the 114th Congress.[58] There, in H.

48. *See id.* § 4(a)(2)(D).

49. WILSON C. FREEMAN & KEVIN M. LEWIS, CONG. RES. SERV., R45636, CONGRESSIONAL PARTICIPATION IN LITIGATION: ARTICLE III AND LEGISLATIVE STANDING 24–27 (2019).

50. 558 F. Supp. 2d 53, 55 (D.D.C. 2008).

51. 979 F. Supp. 2d 1, 11 (D.D.C. 2013).

52. *See id.*; Comm. on Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53, 63 (D.D.C. 2008).

53. H.R. Res. 706, 112th Cong. (2012). For a more thorough discussion of the *Miers* and *Holder* litigation, see JOSH CHAFETZ, CONGRESS'S CONSTITUTION 185–89 (2017).

54. RULES OF THE HOUSE OF REPRESENTATIVES, 116TH CONG., R. II.8(b) (2019) [hereinafter House Rules].

55. Michael Stern, *BLAG's Authority to Represent the House in Court*, POINT OF ORDER (Feb. 17, 2019), https://www.pointoforder.com/2019/02/17/blags-authority-to-represent-the-house-in-court/ [https://perma.cc/N27T-2F34].

56. Salokar, *supra* note 20, at 109.

57. *Compare* House Rules, *supra* note 54, R. II.8(b) (Office of General Counsel), *with* Stern, *supra* note 55 (noting Rules Committee Chairman Jim McGovern's statement that "the BLAG, pursuant to House Rule (II)(8)(B), may authorize the House Office of General Counsel to initiate civil litigation on behalf of this Committee to enforce the Committee's subpoena(s) in federal district court").

58. Stern, *supra* note 55.

Res. 5—sponsored by then-Majority Leader Kevin McCarthy (R-CA 23rd)—the House codified a more muscular version of BLAG into its rules. It amended Rule II(8) to add the following sentence: "Unless otherwise provided by the House, the Bipartisan Legal Advisory Group speaks for, and articulates the institutional position of, the House in all litigation matters."[59] The House's section-by-section analysis of the bill explained that this amendment simply "updates" Rule II(8) "to conform to current practice."[60] Michael Stern, former Senior Counsel to the House of Representatives,[61] notes that this characterization "is true in part," in that it reflects the 2013 DOMA-era resolution authorizing BLAG to take litigating positions on behalf of the House.[62] Yet it contains a key difference: that resolution had authorized BLAG to "*continue*[] to speak for . . . the House in all litigation matters *in which it appears*."[63] The new rule authorizes BLAG to "speak[] for, and articulate[] the institutional position of, the House in *all litigation matters*."[64]

That difference is notable. With a slight shift in language, BLAG assumed responsibility for articulating the House's position not only in pre-existing litigation to which the House was a party but in *all* litigation matters, full stop. The former language seems not to include initiating litigation; the latter might.[65]

Almost immediately, a second ambiguity arose—this one having to do with Rule II(8)'s interplay with another House rule. Rule II(8) gave BLAG the authority to articulate the House's legal positions "[u]nless otherwise provided by the House."[66] But in one key respect, the House rules seemed to provide a relevant exception. Specifically, House Rule XI specified that "[c]ompliance with a subpoena issued by a committee or subcommittee . . . may be enforced only as authorized or directed by the House."[67] Hence the question: does BLAG authorization constitute authorization "by the House" for purposes of Rule XI, or is a full chamber vote necessary?[68]

59. H.R. Res. 5, 114th Cong. (2015).

60. U.S. CONGRESS, HOUSE, ADOPTING RULES FOR THE 114TH CONGRESS: SECTION-BY-SECTION ANALYSIS 3, https://rules.house.gov/sites/democrats.rules.house.gov/files/documents/114-HRes5-SxS.pdf [https://perma.cc/N9ZU-8JE2].

61. *See Michael Stern*, JUST SECURITY, https://www.justsecurity.org/author/sternmichael/ (last visited Jan. 20, 2021) [https://perma.cc/G56M-9BBY].

62. Stern, *supra* note 55 (citing H.R. Res. 5, 113th Cong., § 4(a)(1)(B) (2013)).

63. H.R. Res. 5, 113th Cong., § 4(a)(1)(B) (2013) (emphasis added).

64. H.R. Res. 5, 114th Cong., §2(b) (2015) (emphasis added).

65. *See* Stern, *supra* note 55 ("There is also an interesting question whether and to what extent the new rule authorizes BLAG to initiate litigation, as opposed to intervene in existing litigation."). To be sure, House lawyers certainly may have understood the original wording to include the authority to initiate litigation. The language shift nonetheless implies at least a slightly wider reach, even if not a radical overhaul.

66. H.R. Res. 5, 114th Cong., § 2(b) (2015).

67. House Rules, *supra* note 54, R. XI(2)(m)(C) ("Adoption of written rules"); *see also* Stern, *supra* note 55.

68. *See* Michael Stern, *Can BLAG Authorize a Subpoena Enforcement Action?*, POINT OF ORDER (May 10, 2019), https://www.pointoforder.com/2019/05/10/can-blag-authorize-a-subpoena-enforcement-action/ [https://perma.cc/8GN6-ZR87].

The House soon sought to address these questions. Rules Committee Chairman Jim McGovern (D-MA 2nd) inserted a statement into the Congressional Record on January 3, 2019:

> I want to speak regarding House Rule II(8)(B). Pursuant to this provision, the Bipartisan Legal Advisory Group (BLAG) is delegated the authority to speak for the full House of Representatives with respect to all litigation matters. A vote of the BLAG to authorize litigation and to articulate the institutional position of the House in that litigation is the equivalent of a vote of the full House of Representatives. For example, in the 115th Congress, the BLAG, pursuant to Rule II(8)(B), authorized House Committees to intervene in ongoing litigation. The BLAG has been delegated this authority for all litigation matters, and I want to be clear that this includes litigation related to the civil enforcement of a Committee subpoena.
>
> If a Committee determines that one or more of its duly issued subpoenas has not been complied with and that civil enforcement is necessary, the BLAG, pursuant to House Rule (II)(8)(B), may authorize the House Office of General Counsel to initiate civil litigation on behalf of this Committee to enforce the Committee's subpoena(s) in federal district court.[69]

Chairman McGovern's statement sought to clarify both ambiguities. First, in noting that "[a] vote of the BLAG to authorize litigation . . . is the equivalent of a vote of the full House of Representatives," Chairman McGovern expressed the view that BLAG *could* authorize lawsuits—a novel power beyond the scope of BLAG's historical authority.[70] In so doing, Chairman McGovern sought to resolve the second issue: because a vote of BLAG constituted a vote by the House, Rule XI's requirement that a committee subpoena enforcement be "authorized or directed by the House" is met where BLAG authorizes suit.[71]

But of course, legislative history is not law.[72] Indeed, to legislative history skeptics, Chairman McGovern's statement might resemble a *post hoc* effort to cure the rule of substantive defects. What to do?

Perhaps recognizing these weaknesses, the House acted. In H. Res. 430, passed in June 2019, the House formally ratified Chairman McGovern's statement and affirmed BLAG's power to authorize suit on behalf of committees seeking to enforce subpoenas:

> Consistent with the Congressional Record statement on January 3, 2019, by the chair of the Committee on Rules regarding the civil enforcement of subpoenas pursuant to clause 8(b) of rule II, a vote of the Bipartisan Legal

69. 116 CONG. REC. H30 (daily ed. Jan. 3, 2019); *see also* Michael Stern, *Update on BLAG's Authority to Initiate Subpoena Enforcement Action*, POINT OF ORDER (June 7, 2019), https://www.pointoforder.com/2019/06/07/update-on-blags-authority-to-initiate-subpoena-enforcement-action/ [https://perma.cc/JEF5-RCEM].

70. *Id.*

71. House Rules, *supra* note 54, R. XI(2)(m)(c).

72. *See, e.g.*, JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 210–13 (3d ed. 2017).

> Advisory Group to authorize litigation and to articulate the institutional position of the House in that litigation is the equivalent of a vote of the full House of Representatives.[73]

That resolution empowers BLAG to initiate litigation on behalf of the House. Its authorization is sweeping. BLAG is not limited to articulating the House's litigating position in pre-existing litigation, or to authorizing suit in narrow circumstances—one could, for instance, imagine the House allowing BLAG to authorize suits only to enforce subpoenas. But H. Res. 430 gives BLAG broad power "to authorize litigation and to articulate the institutional position of the House" as "the equivalent of a vote of the full House of Representatives."[74] In other words, the House has, quite simply, delegated its authority to sue to BLAG. The House could pass a resolution authorizing suit against a defendant, but it need not—a vote of BLAG, under House rules, now constitutes a vote of the House.

But is that delegation constitutional? BLAG's newfound authority to initiate suit on behalf of the House has come under scrutiny in court filings, if not yet in the academy.[75] Defendants to BLAG-initiated lawsuits have challenged the group's authority to authorize suit on behalf of the House.[76] They argue that, "simply, the full House has not authorized th[e] lawsuit."[77] They analogize to *INS v. Chadha*,[78] and argue that the House "cannot provide the BLAG blanket, pre-emptive authority to file whatever litigation it might devise."[79] In both modern cases where courts found legislative standing—*Miers* and *Holder*—they note that the full House voted to authorize suit.[80] Here, by contrast, only five members did. That leaves it unclear that the full House considered the issue.[81] On that basis alone, defendants argue that the authorization is improper—thereby defeating standing.

Courts have not squarely addressed the question, though perhaps by implication have accepted the House's delegation. In *U.S. House of Representatives v. Mnuchin*,[82] the border wall case, the district court dismissed the case on a separate jurisdictional basis.[83] But Judge McFadden's analysis seemingly granted that the House had properly authorized the suit.[84] It accepted the House as a plaintiff and analyzed the case as between "two branches of the Federal Government"—not between the President and a congressional leadership committee.[85]

73. H.R. Res. 430, 116th Cong. (2019).

74. *Id.*

75. FREEMAN & LEWIS, *supra* note 49, at 39 n.429.

76. *See* Kristina Peterson & Natalie Andrews, *House Republicans Move to Block Proxy Voting,* WALL ST. J. (May 26, 2020, 9:23 PM), https://www.wsj.com/articles/house-republicans-move-to-block-proxy-voting-11590525018 [https://perma.cc/A556-RFZ4].

77. U.S. Dep't of the Treasury Motion to Dismiss, *supra* note 11, at 27.

78. 462 U.S. 919, 936–37 (1983).

79. U.S. Dep't of the Treasury Motion to Dismiss, *supra* note 11, at 27.

80. By "modern" I mean post-*Raines*. *See generally infra* Section II.B.

81. U.S. Dep't of the Treasury Motion to Dismiss, *supra* note 11, at 28.

82. 379 F. Supp. 3d 8 (D.D.C. 2019).

83. *Id.* at 11.

84. *Id.* at 13.

85. *Id.* at 23.

Moreover, Judge McFadden explicitly considered the House an "institutional plaintiff" in his analysis of informational standing.[86] Yet the court provided no explicit analysis of the BLAG delegation, thus leaving the question unresolved.[87]

So the issue persists: can BLAG constitutionally authorize suits on the House's behalf? Before exploring that question, it is worth pausing to consider its stakes. As this Part discusses next, a great deal turns on whether the House has formally authorized suit. In short, in nearly all legislative suits—and all the House's current cases—plaintiffs need authorization from the House to maintain standing.[88] That fact reveals the importance of determining whether the House has lawfully delegated authority to initiate litigation on its behalf.

B. Why BLAG Matters: Legislative Standing

BLAG authorization is critical for one simple reason: without it, the House's lawsuits would almost surely lack standing.[89] Article III's limit of judicial power to "[c]ases" and "[c]ontroversies" applies no less when a member or chamber of Congress is the plaintiff.[90] Before a court can hear a suit by the House or one of its members, the plaintiff must show it has standing.[91] And that fact lies at the core of why BLAG authorization matters. Under current standing doctrine, whether the House has authorized a member to sue on its behalf often makes all the difference between having and lacking standing.[92]

The Supreme Court has found three well-known requirements for a plaintiff to show standing. First, the plaintiff must allege an injury-in-fact; second, that injury must be fairly traceable to the defendant's allegedly unlawful conduct; and third, the injury must be redressable by a favorable decision.[93] Injury often represents the central focus of the inquiry, and plaintiffs must assert an injury that is "concrete and particularized,"[94] not mere "generalized grievances."[95]

Injury in the legislative context comes in one of two types: personal or institutional.[96] Personal injury harms members themselves; institutional injury harms the broader chamber.[97] At base, the distinction turns on whether the injury

86. *Id.* at 17 ("This type of informational injury, which an individual can allege, is conceptually distinct from the institutional harm to an institutional plaintiff the House asks the Court to recognize here.") (internal quotations and citations omitted).

87. The D.C. Circuit reasoned the same way as well. *See* United States House of Representatives v. Mnuchin, 976 F.3d 1, 4 (2020) ("On April 5, 2019, the House filed this action . . . .").

88. Vicki C. Jackson, *Congressional Standing to Sue: The Role of Courts and Congress in U.S. Constitutional Democracy*, 93 IND. L.J. 845, 864 (2018).

89. *See* FREEMAN & LEWIS, *supra* note 49, at 24.

90. U.S. CONST. art. III, § 2; *see also* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 (1998); Jonathan Remy Nash, *A Functional Theory of Congressional Standing*, 114 MICH. L. REV. 339, 345–46 (2015).

91. Nash, *supra* note 90, at 346.

92. *See* United States House of Rep. v. Mnuchin, 379 F. Supp. 3d 8, 23 (D.D.C. 2018).

93. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992); *see also* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3531.4 (3d ed. 2018).

94. *Lujan*, 504 U.S. at 560.

95. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1555 (2016).

96. FREEMAN & LEWIS, *supra* note 49, at 12.

97. *Id.*

runs with a legislator's seat: if the legislator resigned the next day, would she continue to be harmed, or would the harm be borne by her successor?[98] Harms that remain are personal; harms that transfer are institutional.[99] The House's current lawsuits, enforcing subpoenas or challenging executive appropriations, all seek to vindicate institutional injuries.[100]

Under current doctrine, only the full House may generally maintain standing to assert institutional injuries—as a chamber or by authorizing suit on its behalf.[101] Individual legislators typically may assert only personal injuries and may claim institutional injury only in exceedingly rare cases.[102] As a result, individual members lack standing to pursue the types of lawsuits the House is litigating; those cases will survive only if brought on behalf of the chamber. Authorization from the House thus can make all the difference in the standing analysis.[103]

This Section reveals the stakes of BLAG's constitutionality. It first asks when individual legislators may bring suit without authorization from the House. Rarely, it finds: individual members have standing only to assert personal injuries, or institutional injury akin to complete vote nullification.[104] In general, then, individual legislators cannot assert institutional interests. The Section next asks when the House as a whole may bring suit, either on its own or by authorizing suit on its behalf. It finds that the House can assert institutional injury in a much broader array of cases.[105] The question whether the House can give BLAG responsibility for authorizing lawsuits thus carries significant legal consequences: indeed, the validity of that delegation will often make or break a lawsuit's chances of passing the standing analysis.[106]

1. Standing for Individual Legislators

This Section considers when individual legislators may bring claims asserting personal or institutional injury. In cases of personal injury, legislators need not be formally delegated the power to sue on behalf of the chamber.[107] Yet in only extremely rare circumstances can individual legislators assert institutional injury.[108]

98. *See* Raines v. Byrd, 521 U.S. 811, 821 (1997).

99. *See id.*

100. *See* Mnuchin Complaint, *supra* note 1; Barr Complaint, *supra* note 3.

101. *See, e.g.*, United States v. Am. Tel. & Tel. Co., 551 F.2d 384, 391 (D.C. Cir. 1976) ("It is clear that the House as a whole has standing . . . and can designate a member to act on its behalf.").

102. *See* discussion *infra* Section II.B.1.a.

103. *See* LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW § 3–20 (3d ed. 2000) (discussing cases where the House and its legislators may maintain standing).

104. Nash, *supra* note 90, at 359; *see Raines*, 521 U.S. at 821–22 (citing Coleman v. Miller, 307 U.S. 433 (1939)).

105. *Raines*, 521 U.S. at 830.

106. *Cf.* Hollingsworth v. Perry, 570 U.S. 693, 704–07 (2013) (holding the state of California could not delegate responsibility for litigating on behalf of the state to voters).

107. *Raines*, 521 U.S. at 819–21 (citing Powell v. McCormack, 395 U.S. 486, 496 (1969)).

108. *See id.* at 821–22 (citing *Coleman*, 307 U.S. 433); Nash, *supra* note 90, at 357.

(a) Personal Injury

Legislators are people, and sometimes have personal injuries to redress in court. In those cases, legislators may maintain standing without acting on behalf of the chamber.[109] This doctrine is not controversial: of course legislators can sue for personal injuries, just like the rest of us. But it is also exceedingly narrow. Courts have defined personal injury such that nearly every case a member will want to bring—including all the House's current litigation—vindicates institutional, not personal, injuries.[110] And individual legislators generally lack standing to assert those institutional injuries.[111]

The Supreme Court first entertained a case of personal legislative injury in *Powell v. McCormack*,[112] which remains the canonical example of personal legislator injury. The suit arose when Congressman Adam Clayton Powell, Jr. was reelected in 1966, despite a House investigation finding he had misappropriated travel funds and made illegal salary payments to his wife.[113] When Representative Powell arrived to take the oath of office in January 1967, Speaker John William McCormack did not administer his oath; instead, the House empaneled a Select Committee to determine whether to seat Powell.[114] After an investigation, the committee recommended Powell be sworn into Congress but also be censured and fined.[115] The full House disagreed: it voted to bar Powell from taking his seat and declared the seat vacant.[116] Powell sued Speaker McCormack, alleging the House had violated the Constitution by nullifying his election and adjusting Article I's exclusive membership qualifications.[117]

The Supreme Court found Powell had standing, and in so doing articulated what remains the leading analysis on personal legislative injury.[118] Representative Powell himself had a "legally cognizable interest"[119] in the outcome of the case. In particular, he had an "obvious and continuing interest in his withheld salary."[120] Representative Powell thus had standing to sue, because defendants inflicted personal pecuniary injury on him by depriving him of his salary.

The Supreme Court has subsequently read *Powell* to stand for the proposition that legislators' personal interest in things like salaries are distinct from institutional injuries, and do not require authorization from the chamber. In *Raines v. Byrd*,[121] the Court offered its modern formulation of what makes personal injuries distinct and amenable to suits from individual legislators. In holding that a

109. *Raines*, 521 U.S. at 819, 821 n.4 (citing Kennedy v. Sampson, 511 F.2d 430, 435–36 (D.C. Cir. 1974)).
110. *Id.* at 829–30.
111. *Id.*
112. 395 U.S. 486, 489 (1969).
113. *Id.* at 489–90.
114. *Id.* at 490. Powell still received his salary and benefits during this period. *Id.*
115. *Id.* at 492.
116. *Id.* at 493.
117. *Id.*
118. *Id.* at 490, 496.
119. *Id.* at 496.
120. *Id.* at 497.
121. 521 U.S. 811, 821 (1997).

group of six legislators lacked Article III standing to challenge the constitutionality of the Line Item Veto Act,[122] the Court articulated two factors that made Powell's injury uniquely personal (as compared to the alleged injury in *Raines*) and thus conferred Powell with standing. First, the Court argued, Powell was "singled out for specially unfavorable treatment."[123] Nothing similar happened in *Raines*, where the alleged injury "necessarily damages all Members of Congress and both Houses of Congress equally."[124] Second, the Court found Powell was "deprived of something to which [he] *personally* [was] entitled"[125] in his "private capacity," not due to his status as a congressman.[126] In *Raines*, by contrast, plaintiffs claimed standing "based on a loss of political power, not loss of any private right"[127]— their injury attached "solely because they are Members of Congress."[128] If any of the plaintiff legislators retired, noted the Court, they would no longer have a claim; their successor would.[129] *Raines* thus cemented a fundamental distinction from *Powell*, clarifying that individual members have standing to assert personal injuries only where the member was (1) singled out for specific treatment, and (2) that treatment ran to that member personally, not to their seat.[130]

Lower courts have held that both elements are required for an injury to be personal. That is, personal injury requires not only particularization but also that the member be *personally* entitled to the right.[131] Two cases brought under the "Seven-Member Rule,"[132] which entitles minority party legislators to certain information from the executive,[133] illustrate this effect. First, in *Waxman v. Thompson*,[134] eighteen members of the House sued over a claim for information from a federal agency.[135] Judge Morrow in the Central District of California dismissed the suit, holding plaintiffs were asserting institutional, not personal, injury.[136] Though harmed specifically, the asserted right "runs with their congressional and committee seats" and was thus an injury to Congress, rather than to themselves personally.[137] Similarly, in the 2018 case *Cummings v. Murphy*,[138] Judge Mehta of the U.S. District Court for the District of Columbia held in a similar lawsuit that members of the House failed to assert personal injury because their claim

122. Line Item Veto Act of 1996, Pub. L. No. 104–130 (1996).
123. *Raines*, 521 U.S. at 820.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* ("The claimed injury thus runs (in a sense) with the Member's seat . . . .").
129. *Id.*
130. *Id.*
131. *See id.* at 824 n.6 (citing Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 544–45 n.7 (1986); Waxman v. Thompson, No. 04-3467, 2006 U.S. Dist. WL 102688 (C.D. Cal. July 24, 2006).
132. 5 U.S.C. § 2954.
133. *Id.*
134. *Waxman*, No. CV 04-3467, 2006 U.S. Dist. WL 102688, at *3.
135. *Id.* at *1.
136. *Id.* at *12.
137. *Id.* at *11 (citing Raines v. Byrd, 521 U.S. 811, 821 (1997)).
138. 321 F. Supp. 3d 92, 118 (D.D.C. 2018).

stemmed from "a right granted to them as Members of Congress," not to themselves personally.[139] Both cases crystallize that personal injury ultimately requires more than just particularization. Even when an injury is particularized, when the asserted right is tied to a legislator's status as a member of Congress, a diminution of that right ultimately harms not the legislator personally but the institution of Congress as a whole.

In the narrow set of cases where a member asserts a particularized injury independent of their status as a legislator, the member thus does not need authorization from the House to maintain standing.[140] Fair enough. Indeed, query whether this personal legislative injury doctrine is somewhat self-evident: anyone, legislator or no, may claim personal injury.[141] But its analytic value lies in distinguishing personal injury (that anyone could assert) from injury a member suffers due to their status as a member. While a legislator can generally bring suit over personal injury, the framework governing when individual members can vindicate institutional injuries is far more restrictive.

(b) Institutional Injury

Institutional injury is quite different. Here, legislators are not asserting injuries that run to them as individuals—their claims stem from injury to them *as legislators*. And in that capacity, members nearly always (if not always) lack standing absent express authorization from the chamber to sue on its behalf.[142] In other words, authorization to sue on behalf of the injured legislative body is necessary (though not sufficient) to maintain standing. That fact reveals why the question of whether Congress has officially authorized a lawsuit is so important.

The Supreme Court has articulated a narrow framework for when individual plaintiffs can assert institutional injury—a framework some lower courts have shrunk even further. The Court's first opinion on the topic, in *Coleman v. Miller*,[143] is also in many ways its outlier. *Coleman* involved a challenge to Kansas's ratification of the proposed Child Labor Amendment.[144] The Kansas House had passed the resolution, but the Senate deadlocked 20–20—prompting the state's Lieutenant Governor to break the tie in favor of passage.[145] Plaintiffs, individual legislators who had voted against the amendment, challenged the Lieutenant Governor's action.[146]

139. *Id.* at 109.

140. *See* Coleman v. Miller, 307 U.S. 433, 437–38 (1939); Powell v. McCormack, 395 U.S. 486, 496 (1969).

141. *See Raines*, 521 U.S. at 818 (citing Allen v. Wright, 468 U.S. 737, 751 (1984)).

142. *Id.* at 821.

143. *Coleman*, 307 U.S. at 438.

144. *Id.* at 435–36.

145. *Id.*

146. *Id.* at 436.

A majority of the Court held the plaintiffs had standing, though the Justices splintered on the merits.[147] Regarding standing, the majority found the legislators' votes "had been overridden and virtually held for naught," injuring their "plain, direct and adequate interest in maintaining the effectiveness of their votes."[148] The Court thus held the individual lawmakers' interest in their votes could be vindicated in court, even absent authorization from the legislature.[149]

Coleman remains the only case where the Supreme Court has held individual members may assert an institutional injury. And in its 1996 bookend case, *Raines v. Byrd*,[150] the Court cabined *Coleman*'s holding to cases of true vote nullification; in anything less, the Court has required legislators asserting institutional injury to be suing on behalf of the institution. In *Raines*, six legislators challenged the constitutionality of the Line Item Veto Act of 1996.[151] The legislators argued the Act injured them "directly and concretely . . . in their official capacities" in three ways: it weakened the effect of their votes, undercut their role in repealing legislation, and tilted the balance of powers towards the executive.[152]

The Court rejected the legislators' arguments and held they lacked standing.[153] It began by firmly distinguishing *Powell*.[154] In that case, the Court argued, the members' injury had run to them in a "private capacity," while here, the injury was "institutional."[155] Though *Coleman* presented a case of institutional injury, the Court found it conferred standing only where legislators' votes were "completely nullified" by the allegedly unlawful act.[156] The *Raines* plaintiffs instead claimed a mere "abstract dilution of institutional legislative power,"[157] an injury the Court held insufficiently concrete to fall under *Coleman*'s ambit.[158]

Yet the *Raines* Court offered a revealing caveat: its holding applied only to individual members asserting institutional injury, and the analysis would be different were the House *as a whole* asserting injury.[159] The *Raines* plaintiffs were Senator Byrd and five other members of Congress suing on their own behalves, not as authorized representatives of Congress.[160] "We attach some importance,"

147. Chief Justice Hughes wrote for three Justices in concluding the legislators had standing. *Id.* at 437. Two other Justices implicitly agreed with that conclusion but dissented on the merits, *id.* at 470 (Butler, J., dissenting), and four Justices would have held the legislators lacked standing, *id.* at 460 (Frankfurter, J., concurring in the judgment); *see also* Raines v. Byrd, 521 U.S. 811, 824 n.5 (1997) ("[E]ven though there were only two Justices who joined Chief Justice Hughes' opinion on the merits [in *Coleman*], it is apparent that the two dissenting Justices joined his opinion as to the standing discussion. Otherwise, Justice Frankfurter's opinion denying standing would have been the controlling opinion.").

148. *Coleman*, 307 U.S. at 438 (plurality opinion).

149. *Id.*

150. *Raines*, 521 U.S. 811.

151. *Id.* at 814–15.

152. *Id.* at 816.

153. *Id.* at 813–14, 830.

154. *Id.* at 821.

155. *Id.*

156. *Id.* at 823.

157. *Id.* at 826.

158. *Id.* at 829.

159. *Id.*

160. *Id.* at 814 n.1.

wrote the Court, "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."[161] The Court cited two of its prior cases, which maintained that "members of collegial bodies do not have standing to perfect an appeal the body itself has declined to take"[162] and that congressional action "is not the action of any separate member or number of members, but the action of the body as a whole."[163] Indeed, it expressly declined to decide whether its analysis would change had Congress authorized the suit.[164] In so doing, the Court teed up a distinction that would prove decisive in its subsequent analysis—that of whether the House as a whole has authorized suit on its behalf. This Section takes up that distinction shortly.

Following the Court's lead, lower courts rarely allow individual legislators to assert institutional injury. In twin cases decided the year after *Raines*, the D.C. Circuit rejected claims from groups of individual legislators seeking to claim institutional injuries.[165] In the 1999 case *Chenoweth v. Clinton*,[166] the court denied standing to three members of the House claiming an executive order had diminished their powers by circumventing the legislative process.[167] And the following year, in *Campbell v. Clinton*,[168] the court held that individual legislators lacked standing to challenge President Clinton's use of force in Kosovo.[169] Subsequent decisions, most recently in *Blumenthal v. Trump*,[170] have similarly resisted finding that individual legislators could assert institutional injury.[171] The D.C. Circuit's precise test is the subject of some disagreement,[172] but its basic contours are simple enough: individual legislators will rarely be able to assert institutional injury on behalf of a chamber absent express authorization.

161. *Id.* at 829.

162. *Id.* at 829 n.10 (quoting Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 544 (1986)).

163. *Id.* (quoting United States v. Ballin, 144 U.S. 1, 7 (1892)).

164. *Id.* at 829–30.

165. The D.C. Circuit has unsurprisingly been the locus for most of these questions. *See generally* Richard J. Pierce, Jr., *The Special Contributions of the D.C. Circuit to Administrative Law*, 90 GEO. L.J. 779, 786 (2002).

166. 181 F.3d 112 (D.C. Cir. 1999).

167. *Id.* at 117.

168. 203 F.3d 19 (D.C. Cir. 2000).

169. *Id.* at 23–24; *see also Recent Case: Constitutional Law–Congressional Standing–D.C. Circuit Holds that Members of Congress May Not Challenge the President's Use of Troops in Kosovo.*–Campbell v. Clinton, *2013 F.3d 19 (D.C. Cir. 2000).*, 113 HARV. L. REV. 2134, 2136 (2000).

170. 949 F.3d 14 (D.C. Cir. 2020).

171. *See id.* at 20–21; *see also* Kucinich v. Bush, 236 F. Supp. 2d 1, 2 (D.D.C. 2002) (holding individual House members lacked standing to challenge President Bush's withdrawal from a treaty); Kucinich v. Obama, 821 F. Supp. 2d 110, 112 (D.D.C. 2011) (holding individual House members lacked standing to challenge President Obama's use of force in Libya).

172. *Compare Campbell*, 203 F.3d at 22–23 (describing individual legislators having standing to assert institutional interests only when votes are "nullified," but not where Congress "enjoy[s] ample legislative power"), *with* Cummings v. Murphy, 321 F. Supp. 3d 92, 112 (D.D.C. 2018) ("This court is not of the view that complete vote nullification is the only instance in which an individual legislator can assert institutional injury" and analyzing a mix of other factors to determine whether institutional injury is sufficiently concrete and particularized to allow an individual legislator to maintain standing).

Other circuits have been even more circumspect—indeed, one has found that individual legislators can *never* bring suit to assert institutional injuries.[173] In *Kerr v. Hickenlooper*,[174] the Tenth Circuit categorized *Coleman* as a case of personal, not institutional, injury, finding the injury affected only the twenty members whose votes had been allegedly nullified and not the legislature as a whole.[175] As a result, the court adopted the categorical rule that individual members always lack standing to assert institutional claims.[176] The Sixth Circuit took a similar approach in *Baird v. Norton*,[177] reading *Coleman* as finding vote nullification only when a number of members sufficient to defeat a bill join the lawsuit.[178]

In none of its current suits does the House, or its committees, argue any votes have been nullified. The suits instead allege general diminution of the House's power.[179] The above analysis shows that individual members plainly lack standing to bring such claims, and none of the litigants claim (even in the alternative) that any individual members would be able to maintain standing. So, the question becomes: when can the House *as a whole* show injury sufficient to maintain standing? *Raines* teed up that question, and we turn there next.

2. Standing for the House

The analysis is markedly different when the House as an institution brings suit. Courts today find that legislatures acting as a whole have standing to assert institutional injuries (which individuals could not assert) and to authorize individuals or committees to assert those injuries on the chamber's behalf.[180] Institutional standing has limits, which have been the subject of extensive scholarly commentary.[181] But in the main, the House has standing to assert institutional injuries in many cases where individual members would not.[182] That fact illustrates BLAG's importance: authorization to sue on the chamber's behalf often represents a necessary (if not sufficient) condition for maintaining standing.

The Supreme Court has only recently considered standing for legislatures and has articulated a much more permissive standard for those institutional plaintiffs. *Arizona State Legislature v. Arizona Independent Redistricting Commission*[183] first raised the question of legislative authorization to sue. There, plaintiff

173. *See* Kerr v. Hickenlooper, 824 F.3d 1207, 1216–17 (10th Cir. 2016).

174. *Id.* at 1207.

175. *Id.* at 1215.

176. *Id.*

177. 266 F.3d 408 (6th Cir. 2001).

178. *Id.* at 412–13.

179. Mnuchin Complaint, *supra* note 1, at 2; Ways & Means Complaint, *supra* note 2, at 2; Barr Complaint, *supra* note 3, at 7.

180. Nash, *supra* note 90, at 342.

181. *See, e.g.*, Frost, *supra* note 18, at 948–68; Grove & Devins, *supra* note 18, at 574–75; Nash, *supra* note 90, at 342; David J. Weiner, *The New Law of Legislative Standing*, 54 STAN. L. REV. 205, 206–07 (2001); Anthony Clark Arend & Catherine B. Lotrionte, *Congress Goes to Court: The Past, Present, and Future of Legislator Standing*, 25 HARV. J.L. & PUB. POL'Y 209, 273 (2001).

182. Grove & Devins, *supra* note 18, at 574–75.

183. 576 U.S. 787 (2015).

Arizona State Legislature challenged the authority of the Arizona Independent Redistricting Commission to draw congressional districts, arguing the Constitution's Elections Clause[184] vested in the state's "Legislature" the responsibility for determining the manner of elections.[185] Critically, unlike *Raines*, the legislature formally authorized the lawsuit through votes in both chambers.[186]

In holding the state legislature had standing, the Court placed great weight on those authorizing votes.[187] It cited the language from *Raines*, emphasizing that the *Raines* Court "attach[ed] some importance to the fact that [the *Raines* plaintiffs had] not been authorized to represent their respective Houses of Congress."[188] But in *Arizona State Legislature*, Justice Ginsburg's majority opinion emphasized the plaintiff was very different. It was "an institutional plaintiff asserting an institutional injury"—no mere group of six lawmakers.[189] More specifically, one key fact made it an institutional plaintiff: that "it commenced this action after authorizing votes in both of its chambers."[190] Given that dispositive difference, the Court concluded plaintiffs did have standing.[191]

The key lesson from *Arizona State Legislature* for present purposes is that institutional plaintiffs may assert institutional injuries that individual members cannot. Individual legislators, the Court held, generally lack standing to assert institutional injuries: "[h]aving failed to prevail in their own Houses, the suitors [in *Raines*] could not repair to the Judiciary to complain."[192] But the institution *as a whole* was another matter: plaintiff "Arizona State Legislature" had suffered institutional injury and could thus assert standing.[193]

To be sure, legislative authorization far from guarantees standing. In *Virginia House of Delegates v. Bethune-Hill*,[194] for instance, the Court denied standing to one chamber of Virginia's bicameral legislature, which had asserted interests that ran to both.[195] Even with authorization, then, the House may seek to vindicate only its own injuries and not injuries to Congress as a whole. Yet even if not sufficient, this analysis reveals that authorization from the House represents a necessary ingredient for almost any institutional claim.[196]

184. U.S. CONST. art. I, § 4, cl. 1.

185. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm., 576 U.S. 787, 792 (2015).

186. *Id.* at 802.

187. *Id.* at 803.

188. *Id.* at 802 (quoting Raines v. Byrd, 521 U.S. 811, 829 (1997)).

189. *Id.*

190. *Id.*

191. *Id.* at 803.

192. *Id.* at 802 (quoting *Raines*, 521 U.S. at 823).

193. *Id.* at 813–15.

194. 139 S. Ct. 1945 (2019).

195. *Id.* at 1956 (finding no legislative standing where "[o]ne House of [Virginia's] bicameral legislature . . . continue[d] the litigation against the will of its partners in the legislative process.").

196. A separate question concerns whether authorization from a *committee* might be sufficient to assert an injury that runs specifically to that committee. While the case law has not articulated this distinction, one could imagine an injury that runs specifically to a committee: perhaps if two committees have a dispute over their respective jurisdictions, one might seek to vindicate its institutional interests in court. This distinction, however, has yet to materialize in case law or academic literature. And under this Article's reasoning, such a dispute would almost surely pose a political question. *See infra* Part III.E.

So the foundational question becomes: what constitutes sufficient authorization from the chamber to litigate on its behalf? Courts have regularly held that the House as a whole can authorize a committee to sue on its behalf. In the 2008 case *Committee on Judiciary, U.S. House of Representatives v. Miers*,[197] the House sued former White House Counsel Harriet Miers to enforce a subpoena related to a House investigation.[198] Importantly, the House initiated that lawsuit by passing H. Res. 980, which "authoriz[ed] the Committee on the Judiciary to initiate or intervene in judicial proceedings to enforce" the subpoena against Miers on the House's behalf.[199] Judge Bates found the fact that the House "explicitly authorized" the lawsuit provided "the key factor that move[d] this case from the impermissible category of an individual plaintiff asserting an institutional injury . . . to the permissible category of an institutional plaintiff asserting an institutional injury."[200] That resolution thus was a proper means for the House to deputize the Judiciary Committee to assert the chamber's institutional injury.

The situation was similar in *Committee on Oversight & Government Reform v. Holder*.[201] There, the House sued then-Attorney General Eric Holder to enforce a subpoena related to a House investigation.[202] As in *Miers*, the House passed a formal resolution authorizing the House Oversight Committee to compel compliance with its subpoena through civil litigation.[203] And like Judge Bates, Judge Amy Berman Jackson emphasized that "the House of Representatives has specifically authorized the initiation of this action to enforce the subpoena."[204] She found that *Raines* "was dismissed because the individual lawmakers who brought the action failed to allege the requisite particularized and concrete injury to themselves, not because a legislative body as an institution would lack standing to bring an action on its own behalf."[205] In both cases, courts found the House properly initiated lawsuits by votes of the full chamber.[206]

Courts have also found that the House must authorize the specific suit in question. In *Walker v. Cheney*,[207] Judge Bates rejected standing for a suit brought by the Comptroller General, an agent of Congress.[208] The Comptroller General sought certain documents from then-Vice President Cheney, and argued Congress had authorized him to bring suit through 31 U.S.C. § 716(b)(2), which

197. 558 F. Supp. 2d 53 (D.D.C. 2008).

198. *Id.* at 55.

199. H.R. Res. 982, 110th Cong. (2008) (adopting H.R. Res. 980, 110th Cong. (2008)); *see also Miers*, 558 F. Supp. 2d at 63.

200. *Miers*, 558 F. Supp. 2d at 71 (citation omitted).

201. 979 F. Supp. 2d 1 (D.D.C. 2013).

202. *Id.* at 2–3.

203. H.R. Res. 706, 112th Cong. (2012).

204. *Holder*, 979 F. Supp. 2d at 21.

205. *Id.*

206. *Id.* at 7; Comm. on the Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53, 63 (D.D.C. 2008).

207. 230 F. Supp. 2d 51 (D.D.C. 2002).

208. *Id.* at 53–54. The Comptroller General serves as head of the Government Accountability Office (GAO). *About GAO: Comptroller General*, U.S. GOV. ACCOUNTABILITY OFF., https://www.gao.gov/about/comptroller-general/ [https://perma.cc/M8SK-7745]. For a lengthier discussion of GAO's role within the legislative scheme, see *infra* Section III.B.4.

noted "the Comptroller General may bring a civil action . . . to require the head of [an executive] agency to produce a record."[209] While granting that "in some theoretical sense" Congress may have authorized suit through the statute, Judge Bates found that decades-old, "highly generalized" grant was insufficient to show that the contemporary Congress had authorized suit over the "specific issues" in this case.[210] Because "neither House of Congress, and no congressional committee, ha[d] authorized the Comptroller General to pursue the requested information through this judicial proceeding," the court concluded he lacked the authorization to sue and thus lacked standing.[211] *Walker*, therefore, stands for the proposition that generalized grants of litigating authority, particularly from prior Congresses, are insufficient to confer authority to sue on behalf of the House. Only express authorization to sue in a specific case counts.

The House recognizes this analysis. Namely, that with vanishingly narrow exceptions, only institutional plaintiffs have standing to assert institutional injury.[212] In its current litigation, the House does not argue that its members could maintain standing absent formal authorization from the chamber (as conferred through BLAG). Take, for instance, the House's litigation against the Department of the Treasury over the President's tax returns.[213] The House Ways and Means Committee does not argue that its forty-two members, or its twenty-five Democratic members, independently have standing to sue the Treasury Department. Rather, it argues those members are suing under an express grant by the House to assert institutional injury.[214] As a group of individual legislators, they would lack standing. But on behalf of the House, they might have standing.[215]

This background tees up the question: in these lawsuits, has the House validly authorized suit through BLAG? If it has, the inquiry proceeds; if it has not, the individual members will lack standing. This Article explores that question next and then considers who should decide it—courts or House lawyers.

III. CAN BLAG AUTHORIZE SUIT?

The Constitution is silent on the question of how, or even whether, the House may sue. In stark contrast to the Article I, Section 7 bicameralism and presentment process, there is no equivalent "single, finely wrought and exhaustively considered, procedure" that dictates how or when the House may sue.[216] The House today claims the authority to sue primarily to enforce subpoenas under its broad grant of legislative power,[217] but also periodically looks to other

209. 31 U.S.C. § 716(b)(2).

210. *Walker*, 230 F. Supp. 2d at 69–70.

211. *Id.* at 61–62.

212. *Id.* at 64–65.

213. Ways & Means Complaint, *supra* note 2, ¶¶ 1–9.

214. *See id.* ¶ 87.

215. *See* United States v. Am. Tel. & Tel. Co., 551 F.2d 384, 391 (D.C. Cir. 1976) (noting the House may "designate a member to act on its behalf").

216. INS v. Chadha, 462 U.S. 919, 951 (1983).

217. *See, e.g.*, McGrain v. Daugherty, 273 U.S. 135, 174 (1927); Quinn v. United States, 349 U.S. 155, 160–61 (1955); Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 504 n.15 (1975) (internal citations omitted);

provisions of the Constitution for legal authority, most recently the appropriations clause.[218] But in none of those cases does the Constitution explicitly give the House the right to judicial redress, much less specify how the House must decide when to exercise that authority.

BLAG's constitutionality then turns on the interplay of Articles I and III. Article I vests in the House broad authority to "determine the Rules of its proceedings."[219] The House uses this provision to structure its affairs in many ways, for many reasons: to increase efficiency, cultivate expertise, and protect confidentiality.[220] This functionalist approach, then, is more than a policy preference. It is baked into the constitutional design.

Yet that broad functionalist grant is not unbounded, as other provisions of the Constitution specify procedures that the House cannot bend. *INS v. Chadha*[221] offers an example: despite the Constitution's grant to the House of authority to determine its own rules, the *Chadha* Court affirmed limits on how far Congress can modify the formal requirements of the Constitution.[222] So too here, challengers argue, Article III standing doctrine might place limits on Congress's ability to allow BLAG to authorize suit.

This interplay allows for reasonable disagreement. Yet this Part concludes the House's delegation to BLAG is constitutional. Courts should take authorization from BLAG as equivalent to authorization from the full House. The House regularly delegates other, arguably comparable authorities to subparts of the chamber without transgressing constitutional barriers.[223] And Article III precedent requires only authorization by the chamber for a plaintiff to assert institutional injury; it does not dictate *how* the chamber must provide that authorization.[224] Text, precedent, practice, and normative considerations all suggest that determination falls within Congress's prerogative to set its own rules.

This Part proceeds as follows. First, Section III.A analyzes the scope of Congress's authority to determine its own rules under the Rulemaking Clause. From the founding to the present, Congress has enjoyed broad authority to structure its proceedings.[225] Article III offers an external boundary on the breadth of the Rulemaking Clause, but one that ultimately only restates the inquiry: whether BLAG is a valid exercise of the House's rulemaking authority.

Section III.B then surveys the myriad of ways the House currently delegates its authority to component parts. It examines the House's delegations to its

see also TODD GARVEY, CONG. RSCH. SERV., R45653, CONGRESSIONAL SUBPOENAS: ENFORCING EXECUTIVE BRANCH COMPLIANCE 5–6 (2019), https://fas.org/sgp/crs/misc/R45653.pdf [https://perma.cc/8ECA-6ELD].

218. *See* Mnuchin Complaint, *supra* note 1, ¶¶ 1–7.

219. U.S. CONST. art. I, § 5, cl. 2.

220. *See, e.g.*, Powell v. McCormack, 395 U.S. 486, 547–49 (1969); John C. Roberts, *Are Congressional Committees Constitutional?: Radical Textualism, Separation of Powers, and the Enactment Process*, 52 CASE W. RES. L. REV. 489, 496 (2001).

221. 462 U.S. 919 (1983).

222. *Id.* at 954–56.

223. *Id.*

224. *Id.* at 931.

225. *Id.* at 945; *see* 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 298 (Leonard W. Levy ed., 1970) (1833).

Speaker, committees, other officers, and other agencies. That tour reveals the significant and diverse ways the House deputizes its components to make major decisions on the chamber's behalf, decisions that often implicate inter-branch relations. Viewed in the context of the House's other delegations, BLAG begins to feel more routine than exceptional.

As a result, Section III.C finds BLAG to be a constitutional exercise of the House's rulemaking authority. It arose from a valid House resolution, neither limits fundamental rights nor intrudes on other constitutional protections, and rests within the mainstream of congressional practice.

Section III.D analyzes the normative implications. It suggests that BLAG represents a normatively desirable way of structuring the House's litigating decisions. Far from being an improper delegation, BLAG represents a positive development that increases the House's efficiency without sacrificing the accountability of its decisions.

Finally, the Part closes by considering in Section III.E whether the question is justiciable in the first place. It concludes the question whether BLAG may authorize suit likely represents a political question, textually committed to congressional judgment. The justiciability issues, this Section suggests, sound similar to the merits issues—but courts have resisted second-guessing Congress's chosen procedures, and may do similarly here.

This Part aims to be tentative in its conclusions. The issues it examines are novel, and reasonable minds may disagree over how to approach them. But at the very least, this important development in constitutional law—which to date has passed with no fanfare—should receive careful analysis. By providing legal analysis and contextual survey, this Part aims to open that conversation.

A. The Scope of the Rulemaking Clause

The Rulemaking Clause of the United States Constitution declares that each House of Congress shall "determine the Rules of its Proceedings."[226] That provision grounds the functioning of the modern House.[227] It is also the source of the House's purported authority to allow BLAG to make litigating decisions on its behalf.[228] Yet despite its importance, the Rulemaking Clause has been the subject of scant academic scholarship.[229] This Section explores the Clause and examines two boundaries the Court has placed on the House's authority under it.

226. U.S. CONST. art. I, § 5, cl. 2.

227. *See* Roberts, *supra* note 220, at 525 n.89.

228. *See* Brief in Opposition to Motion to Dismiss at 33, Comm. on Ways & Means, U.S. House of Representatives v. U.S. Dep't of the Treasury (D.D.C. Sept. 23, 2019) (No. 1:19-cv-01974-TNM) ("To hold BLAG's authorization for the litigation insufficient would be to undermine the House's constitutionally mandated right to create its own Rules.").

229. *See* Roberts, *supra* note 220, at 527 ("[V]irtually no attention has been given to the Rulemaking Clause . . . .").

1. History and Case Law

The Rulemaking Clause is perhaps one of the least controversial provisions of the Constitution. As Professor John Roberts charts in his influential exegesis of the Clause, no reference to the Clause appears in the record of the Convention debates, nor the Federalist Papers.[230] Indeed, Joseph Story's early influential study of the Constitution argued the power was inherent to Article I:

> No person can doubt the propriety of the provision authorizing each house to determine the rules of its own proceedings. If the power did not exist, it would be utterly impracticable to transact the business of the nation, either at all, or at least with decency, deliberation, and order. The humblest assembly of men is understood to possess this power; and it would be absurd to deprive the councils of the nation of a like authority.[231]

Few Supreme Court cases have addressed the scope of the Rulemaking Clause. But the basic framework comes from the 1892 case *United States v. Ballin*,[232] which generally still governs the analysis today. That framework articulates two general limits on the rulemaking power while setting the stage for an expansive read of the Rulemaking Clause.

Ballin concerned whether a constitutionally sufficient quorum was present when the House passed a challenged tariff bill.[233] The Constitution requires that a quorum consisting of the majority of the chamber be present when the House votes on a bill but does not specify how the House should ascertain the presence of such a quorum.[234] Two years prior, the House had passed Rule XV to provide a method for ascertaining a quorum: under the rule, a quorum would include members "in the hall of the house who do not vote," and not just those voting.[235] Petitioners challenged the House's authority to count those present, but not voting, members toward the quorum.[236]

Writing for the Court, Justice Brewer found the rule to be a valid exercise of the House's authority under the Rulemaking Clause.[237] He noted that the Constitution proscribes no method for determining a quorum and that the task thus fell to the House.[238] But with two limits: the House may not through its rules "violate fundamental rights" or "ignore constitutional restraints."[239] In the instant case, the House's proposed method of ascertaining a quorum neither violated

230. *Id.* at 529.
231. STORY, *supra* note 225, at 298.
232. 144 U.S. 1 (1892).
233. *Id.* at 3.
234. U.S. CONST. art. I, § 5, cl. 1.
235. United States v. Ballin, 144 U.S. 1, 5 (1892).
236. *Id.* at 5–6.
237. *Id.* at 9, 11.
238. *Id.* at 6.
239. *Id.* at 5. The Court also noted that "there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained." *Id.*

fundamental rights nor transgressed a different constitutional provision.[240] As a consequence, the Court upheld the House rule.[241]

Two lines of cases emerge from these twin limits. The first consists of challenges under the "fundamental rights" exception: that is, the idea that Congress may not transgress other fundamental rights through rulemaking. In two cases, *Christoffel v. United States*[242] and *Yellin v. United States*,[243] the Court held that witnesses before congressional committees were entitled to certain "fundamental right[s]"[244] which could not be abrogated by chamber rules.[245] But the Court never went further and has since hewed closely to the *Ballin* rule. The D.C. Circuit in particular has subsequently held that judicial intervention in the Rulemaking Clause context is only "appropriate where rights of persons other than members of Congress are jeopardized by congressional failure to follow its own procedures."[246]

In the second, the Court emphasized that other Constitutional provisions may place independent limits on the rulemaking power. *United States v. Munoz-Flores*[247] is illustrative. There, the Court considered whether the Origination Clause[248] required that a certain bill originate in the House.[249] The Court reached the merits but found that the bill was not a revenue measure and that the Origination Clause thus did not apply.[250] While not a Rulemaking Clause case, *INS v. Chadha* perhaps most clearly illustrates that where the Constitution explicitly specifies a certain procedure, the House may not circumvent that procedure under its Rulemaking Clause authority.[251] For instance, the House likely could not under the guise of rulemaking delegate to its Speaker the authority to decide, without conducting any vote by Members of the House itself, that any "[m]easure" the President "judge[s] necessary and expedient"[252] is deemed "passed [by] the House."[253] When the Constitution itself specifies an interbranch process, as with bicameralism and presentment, no branch is free to deviate from

240. *Id.* at 6.
241. *Id.* at 11.
242. 338 U.S. 84 (1949).
243. 374 U.S. 109 (1963).
244. *Christoffel*, 338 U.S. at 90.
245. *See id.* at 87–90; *see also Yellin*, 374 U.S. at 121–24.
246. Metzenbaum v. FERC, 675 F.2d 1282, 1287 (D.C. Cir. 1982) (citing *Yellin*, 374 U.S. at 109; *Christoffel*, 338 U.S. at 84).
247. 495 U.S. 385, 388–89 (1990).
248. U.S. CONST. art. I, § 7, cl. 1 ("All Bills for raising Revenue shall originate in the House of Representatives . . . .").
249. *See Munoz-Flores*, 495 U.S. at 387–88.
250. *Id.* at 397–401.
251. *See generally* INS v. Chadha, 462 U.S. 919 (1983).
252. U.S. CONST. art. II, § 3.
253. *See generally* Bruce Ackerman et al., *An Open Letter to Congressman Gingrich*, 104 YALE L.J. 1539 (1995) (arguing that a majority vote of the House is both necessary and sufficient for passing legislation); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002) (treating the nondelegation doctrine as only prohibiting delegation of literal legislative authority).

that process.[254] Yet where the Constitution is silent, the Rulemaking Clause grants the House leeway to design its procedures.[255]

The D.C. Circuit recently emphasized the permissiveness of this second limit in *Trump v. Mazars*.[256] There, plaintiffs argued that a subpoena issued to the President's accounting firm by the House Oversight and Reform Committee was invalid because the full House should have issued the subpoena (despite contrary House rules).[257] The court decisively rejected that argument. Noting that the Constitution gives each House authority to "determine the Rules of its Proceedings,"[258] the court held that "unless and until Congress adopts a rule that offends the Constitution, the courts get no vote in how each chamber chooses to run its internal affairs."[259] Absent the violation of a constitutional right, then, courts may not impose a particular structure onto House proceedings.

The Rulemaking Clause thus seems on its face to vest Congress with extraordinarily wide discretion, as modern practice bears out. Yet that discretion is circumscribed in two ways: Congress may violate neither other constitutional provisions nor fundamental rights in exercising that power.[260]

Those two lines open up two challenges to BLAG's authority. First, one could argue BLAG violates fundamental rights. Though this argument might surface in future cases, it has not been advanced by the President or government in any of the House's litigation. Unlike the cases of witnesses testifying before Congress, where unfair procedures might seem to target a specific person's procedural protection, it would seem difficult for the President to claim he has a fundamental right to be sued only by a full House vote. Perhaps, for this reason, the D.C. Circuit did not even consider this prong in its *Mazars* analysis.[261]

The executive's primary challenge has been that Article III offers an independent external limit on the Rulemaking Clause. This Section takes up that challenge next.

2. Article III as External Limit

Another possible limitation stems not from the Rulemaking Clause, but Article III. The standing requirements inherent in that constitutional boundary, some have argued, require the House to receive authorization from the full chamber before it sues—irrespective of its rulemaking power.[262] In *Miers* and *Holder*, the courts arguably found standing because the House *as a whole* had authorized

254. *Cf.* Public Citizen v. U.S. Dep't of Just., 491 U.S. 440, 486–87 (1989) (Kennedy, J., concurring) (finding that, because the Constitution's text commits appointment power to the President, the Court may not "arrogate to itself the power to adjust a balance settled by the explicit terms of the Constitution.").

255. *Cf. id.* at 484–85 (recognizing that, regarding questions of presidential power where the Constitution does *not* explicitly strike such a balance, courts "have employed something of a balancing approach").

256. 940 F.3d 710, 723 (D.C. Cir. 2019), *rev'd and remanded on other grounds*, 140 S. Ct. 2019 (2020).

257. *Id.* at 743–44.

258. *Id.* at 746 (quoting U.S. CONST. art. I, § 5, cl. 2).

259. *Id.* (citing Exxon Corp. v. F.T.C., 589 F.2d 582, 590 (D.C. Cir. 1978)).

260. *Id.* at 723.

261. *See id.* at 724.

262. *See* Nash, *supra* note 90, at 376.

suit.[263] Indeed, the *Walker* court even had rejected as insufficient congressional approval not specific to the lawsuit in question.[264] On this view, courts should find the House has Article III standing only where the full chamber has authorized suit—thereby rendering meaningless the BLAG delegation. To date, this has been the primary argument advanced by BLAG's challengers.[265]

This argument rests on a contrary read of the legislative standing case law canvassed above. On this approach, the cases stand for an importantly different proposition: the key factor is not whether the institution has sued, but whether a majority of the institution supports suit.[266] Proponents claim several lower court opinions offer support for this read. The government defendants in the ongoing litigation over the President Trump's tax returns, for instance, read the D.C. District Court's opinion in *Cummings v. Murphy*[267] to suggest this approach.[268] The *Cummings* court found that individual members lacked standing to sue on behalf of the chamber, absent authorization from the House.[269] In so doing, the court discussed the reason for insisting on institutional approval: that view "protects Congress' institutional concerns from the caprice of a restless minority of Members."[270] This analysis might suggest that the vote of a small group of members (even from the House's leadership) is insufficient to protect the concerns of the House as a whole. Only a full vote of the entire body can ensure that a "restless minority" does not impose its will onto the chamber.

On balance, however, the Article III argument appears circular. It elides that the House *as a whole* has itself decided to allow BLAG to authorize suits on its behalf.[271] The House *as a whole* determined that the BLAG mechanism, whereby the chamber's leadership collectively made litigating decisions, was an adequate way of "protect[ing] Congress' [own] institutional concerns from the caprice of a restless minority of Members."[272] In eliding that fact, the Article III argument assumes that the only way the House as a whole can protect its interests is with a full chamber vote. By assuming its conclusion, it ignores other ways the House might structure decision-making processes to vindicate its institutional interests.

This argument raises a broader theme that contextualizes the House's delegation. The modern House does not exercise all, or indeed most, of its powers

263. *See, e.g.*, Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53, 67 (D.D.C. 2008); Comm. on Oversight & Gov't Reform v. Holder, 979 F. Supp. 2d 1, 16 (D.D.C. 2013).

264. Walker v. Cheney, 230 F. Supp. 2d 51, 66 (D.D.C. 2002).

265. *See, e.g.*, Brief of Plaintiff at 33, Comm. on Ways & Means, U.S. v. Dep't of the Treasury (No. 1:19-cv-1974) (D.D.C. 2019) ("That the House has some discretion to organize itself how it thinks best under Article I does not mean that it may ignore the Article III requirement of authorizing litigation against the Executive before filing it.").

266. *See Miers*, 558 F. Supp. 2d at 67.

267. 321 F. Supp. 3d 92, 108 (D.D.C. 2018).

268. Motion to Dismiss at 28, Comm. on Ways & Means, U.S. v. Dep't of the Treasury (No. 1:19-cv-1974) (D.D.C. 2019).

269. Cummings v. Murphy, 321 F. Supp. 3d 92, 115 (D.D.C. 2018).

270. *Id.*

271. And notably, unlike *INS v. Chadha*, the Constitution does not itself specify an alternate procedure.

272. *Cummings*, 321 F. Supp. 3d at 115. Each new House sets its own rules of proceedings, ensuring a past House's BLAG delegation does not bind a future House without its consent. *See* U.S. CONST. art. I, § 5, cl. 2.

as a full chamber. Rather, the House delegates extensively to internal and external subcomponents.[273] That widespread modern practice illustrates the notion that an action taken on behalf of the chamber need not come through a formal vote of the full House—indeed, that notion is central to modern legislative practice.

B. Historical and Modern Practice

Practice plays an important role in analyzing vague constitutional text.[274] And surveying that practice, perhaps the most remarkable feature of BLAG is how utterly unremarkable it is. The House has delegated all sorts of powers to its component parts; indeed, that internal delegation is a key feature of our current legislative scheme.[275] To be sure, in some areas the Constitution expressly forecloses delegation.[276] But those areas are few and far between; on the whole, the House liberally delegates elements of the legislative process to various components both within and outside the House.[277]

BLAG differs from the House's other delegations in key respects. But those delegations—across diverse topics, to a multiplicity of actors, and resting against other constitutional provisions—contextualize the House's delegation to BLAG. This extensive practice cannot alone settle the question. But it does illuminate the breadth of the Rulemaking Clause, and in so doing suggests BLAG represents a lawful exercise of the House's rulemaking authority.

1. Delegation to Speaker

Begin with the Speaker, an officer created in Article I, section 2 of the Constitution. "The House of Representatives shall chuse their Speaker and other Officers," proclaims the text—and no more.[278] What duties the Speaker (and unspecified other officers) would have was left entirely unsaid.[279] Indeed, the text does not even require the Speaker be a member of the House.[280] Yet the modern Speaker wields a range of powers, from the formidable to the mundane to the

273. *See id.* at 108.

274. *See generally* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019) (collecting examples).

275. For an excellent, comprehensive analysis of just how important this bureaucratic reality is to Congress's contemporary functioning, see Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. PA. L. REV. 1541 (2020).

276. The bicameralism and presentment dictates of Article 1 Section 7, for instance, surely prohibit the House from declaring in advance that any legislation the President deems in the national interest shall automatically be deemed passed. *Cf.* INS v. Chadha, 462 U.S. 919, 951 (1983).

277. *See generally* Cross & Gluck, *supra* note 275.

278. U.S. CONST. art. 1, § 2.

279. *See id.*

280. *See, e.g.*, VALERIE HEITSHUSEN, CONG. RSCH. SERV., R44243, ELECTING THE SPEAKER OF THE HOUSE OF REPRESENTATIVES: FREQUENTLY ASKED QUESTIONS 2 (2018), https://fas.org/sgp/crs/misc/R44243.pdf [https://perma.cc/BZ3B-RHM8] (noting that "the U.S. Constitution does not require the Speaker to be a Member of the House," but "all Speakers have been Members" though "some individuals not serving in the House have received votes").

downright bizarre.[281] Those powers illustrate the normalcy of intra-House delegation and the broad authority of Congress to construct its own rules of proceedings.

First, the House gives the Speaker control over the House floor. She calls the House to order,[282] preserves decorum on the floor,[283] and decides all questions of order.[284] She appoints speakers *pro tempore*[285] and counts the presence of a quorum.[286] She recognizes Members to speak and make motions.[287] And perhaps most importantly, she controls the floor calendar: a power that can make or break legislation.[288] Indeed, as Speaker O'Neill wrote, control over the calendar represents one of the Speaker's most important powers, because "if [a Speaker] doesn't want a certain bill to come up, it usually doesn't."[289] Nowhere does the Constitution ordain such a powerful range of legislative tools, and one could imagine a system without such a powerful Speaker—one need only look to the Senate for such a model. Yet the House's comfort with delegating so much authority to its leader begins to illustrate the central role of internal delegation in the modern House.

Relatedly, the House gives its Speaker control over the galleries—both in the room[290] and through controlling C-SPAN's cameras in the chamber.[291] This power is likewise more than ministerial. When cameras first came to the chamber, authority over them was "a real lever of power in Congress."[292] Democratic Speaker Tip O'Neill, for instance, once ordered the cameras to pan the chamber as a Republican Congressman spoke, revealing its near-emptiness to the viewing public.[293] When Newt Gingrich became Speaker, he also often directed C-SPAN camera operators to take cutaway shots of the full floor, angering many lawmakers.[294] In recent history, Speakers have twice turned off the C-SPAN cameras after the House's adjournment, as the minority party staged floor debates:

281. *See generally* VALERIE HEITSHUSEN, CONG. RSCH. SERV., 7-5700, THE SPEAKER OF THE HOUSE: HOUSE OFFICER, PARTY LEADER, AND REPRESENTATIVE (2017) [hereinafter HEITSHUSEN 2], https://fas.org/sgp/crs/misc/97-780.pdf [https://perma.cc/Z24V-J726]. Indeed, House Rule II.8(a) notes that the General Counsel "shall function pursuant to the direction of the Speaker, who shall consult with the Bipartisan Legal Advisory Group." House Rules, *supra* note 54, R. II.8(a). While BLAG is responsible for articulating the House's legal positions, then, the Speaker still retains ultimate control over the office. *See* HEITSHUSEN 2, *supra*.

282. House Rules, *supra* note 54, R. I.1.

283. *Id.* R. I.2.

284. *Id.* R. I.5.

285. *Id.* R. I.8.

286. *Id.* R. XX.7(c).

287. *Id.* R. XVII.

288. *See* HEITSHUSEN 2, *supra* note 281, at 6.

289. *Id.* (quoting THOMAS P. O'NEILL JR., MAN OF THE HOUSE 273 (1987)).

290. House Rules, *supra* note 54, R. I.2.

291. *Id.* R. V.2(a). The Speaker also controls the House press galleries. *See id.* R. VI.2–3.

292. Hadas Gold, *C-SPAN's Viral Video Moment*, POLITICO (June 22, 2016, 8:36 PM), https://www.politico.com/story/2016/06/cspan-house-sitin-democrats-224696 [https://perma.cc/J9CD-DLT2].

293. *House Session: May 10, 1984*, C-SPAN, https://www.c-span.org/video/?124921-1/house-session [https://perma.cc/E3N3-J8QH].

294. *See* Howard Kurtz, *Under Speaker's Order, C-SPAN Pans the House*, WASH. POST (Mar. 29, 1995), https://www.washingtonpost.com/archive/politics/1995/03/29/under-speakers-order-c-span-pans-the-house/e805c9a6-cebb-4e90-aaca-bc3a93b487d2/ [https://perma.cc/FH5A-QJ3H].

Speaker Nancy Pelosi cut the cameras on a House GOP debate over offshore drilling in 2008,[295] and Speaker Paul Ryan did the same when Democrats staged a sit-in on the House floor over the chamber's refusal to vote on gun safety legislation.[296] Control of the cameras, the gateway between the House and the public, thus represents a substantive power delegated to the Speaker.

The House also gives the Speaker control over the committee process in important ways. Perhaps most significantly, the Speaker unilaterally appoints conferees when bills are set to conference,[297] a potent tool that allows the Speaker to directly shape final legislation.[298] The Speaker also controls to which committees to refer bills in the event of overlapping jurisdiction.[299] Though today each party selects membership of standing committees through a "committee on committees,"[300] historically Speakers also controlled committee membership: Speaker Cannon, for instance, unilaterally selected committee members and wielded that power to great strategic effect.[301] Committee appointments—today, conference committee appointments in particular—thus represent another suite of legal tools the House gives its Speaker.

Salient of late, the House also appears to give its Speaker power to control the timing of the delivery of impeachment papers to the Senate. After the House impeached President Trump on December 18, 2019, Speaker Pelosi announced she would temporarily withhold the papers from the Senate pending further information on how the Senate would conduct its trial.[302] Legal experts debate the constitutionality of her maneuver, and some suggest the Senate might change its rules to initiate a trial even without the Speaker's go-ahead.[303] But as a matter of

295. *See* John Bresnahan, *House Dems Turn Out the Lights but GOP Keeps Talking*, POLITICO (Aug. 1, 2008, 12:13 PM), https://www.politico.com/blogs/politico-now/2008/08/house-dems-turn-out-the-lights-but-gop-keeps-talking-010724 [https://perma.cc/YEP6-WVGS].

296. Gold, *supra* note 292. But while the cameras are controlled by the Speaker, the network isn't—and when the Speaker announced the chamber's cameras would be turned off, C-SPAN began to broadcast live feeds broadcast from legislators' smartphones. *Id.*; *see also Dem Sit In Periscope*, C-SPAN (Oct. 14, 2016), https://www.c-span.org/video/?c4625112/dem-sit-periscope [https://perma.cc/73LT-XXQ8].

297. *See* CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., 7-5700, THE LEGISLATIVE PROCESS ON THE HOUSE FLOOR: AN INTRODUCTION 8–9 (2019), https://www.senate.gov/CRSpubs/8098f506-ee7b-42c7-a003-92f13aaec0bc.pdf [https://perma.cc/8YKT-SP96].

298. *See* HEITSHUSEN 2, *supra* note 281, at 6.

299. House Rules, *supra* note 54, R. XII.2.

300. *See* LEWIS DESCHLER, DESCHLER'S PRECEDENTS OF THE UNITED STATES HOUSE OF REPRESENTATIVES 173, https://www.govinfo.gov/content/pkg/GPO-HPREC-DESCHLERS-V1/pdf/GPO-HPREC-DESCHLERS-V1-3-3-8.pdf (last visited Jan. 21, 2021) [https://perma.cc/QLS5-D6UV].

301. *See* Eric D. Lawrence, Forrest Malzman & Paul J. Wahlbeck, *The Politics of Speaker Cannon's Committee Assignments*, 45 AM. J. POL. SCI. 551, 551 (2001).

302. *See* Mike DeBonis, *Pelosi Says House May Withhold Impeachment Articles, Delaying Senate Trial*, WASH. POST (Dec. 18, 2019, 10:21 PM), https://www.washingtonpost.com/politics/some-house-democrats-push-pelosi-to-withhold-impeachment-articles-delaying-senate-trial/2019/12/18/6e25814a-21c5-11ea-a153-dce4b94e4249_story.html [https://perma.cc/B3VA-JRLW].

303. *Compare* Laurence H. Tribe, *Don't Let Mitch McConnell Conduct a Potemkin Impeachment Trial*, WASH. POST (Dec. 16, 2019, 3:48 PM), https://www.washingtonpost.com/opinions/dont-let-mitch-mcconnell-conduct-a-potemkin-impeachment-trial/2019/12/16/71a81b30-202f-11ea-a153-dce4b94e4249_story.html [https://perma.cc/KK86-H7LZ] (defending the move's constitutionality), *with* Jonathan Turley, *Pelosi's Half Right Constitutional Claim Leaves the House All Wrong*, HILL (Dec. 30, 2019, 11:00 AM), https://thehill.

internal delegation, the Speaker's unilateral decision delayed the trial without protest that such a move required a chamber vote—illustrating the Speaker's control over the delivery of impeachment papers to the Senate.[304]

The Speaker also exercises more mundane powers. Among them, she maintains "general control" over areas of the Capitol occupied by the House.[305] This power includes minute details: in 1989, following a unanimous consent request for a change of décor in the House chamber, Speaker Jim Wright noted he would "take the suggestion under advisement in exercising his authority under" the House rules.[306] The Speaker also controls office space in the House. In 2017, for instance, Speaker Ryan gave Vice President Pence office space on the House side of the Capitol—and Speaker Pelosi revoked that space in 2019.[307]

Finally, and illustratively, the Speaker is also delegated control over one peculiarly intimate function: drug testing.[308] Yes, drug testing. Rule 1, clause 9 of the House Rules dictates that "[t]he Speaker, in consultation with the Minority Leader, shall develop through an appropriate entity of the House a system for drug testing in the House."[309] That system, the rule elaborates, "may provide for the testing of a Member, Delegate, Resident Commissioner, officer, or employee of the House."[310] The clause was first inserted into the House rules under Speaker Gingrich in 1997 and has remained in force since then with only clerical changes.[311] No Speaker has set up such a system (despite the seemingly mandatory "shall" language)[312]—indeed, a spokesperson for former Speaker John Boehner noted the Speaker did not know the rule existed.[313] But it represents a

com/opinion/judiciary/476222-pelosis-half-right-constitutional-claim-leaves-the-house-all-wrong [https://perma.cc/K7BV-BRBH] (challenging it).

304. The process for transmitting legislation to the Senate appears more ministerial, though perhaps a Speaker one day might similarly attempt strategic withholding. *See* Robert B. Dove, *Enactment of a Law*, CONGRESS.GOV (Feb. 1997), https://www.congress.gov/resources/display/content/Enactment+of+a+Law+-+Learn+About+the+Legislative+Process [https://perma.cc/5TLY-ZY9S] (noting that the House follows the same post-passage procedures as the Senate, where clerks from the Secretary's office formally print and transmit bills to the House following passage).

305. House Rules, *supra* note 54, R. I.3.

306. RULES OF THE HOUSE OF REPRESENTATIVES, 115TH CONG., R. I.5 (2017); H.R. DOC. NO. 114–192, 114th Cong., at 345 (2017). The record does not reflect a subsequent change in décor.

307. *See* Susan Davis, *Speaker Pelosi Revokes Vice President Pence's House Office Space*, NPR (Mar. 12, 2019, 1:40 PM), https://www.npr.org/2019/03/12/702577175/speaker-pelosi-revokes-mike-pences-house-office-space [https://perma.cc/U72A-WZ8E].

308. RULES OF THE HOUSE OF REPRESENTATIVES, 115TH CONG., R. I.9 (2017); H.R. DOC. NO. 114–192, 114th Cong., at 357 (2017).

309. H.R. DOC. NO. 114–192, 114th Cong., at 357 (2017).

310. *Id.*

311. H.R. DOC. NO. 114–192, 114th Cong., at 357 (2017); *see also* Stephen Barr, *Drug-Test Program Approved by House for Members, Staff*, WASH. POST (Jan. 8, 1997), https://www.washingtonpost.com/archive/politics/1997/01/08/drug-test-program-approved-by-house-for-members-staff/46c0c7d1-34ec-4b2b-96be-cef1a1825156/ [https://perma.cc/AW45-K8RV] (discussing passage and members' initial enthusiasm for setting up such a system).

312. *See* Ben Peters, *Will Members of Congress Ever Drug Test Themselves? They've Certainly Tried*, ROLL CALL (Feb. 22, 2019, 5:00 AM), https://www.rollcall.com/news/hoh/congress-ever-drug-test-itself [https://perma.cc/2QB7-RAK4] ("The provision still exists in the House rules, but no speaker has chosen to use it.").

313. *See* Ashley Alman, *House Rules Have Allowed Random Drug Testing Of Members Since 1997*, HUFFPOST (Nov. 20, 2013, 10:38 PM), https://www.huffpost.com/entry/house-drug-testing_n_4306056

vivid example of just how far afield from legislation the Speaker's delegated powers range.

What to make of all this delegation—and so much more[314]—to the Speaker? The Constitution nowhere vests in Congress the right to drug test its members, much less the right to delegate that power to its Speaker; to derive such authority from either the Speaker Clause or the Rulemaking Clause feels specious. Throughout history, some members have raised concerns about the constitutionality of the strong speakership.[315] Yet these delegations at once feel utterly unremarkable. Of course the House may give clerical and administrative duties to its self-selected leader. Floor debates don't moderate themselves; a necessary corollary of much of the House's work is a functioning legislative chamber.

But could the same not be said about the House's authority to determine how it sues? If the House is to have the power to sue, absent a specific constitutional requirement that the power be exercised in a certain way, at first pass it seems unclear why delegating that power is any more objectionable than delegating control of the chamber's cameras, or of who speaks and when, or of drug testing colleagues. To be sure, BLAG implicates inter-branch concerns distinct from purely intra-chamber delegation to the Speaker. But just as the Constitution is silent as to who shall control the House floor, create committees, or drug test members, so too is it silent as to how Congress shall sue. That decision similarly seems to remain within the sound discretion of the chamber.

2. Delegation to Committees

The elaborate House committee system represents a second, perhaps more policy-facing internal delegation. Committees, as one legislator noted, are the "heart and soul" of Congress.[316] That structure dates back to the Founding: the Constitutional Convention organized itself into committees,[317] and the First Congress did so as well.[318] Today, House Rule X, clause 1 creates twenty standing committees, from Agriculture to Ways and Means.[319] Clause 11 adds in the Permanent Select Committee on Intelligence.[320] House Resolution 6 created two

[https://perma.cc/49BW-5XRC]. Such a scheme might not even be constitutional: the Supreme Court in 1997 struck down a Georgia law requiring drug testing from candidates for certain state offices. *See* Chandler v. Miller, 520 U.S. 305, 305 (1997).

314. *See generally* HEITSHUSEN 2, *supra* note 281, at 4.

315. *See, e.g.*, *Speaker of the House*, HIST. ART & ARCHIVES: U.S. HOUSE OF REPRESENTATIVES, https://history.house.gov/Institution/Origins-Development/Speaker-of-the-House/ (last visited Jan. 21, 2021) [https://perma.cc/BXB2-9UD7] (noting one legislator argued in 1910 that the strong speakership under Speaker Joseph Cannon was "not a product of the Constitution" and that the Speaker was not "entitled to be the political and legislative dictator" of the House).

316. H.R. DOC. NO. 103-324, at 143 (1994); Roberts, *supra* note 220, at 543.

317. *See* ARTHUR TAYLOR PRESCOTT, DRAFTING THE FEDERAL CONSTITUTION 37–42 (1941); MAX FARRAND, 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 9 (1911).

318. H.R. DOC. NO. 103-324, at 171–73.

319. House Rules, *supra* note 54, R. X.1(a)–(t).

320. *Id.* R. X.11.

House Select Committees—on the Climate Crisis and the Modernization of Congress—in 2019.[321] Add five Joint Committees and one Joint Select Committee, and we've got the full suite.[322]

These committees represent a powerful, highly sophisticated set of policy-making centers. As Professor Roberts observes, "it is an empirical fact that committees dominate the enactment process."[323] Committee members play particularly important roles in shaping legislation in their respective areas. Committee reports, too, are widely recognized as the "gold standard" of legislative history, and often the only form of legislative history courts consult today.[324] Legislative history remains the subject of legal debate; but as a descriptive matter, committee reports undoubtedly shape legislative interpretation.[325]

House committees exercise a broad range of concrete delegated powers. They adopt written rules of procedure,[326] maintain their own records,[327] and may even "sit and act" when the rest of the House has adjourned.[328] Committees also exercise substantial investigative powers. A committee "may conduct at any time such investigations and studies as it considers necessary or appropriate in the exercise of its responsibilities."[329] To that end, committees may call and question witnesses, and may "require, by subpoena or otherwise, the attendance and testimony of such witnesses."[330] Substantial variation exists among how House committees issue subpoenas.[331] Some, like the House Veterans' Affairs Committee, issue subpoenas only through a majority vote of the committee.[332] Yet others, like the House Oversight and Government Reform Committee, allow the Chair to initiate a subpoena on their own initiative with no involvement from any other committee member.[333] The House has chosen to leave these procedures entirely up to its committees.[334]

The House even expressly deputizes some committees and their leaders to represent the chamber in inter-branch matters.[335] The House Permanent Select Committee on Intelligence ("HPSCI"), for instance, is the only House committee

321. *See* H.R. RES. 6, 116th Cong. (2019).

322. For a list of all the House's committees and links to websites for each, see *Committees*, U.S. HOUSE OF REPRESENTATIVES, https://www.house.gov/committees (last visited Jan. 21, 2021) [https://perma.cc/TQ3C-G6JY].

323. Roberts, *supra* note 220, at 551.

324. *See* MANNING & STEPHENSON, *supra* note 72, at 191–94.

325. *See id.*

326. House Rules, *supra* note 54, R. XI.2.

327. *Id.* R. XI.2(e)(1)(A).

328. *Id.* R. XI.2(m)(1)(A).

329. *Id.* R. XI.1(b)(1).

330. *Id.* R. XI.2(m)(1)(B). *See generally* McGrain v. Daugherty, 273 U.S. 135, 151–52 (1927) (holding Article I authorizes Congress to issue subpoenas).

331. *See* Michael L. Koempel, CONG. RSCH. SERV., R44247, A SURVEY OF HOUSE AND SENATE COMMITTEE RULES ON SUBPOENAS 1 (2019), https://fas.org/sgp/crs/misc/R44247.pdf [https://perma.cc/P26W-7DZ8]. Data is from the 115th Congress.

332. *See id.* at 9.

333. *See id.* at 8.

334. *See id.* at 1.

335. These delegations are statutory, but nonetheless illustrate the House deciding to cede substantive interbranch representation to component parts.

the President is required to keep "fully and currently informed of the intelligence activities of the United States."[336] That requirement grew out of the Intelligence Oversight Act of 1980, which reduced the number of committees that had to be notified of covert action from four to one in each chamber.[337] In so doing, the statute expressly deputizes HPSCI as the House's representative to the President. Informing that committee about covert intelligence activities is sufficient notice to the House to allow for oversight—even if the rest of the chamber remains in the dark. Indeed, the committee report on the 1980 Act expressly recognized that, with respect to its intelligence oversight function, Congress exercises its duties "through its intelligence oversight committees."[338] Yet the law delegates further still. Under "extraordinary circumstances," when the President determines it "essential to limit access" to information about a covert action, the President may report the action to only eight people: the Speaker and Minority Leader, the HPSCI Chair and ranking member, and their four Senate counterparts.[339] From the Bush Administration's NSA warrantless surveillance program[340] to the Obama Administration's Osama bin Laden raid,[341] the so-called "Gang of Eight" have been the only legislators briefed on some of our nation's most consequential covert programs.[342] That internal delegation from Congress to the Gang of Eight is enormously potent.

Other committee delegations are further afield from substantive policy decision-making. The House Committee on Ethics was codified in its modern form on April 13, 1967, in a vote of 400 to zero.[343] Since then, the Committee has carried out four major kinds of activities: (1) recommending to the full chamber disciplinary actions and modifications to the code of conduct; (2) investigating alleged ethics violations by members and staff; (3) reporting violations to state and federal officials; and (4) issuing ethics advisory opinions.[344] The Committee also serves as the "supervising ethics office" for the House with respect to a range

336. *See* 50 U.S.C. § 3091(a)(1).

337. *See* James S. Van Wagenen, *A Review of Congressional Oversight: Critics and Defenders*, CIA: CTR. FOR STUDY INTEL. (June 27, 2008, 7:48 AM), https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/97unclass/wagenen.html [https://perma.cc/FF76-T67D].

338. S. REP. NO. 96-730, at 5 (1980).

339. *See* 50 U.S.C. § 3093(c)(2).

340. *See* ALFRED CUMMING, CONG. RSCH. SERV., STATUTORY PROCEDURES UNDER WHICH CONGRESS IS TO BE INFORMED OF U.S. INTELLIGENCE ACTIVITIES, INCLUDING COVER ACTIONS 6–8 (Jan. 18, 2006), https://fas.org/sgp/crs/intel/m011806.pdf [https://perma.cc/F5VZ-FPMB] (describing assertions from legislators that the executive branch limited its briefing on the program to the Gang of Eight).

341. *See* JOHN ROLLINS, CONG. RSCH. SERV., R41809, OSAMA BIN LADEN'S DEATH: IMPLICATIONS AND CONSIDERATIONS 1 (2011), https://fas.org/sgp/crs/terror/R41809.pdf [https://perma.cc/QGT9-RLCQ] (describing how the Gang of Eight, but not others, were briefed on the covert activity).

342. Unusually, President Trump did not brief members on the October 26 Abu Bakr al-Baghdadi raid; a move commentators have argued was, if politically suspect, likely legal given the nature of the raid. *See* Robert Chesney, *Targeting al-Baghdadi and Selective Notification to Congress: Assessing the Issues*, LAWFARE (Oct. 27, 2019, 9:02 PM), https://www.lawfareblog.com/targeting-al-baghdadi-and-selective-notification-congress-assessing-issues [https://perma.cc/A9CW-LMLM].

343. 113 CONG. REC. 9448 (1967); *see also* JACOB R. STRAUS, CONG. RSCH. SERV., 98-15, HOUSE COMMITTEE ON ETHICS: A BRIEF HISTORY OF ITS EVOLUTION AND JURISDICTION 4 (2019), https://fas.org/sgp/crs/misc/98-15.pdf [https://perma.cc/EK3V-LSXX].

344. House Rules, *supra* note 54, R. XI.3.

of federal statutes, giving it responsibilities for overseeing the financial disclosure statements of members and staff (including from outside congressional offices)[345] and overseeing gift restrictions.[346] Following recommendations from the Committee, the House has reprimanded members for everything from failing to report financial holdings, to improperly accepting foreign gifts, to using official resources for personal travel.[347]

Perhaps most revealing of all is the fact that a House committee—with the blessing of the Speaker—may begin conducting an impeachment inquiry without a ratifying vote of the full chamber.[348] Chief Judge Beryl Howell's holding in *In re Application of the Committee on the Judiciary*[349] highlights a powerful parallel to BLAG's litigating authority. There, the court held that the House properly initiated an impeachment proceeding against the President without passing a formal authorizing resolution.[350] Historical practice, Chief Judge Howell found, did not require any such resolution.[351] Moreover, neither did the text of the Constitution or House Rules.[352] As a result, she found no such requirement.[353] The ruling underscores the breadth of action committees may take on behalf of the House, even without a formal delegation from the chamber.

In sum, House committees exercise an extraordinary range of delegated powers. As President Woodrow Wilson once observed, "Congress in its committee-rooms is Congress at work."[354] Yet the Constitution no more authorizes Congress to delegate to a committee the authority to enforce subpoenas, receive intelligence briefings on the chamber's behalf, or recommend member punishments than it authorizes Congress to delegate to a committee the authority to make litigating decisions. If the House may delegate to its committees the authority to issue subpoenas, it seems unobjectionable that the House might delegate to another committee authority to launch litigation to enforce them.

345. *See* 5 U.S.C. app. 4 § 101 (adopted as House Rule XXVI); *see also Committee Jurisdiction*, COMM. ON ETHICS, U.S. HOUSE OF REPRESENTATIVES, https://ethics.house.gov/about/committee-jurisdiction (last visited Jan. 21, 2021) [https://perma.cc/HY9X-FJXM].

346. 5 U.S.C. §§ 7351, 7353; *see also Committee Jurisdiction*, *supra* note 345.

347. *See* H.R. DOC. NO. 114–192, 114th Cong., at 985 (2017).

348. *See* ELIZABETH RYBICKI & MICHAEL GREENE, CONG. RSCH. SERV., R45769, THE IMPEACHMENT PROCESS IN THE HOUSE OF REPRESENTATIVES 2 (2019), https://fas.org/sgp/crs/misc/R45769.pdf [https://perma.cc/BF34-42FR].

349. *In re* Application of the Committee on the Judiciary, U.S. House of Representatives, For an Order Authorizing the Release of Certain Grand Jury Materials, 414 F. Supp. 3d 129 (D.D.C. 2019), *aff'd sub nom. In re* Comm. on the Judiciary, U.S. House of Representatives, 951 F.3d 589 (D.C. Cir. 2020), *judgment entered*, No. 19-5288, 2020 WL 1146808 (D.C. Cir. Mar. 10, 2020), and *cert. granted sub nom* Dep't of Justice v. House Comm. on the Judiciary, No. 19-1328, 2020 WL 3578680 (U.S. July 2, 2020).

350. *Id.* at 167–68.

351. *Id.* at 168.

352. *Id.* at 169.

353. *Id.*

354. WOODROW WILSON, CONGRESSIONAL GOVERNMENT 69 (Johns Hopkins Univ. Press 1981) (1885); *accord* Roberts, *supra* note 220, at 543.

3. Delegation to Other Officers

The House also delegates a range of functions to officials outside of its elected members. Officers including the Clerk of the House, the Chief Administrative Officer, and the Chaplain perform valuable services under the aegis of the chamber.[355] Moreover, several important internal House organizations play important roles in the functioning of the House. The House Inspector General, Office of Congressional Ethics, and Office of Legislative Counsel are illustrative examples.[356] All reveal just how varied the House's delegations are.

Begin with the House's officers. The Constitution specifies that "[t]he House of Representatives shall chuse their Speaker and other Officers," but specifies neither what non-Speaker roles shall exist, nor (as with the Speaker) anything about their qualifications or duties.[357] Today, those officers are the Clerk, Sergeant-at-Arms, Chief Administrative Officer, and Chaplain[358]—and previously included a Doorkeeper and Postmaster, until both were abolished in the 1990s.[359] Interestingly, while the Speaker has always been chosen from the contemporary House membership, none of the other officers have concurrently served in the House; a result not preordained by (or even intuitive from) the Constitutional text, though seemingly settled by practice.[360]

Another threshold issue of note: House Rule II allows the Speaker to unilaterally remove all officers other than the Chaplain. [361] That power appears to sit rather uneasily with the constitutional text. If the Constitution vests in the House the power to choose its officers, on what Constitutional authority may the House vest in one officer—the Speaker—authority to override the House's choice?[362] The answer must be the Rulemaking Clause. Even recognizing the basic constitutional distinction between appointment and removal,[363] that practice requires accepting a muscular form of the Rulemaking Clause, one that allows the House to delegate even within functions the Constitution implicitly grants the chamber as a whole.

Removal aside, those officers bear responsibility for a range of critical legislative, administrative, and support functions. The Clerk of the House certifies the passage of legislation and presents House-originated bills to the President;

355. These examples are illustrative: several other officers and officials support the House in its work. *See Officers and Organizations of the House*, U.S. HOUSE OF REPRESENTATIVES, https://www.house.gov/the-house-explained/officers-and-organizations (last visited Jan. 21, 2021) [https://perma.cc/CU5V-CB7B].

356. For a list of additional House organizations, see *id.*

357. U.S. CONST. art. I, § 2, cl. 5.

358. House Rules, *supra* note 54, R. II.1–5 (establishing the four officers, Clerk, Sergeant-at-Arms, Chief Administrative Officer, and Chaplain positions).

359. *See* H.R. DOC. NO. 114–192, 114th Cong., at 13 (2017); *see also Other Officers of the House*, U.S. HOUSE OF REPRESENTATIVES, https://history.house.gov/Institution/Origins-Development/Other-Officers-of-the-House/ (last visited Jan. 21, 2021) [https://perma.cc/5GGP-6T7W].

360. *See* H.R. DOC. NO. 114–192, 114th Cong., at 13(2017).

361. House Rules, *supra* note 54, R. II.1 ("The Clerk, Sergeant-at-Arms, and Chief Administrative Officer may be removed by the House or by the Speaker.").

362. *Cf.* Myers v. United States, 272 U.S. 52, 106, 117 (1926).

363. *Cf.* Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2224–38 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part) (elaborating this distinction within Article II).

compiles for members lists of reports agencies must make to Congress; manages a member's office upon their death, resignation, or expulsion; and presides over the election of a Speaker.[364] The Sergeant-at-Arms maintains order on the House side of the United States Capitol, oversees the House floor and galleries, and issues identification badges and pins.[365] One point of texture: per House rules, he is also "authorized and directed" to fine legislators who take photos or video recordings on the House floor—$500 for a first offense, and a cool $2,500 for any others.[366] The Chief Administrative Officer manages all acquisitions, information technology, and financial support for Members and their staffs, among other duties.[367] And the Chaplain has one job: to "offer a prayer at the commencement of each day's sitting of the House."[368] In practice, Chaplains also provide pastoral counseling to members and their staffs, coordinate the visiting of guest chaplains, and perform marriage and funeral services for House members and their staffs.[369] These officers thus exercise a wide range of duties, unspecified in the Constitution, some even involving imposing significant burdens ($2,500 per selfie)[370] on legislators.

Several other offices within the House also represent important internal delegations. The House Office of the Inspector General audits House officers and other officials on behalf of the House and submits reports to the Speaker and other leaders on financial regularities or other violations.[371] The Office of Congressional Ethics exercises unilateral authority to decide whether to investigate allegations of misconduct against House Members, officers, and staff—pursuant to that power, it holds hearings, reviews evidence, and can refer information to state and federal authorities.[372] And perhaps most substantively of all, the Office of Legislative Counsel provides technical drafting services to members and committees;[373] scholars have emphasized the "centrality of the [office] in drafting statutory text" as "critical to understanding how statutes should be interpreted."[374] Indeed, that office often writes the very text that makes its way into

364. House Rules, *supra* note 54, R. II.2; *see also* IDA A. BRUDNICK, CONG. RSCH. SERV., RL33220, SUPPORT OFFICES IN THE HOUSE OF REPRESENTATIVES: ROLES AND AUTHORITIES 3, 6, 14 (2013), https://fas.org/sgp/crs/misc/RL33220.pdf [https://perma.cc/B2HH-SVH2].

365. House Rules, *supra* note 54, R. II.3.

366. *Id.* R. II.3(g).

367. *Id.* R. II.4; *see also About*, CHIEF ADMIN. OFFICER, https://cao.house.gov/about (last visited Jan. 21, 2021) [https://perma.cc/KVM5-WVWT].

368. House Rules, *supra* note 54, R. II.5.

369. *See History of the Chaplaincy*, OFF. OF THE CHAPLAIN, U.S. HOUSE OF REPRESENTATIVES, https://chaplain.house.gov/chaplaincy/history.html (last visited Jan. 21, 2021) [https://perma.cc/RRV4-M294].

370. House Rules, *supra* note 54, R. II.1–5.

371. *Id.* R. II.6. *See generally* JACOB R. STRAUS, CONG. RSCH. SERV., RL 7-5700, OFFICE OF THE HOUSE OF REPRESENTATIVES INSPECTOR GENERAL (2018), https://fas.org/sgp/crs/misc/IF11024.pdf [https://perma.cc/7DGW-RBLS].

372. *See* JACOB R. STRAUS, CONG. RSCH. SERV., R40760, HOUSE OFFICE OF CONGRESSIONAL ETHICS: HISTORY, AUTHORITY, AND PROCEDURES 15–22 (2019), https://fas.org/sgp/crs/misc/R40760.pdf [https://perma.cc/N4V6-ZY5H].

373. *See History and Charter*, HOUSE OFF. OF THE LEGIS. COUNS., https://legcounsel.house.gov/about/history-and-charter (last visited Jan. 21, 2021) [https://perma.cc/A7JG-7K4G].

374. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 908 (2013). The

the U.S. Code—the ultimate delegation of all.[375] These offices thus all exercise important legislative powers pursuant to internal delegations from the House.[376]

What to make of all this delegation? Again, it seems at once both ordinary and extraordinary. On the one hand, the House needs a professional support cadre to function. Yet on the other, that cadre exercises a remarkably broad array of powers—everything from writing legislative text to fining members for photography. And indeed, the House has given the Speaker power to fire three of the House's officers, despite constitutional text that commits the selection of those officers to the House itself.[377] The sense that emerges from this analysis is a functionalist comfort with extensive delegation, a muscular Rulemaking Clause that tiptoes right up to the Constitution's other lines.

4. Delegation to Legislative Agencies

Of particular consequence, the House also delegates substantial authority to subordinate legislative agencies. Termed "Legislative Branch Partners,"[378] these sister agencies range from the Library of Congress and the Government Printing Office to the U.S. Capitol Police.[379] This Section focuses on the three legislative branch agencies: the Congressional Research Service ("CRS"), Congressional Budget Office ("CBO"), and Government Accountability Office ("GAO").[380] All three represent major intra-congressional delegations.[381]

The appointment processes for the heads of these agencies vary greatly. The CRS Director is appointed by the Librarian of Congress, herself an officer appointed by the President and confirmed by the Senate.[382] The CBO Director is appointed by the Speaker and President *pro tempore* of the Senate after considering recommendations from their respective budget committees.[383] And the Comptroller General, the head of GAO, is appointed by the President and confirmed by the Senate from a list of names supplied by a congressional commission.[384] One of the three is appointed by a House Officer, another is appointed

Office also bears sole responsibility for drafting and promulgating the House's legislative drafting manual, the Guide to Legislative Drafting, a document that guides legislative drafts and at times courts. *See generally* BJ Ard, Comment, *Interpreting by the Book: Legislative Drafting Manuals and Statutory Interpretation*, 120 YALE L.J. 185 (2010).

375. Cross & Gluck, *supra* note 275, at 1563–67.

376. For a more comprehensive examination, see *id.*

377. Of course, selection and removal are very different powers, as the Supreme Court's doctrine on principal officer removal illustrates. *See generally* Morrison v. Olson, 487 U.S. 654, 678–82 (1988) (discussing selection and termination of independent counsel).

378. *See Legislative Branch Partners*, U.S. HOUSE OF REPRESENTATIVES, https://www.house.gov/the-house-explained/legislative-branch-partners (last visited Jan. 21, 2021) [https://perma.cc/ANX4-C5ZM].

379. *Id.*

380. *See* BRUDNICK, *supra* note 364, at 1–2.

381. Cross & Gluck, *supra* note 275, at 1544–45.

382. 2 U.S.C. § 166(c)(1). The Librarian of Congress is appointed by the President with the advice and consent of the Senate pursuant to 2 U.S.C. § 136-1(a).

383. 2 U.S.C. § 601(a)(2).

384. 31 U.S.C. § 703(a).

by House and Senate leadership, and the third is appointed by the President from candidates Congress recommends.

Begin with the Congressional Research Service, a legislative agency whose mission is to "provid[e] comprehensive and reliable legislative research analysis" to Congress.[385] To that end, CRS does much more than author its ubiquitous (and invaluable) reports. It also provides custom services to individual member offices, including telephone and email responses, in-person briefings, and confidential memoranda.[386] The agency's 2,741 confidential memoranda from FY2018 represent nearly triple the 1,036 new general-distribution reports CRS authored that year.[387] In total, the agency managed 700 employees and more than $116 million in appropriated funds in FY2018.[388] Indeed, 99% of all member and committee offices received some form of custom CRS research service that year.[389] CRS thus operates as a full research center under the purview of the legislature. For that reason, it is often described as Congress's "think tank."[390]

The Congressional Budget Office represents an even more substantial internal legislative delegation. Congress's budgetary and economic analysis agency, CBO produces reports and cost estimates on proposed legislation.[391] One principal impact of CBO's budget scoring comes through a budget process known as "Pay-As-You-Go," codified in House Rule XXI.[392] Under that rule, "it shall not be in order to consider" legislation that would on net increase the federal deficit over a six- or eleven-year period.[393] Critically, Congress makes that determination based on "estimates supplied by the Congressional Budget Office."[394] In effect, then, CBO's estimates can functionally veto legislation: the office has the power to determine that a bill would add to the deficit, rendering that bill unable to proceed. An extraordinary power, which legislators try to manipulate: Republican lawmakers often pass rules requiring CBO to use certain measurement techniques known as "dynamic scoring" that favor tax cuts, and

385. *History and Mission*, LIBRARY OF CONG. (Nov. 15, 2011), http://www.loc.gov/crsinfo/about/history.html [https://perma.cc/55X7-XQRL].

386. LIBR. OF CONG.: CONG. RSCH. SERV., CRS ANNUAL REPORT FISCAL YEAR 2018 13 (2019), http://www.loc.gov/crsinfo/about/crs18_annrpt.pdf [https://perma.cc/7WQY-5RXZ].

387. *Id.* at 7.

388. *Id.* at 94.

389. *Id.* at 7.

390. See STEPHEN W. STATHIS, CONG. RSCH. SERV., CRS AT 100: THE CONGRESSIONAL RESEARCH SERVICE 25 (2014) https://stacks.stanford.edu/file/druid:qj786rq5965/CRS-at-100.pdf [https://perma.cc/8XZT-FQU6].

391. *Introduction to CBO*, CONG. BUDGET OFF., https://www.cbo.gov/about/overview (last visited Jan. 21, 2021) [https://perma.cc/29J7-QE8W].

392. House Rules, *supra* note 54, R. XXI.10. "Pay-As-You-Go" has also been codified in statute since 2010. *See* 2 U.S.C. § 933(a)(1)(A)–(B).

393. House Rules, *supra* note 54, R. XXI.10(a)(1); *see* BILL HENIFF JR., CONG. RSCH. SERV., R41510, BUDGET ENFORCEMENT PROCEDURES: HOUSE PAY-AS-YOU-GO (PAYGO) RULE 1, 9 (2019) https://fas.org/sgp/crs/misc/R41510.pdf [https://perma.cc/AK4W-RJUX].

394. House Rules, *supra* note 54, R. XXI.10(a)(2).

Democratic Houses repeal them.[395] But at base, this back-and-forth illustrates the significance of the tasks the House delegates to CBO.

The House's delegations to the Government Accountability Office are perhaps most interesting of all. Rooted in the House's long-recognized "power of inquiry" as an "essential and appropriate auxiliary to the legislative function,"[396] GAO serves as Congress's watchdog agency. Its many duties include monitoring government spending and authoring reports for Congress.[397] But some of its duties involve making substantive determinations on behalf of the House. The Comptroller General, for instance, by statute "shall settle all accounts of the United States Government"[398]— the word "settle" meaning authoritatively determine the balance of those accounts.[399] Indeed, those determinations are binding on the executive branch.[400] The House, in other words, delegates to the Comptroller General and GAO the authority to make legally binding judgments about the state of the government's coffers.

The impoundment control process illuminates the importance of this authority. The Impoundment Control Act of 1974[401] governs the process by which the President can propose to rescind funding appropriated by Congress.[402] When Congress appropriates money, the President generally has to spend it[403]—just as the President has to implement any other law. But under the Act, the President is authorized, in certain circumstances, to "impound," or not spend, appropriated funds.[404] President Trump's failure to spend money appropriated to Ukrainian military aid represents an unusually high-profile example of such impoundment.[405]

395. *See generally* JAMES V. SATURNO & MEGAN S. LYNCH, CONG. RSCH. SERV., R45552, CHANGES TO HOUSE RULES AFFECTING THE CONGRESSIONAL BUDGET PROCESS INCLUDED IN H. RES. 6 (116TH CONGRESS) 1 (2019), https://fas.org/sgp/crs/misc/R45552.pdf [https://perma.cc/P7J3-KGCZ].

396. *See* McGrain v. Daugherty, 273 U.S. 135, 174 (1927).

397. *See About GAO: Overview*, U.S. GOV'T ACCOUNTABILITY OFF., https://www.gao.gov/about/ (last visited Jan. 21, 2021) [https://perma.cc/HD4N-PLS4]; *see also About GAO: What GAO Does*, U.S. GOV'T ACCOUNTABILITY OFF, https://www.gao.gov/about/what-gao-does/ (last visited Jan. 21, 2021) [https://perma.cc/Z6UW-5EHM].

398. 31 U.S.C. § 3526(a); *see also* U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-464SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 12 (4th ed., 2016) [hereinafter GAO, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW], https://www.gao.gov/assets/680/675699.pdf [https://perma.cc/QNW3-F3SN].

399. *See* Illinois Surety Co. v. United States *ex rel.* Peeler, 240 U.S. 214, 219–21 (1916); *see also* GAO, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, *supra* note 398, at 12.

400. GAO, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, *supra* note 398, at 12–13 (citing 31 U.S.C. § 3526(d)); St. Louis, Brownsville & Mex. R. Co. v. United States, 268 U.S. 169, 174 (1925); In the Matter of Implementation of Arb. Award, 54 Comp. Gen. 921, 926 (1975); Pay Status of Enlisted Man Restored to Naval Serv.–Question for Comptroller Gen., 33 Op. Att'y Gen. 268, 271 (1922).

401. Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 332 (codified as amended at 2 U.S.C. §§ 681–688 (1982)).

402. *See* U.S. GOV'T ACCOUNTABILITY OFF., B-330330, IMPOUNDMENT CONTROL ACT–WITHHOLDING OF FUNDS THROUGH THEIR DATE OF EXPIRATION 1 (2018), https://www.gao.gov/assets/700/695889.pdf. [https://perma.cc/7L4J-CCSZ].

403. *Id.* at 7.

404. *Id.* at 3; *see also* Irwin R. Kramer, *The Impoundment Control Act of 1974: An Unconstitutional Solution to a Constitutional Problem*, 58 UMKC L. REV. 157, 165–67 (1990) (summarizing Act).

405. *See* Alan B. Morrison, *INSIGHT: Trump Violation Puts Spotlight on Impoundment Control Act*, BLOOMBERG L. (Oct. 4, 2019, 3:01 AM), https://news.bloomberglaw.com/white-collar-and-criminal-law/insight-

GAO plays a central role within the Impoundment Control Act. By law, the Comptroller General is expressly authorized to file a civil action to compel agencies to spend appropriated funds.[406] GAO also issues legal opinions applying the Impoundment Control Act in various factual situations.[407] In December 2017, for instance, GAO determined that the Trump administration improperly failed to spend $91 million appropriated to research programs at the Department of Energy.[408] That determination represented a definitive finding that the executive had violated the law, and the Department of Energy began funding the program as a result.[409] GAO similarly in 2018 released a legal opinion that limited the time frame within which a president can make a recession request,[410] a finding that was welcomed by the House Budget Committee Chairman and Ranking Member.[411]

The implication is that GAO, a legislative agency, may make judgments about executive spending that bind the executive and legislative branches. It does so on behalf of Congress, pursuant to Congress's appropriations power.[412] But it is not Congress. And indeed, members of Congress cite its rulings as though they come from a court.[413] That power, to resolve spending disputes on Congress's behalf, represents just one of the substantial delegations of power Congress gives to its independent agencies. To be clear, the comparison is still to the internal

trump-violation-puts-spotlight-on-impoundment-control-act [https://perma.cc/7AJF-4CM3]; *see also* Jacques Singer-Emery, Margaret Phyle & Jack Goldsmith, *More on the Role of OMB in Withholding Ukrainian Aid*, LAWFARE (Oct. 23, 2019, 2:39 PM), https://www.lawfareblog.com/more-role-omb-withholding-ukrainian-aid [https://perma.cc/V83T-6AFG].

406. 2 U.S.C. § 687 ("expressly empower[ing]" the Comptroller General "to bring a civil action" to compel an agency to release for use the improperly withheld funds); *see* Bowsher v. Synar, 478 U.S. 714, 734 n.9 (1986) (noting that since 1921 the Comptroller General has held a statutory "duty to bring suit to require release of impounded budget authority").

407. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFF., B-329092, IMPOUNDMENT OF THE ADVANCED RESEARCH PROJECTS AGENCY–ENERGY APPROPRIATION RESULTING FROM LEGISLATIVE PROPOSALS IN THE PRESIDENT'S BUDGET REQUEST FOR FISCAL YEAR 2018 1 (2017).

408. *See id.* at 1–2; *see also* Steven Mufson, *The Trump Administration Wrongfully Withheld Funds from a Popular Energy Program, a Federal Watchdog Rules*, WASH. POST (Dec. 12, 2017), https://www.washingtonpost.com/business/economy/the-trump-administration-wrongfully-withheld-funds-from-a-popular-energy-program-a-federal-watchdog-rules/2017/12/12/67606a24-d9f5-11e7-b1a8-62589434a581_story.html [https://perma.cc/6ZFP-DKYX].

409. *See, e.g.*, *Cantwell Statement on $91 Million Illegally Withheld from Advanced Research Projects Agency-Energy*, S. COMM. ON ENERGY & NAT. RES. (Dec. 12, 2017), https://www.energy.senate.gov/public/index.cfm/2017/12/cantwell-statement-on-91-million-illegally-withheld-from-advanced-research-projects-agency-energy [https://perma.cc/ELG6-47VK] ("DOE has resolved the issue after the GAO raised it, and ARPA-E is releasing a funding opportunity to start the competitive process to award the funds.").

410. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 402, at 12.

411. *See Yarmuth & Womack Respond to GAO's Legal Opinion Confirming Congress's Power of the Purse,* HOUSE COMM. ON BUDGET (Dec.10, 2018), https://budget.house.gov/news/press-releases/yarmuth-womack-respond-gao-s-legal-opinion-confirming-congress-s-power-purse [https://perma.cc/642J-QZBG].

412. *See generally* U.S. CONST. art. I, § 9, cl. 7.

413. *See, e.g.*, *Yarmuth & Womack Respond to GAO's Legal Opinion Confirming Congress's Power of the Purse*, *supra* note 411.

delegations canvassed above; delegations to non-executive agencies raise separate constitutional questions.[414] But it is noteworthy that Congress may, without serious question, delegate even its most significant powers to its sub-agencies.[415]

5. Takeaways

This tour of House internal delegation offers three principal lessons. First and foremost, it reveals that the House internally delegates, all the time. That fact is an inescapable reality of modern legislative practice. In some ways, it seems necessary: the House could hardly function were it required to collectively decide everything from conference committee members to its morning prayer. Yet it feels like a stretch to say efficient legislative operations require empowering the Sergeant-at-Arms to fine members for on-floor photography, or outsourcing national security briefings to just four representatives. The Rulemaking Clause, though, does not only authorize the House to create rules *necessary* to a functioning body: it gives the House free reign to "determine the Rules of its Proceedings."[416] So on substantive areas from committee assignments to budget-scoring procedures, the House regularly delegates elements of its authority.

Second, it highlights the wide range of actors to whom the House delegates. The House delegates to its Speaker, its committees (and committee chairs), non-member officers within the House, and its legislative agencies.[417] The substance of these delegations also varies widely. This survey at base reveals that the House does more than just outsource administrative management to a few internal officers: it oversees a sprawling structure of varied delegations to numerous officials elected and non-elected, inter- and intra-House, political and career.[418] As Professors Abbe Gluck and Jesse Cross describe, it leads a full-fledged bureaucracy.[419]

Finally, those delegations often brush up against other express constitutional provisions. Even recognizing the constitutional distinction between appointment and removal, the Speaker's delegated authority to remove other officers of the House sits uncomfortably with the Constitution's express declaration that the "House" shall choose its officers. But the functionalist imperative to make the House work, and not require a full vote of the chamber for every single administrative decision, wins out in the end. So too with CRS and GAO, which exercise powers (budgetary and investigative) the Constitution arguably delegates to the chamber—and, in GAO's case, does so in express confrontation with

414. *See generally* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 672, 718 (1997).

415. *See id.* at 700.

416. U.S. CONST. art. I, § 5, cl. 2; *cf.* McCulloch v. Maryland, 17 U.S. 316, 323–26 (1819) (offering expansive read of the Constitution's Necessary and Proper Clause and noting that "if Congress could use no means but such as were absolutely indispensable to the existence of a granted power, the government would hardly exist").

417. *See* BRUDNICK, *supra* note 364, at 1.

418. *See generally id.* (describing the relationships among the different roles and functions performed by daily operation offices and organizational authorities in the House).

419. *See generally* Cross & Gluck, *supra* note 275.

other branches. The chamber's ability to delegate those powers to its subcomponents has become a given of modern legislative practice.

The inescapable conclusion from this tour is that the House's authority to create its own rules is quite broad. Massive portions of the chamber's business are done off the House floor, without full chamber votes. Indeed, it is no stretch to say that the entire modern House is built on internal delegation.

C. BLAG Under Those Limits

This examination of the Rulemaking Clause practice leads us back to the question of BLAG's legality. On one view, BLAG is basically the same as all the above delegations. The Rulemaking Clause allows the House to determine how it sues no less than it allows the House to empower committees to issue subpoenas, the Sergeant at Arms to fine on-floor photography, and GAO to adjudicate impoundment disputes.[420] BLAG, on this view, is of a piece with all these delegations—just another intra-House rule that allows the chamber to function efficiently.

On the other, BLAG is a qualitatively different species of delegation. It implicates the House's role in inter-branch disputes and vests the power to directly confront the executive in the hands of just five members. Textually, the House's power to determine "its" proceedings might reach only internal procedural matters, not those that implicate external actors. Moreover, unlike other delegations, BLAG arguably implicates Article III standing: far from circular logic, the Article III requirement of legislative authorization does real work in limiting courts to hearing only cases where the full chamber has voted to sue. This view understands BLAG to be fundamentally different from the House's other delegations, and impermissible where the others are valid.

To be sure, BLAG is a distinctive arrangement. But as this Part has revealed, it falls within the mainstream of House practice. As discussed, the House routinely issues legally enforceable subpoenas approved only by a committee (or a chair).[421] Authorizing enforcement of those subpoenas seems an ancillary power: if the House can delegate subpoena issuance—as *Trump v. Mazars* recently re-affirmed it can[422]—it seems difficult to argue that delegating subpoena enforcement presents a qualitatively different type of delegation.

Moreover, the House delegates perhaps even more substantive powers, including those that implicate other branches.[423] As discussed, it authorizes CBO to effectively create veto-gates to legislation and authorizes GAO to authorita-

420. *See* Grove & Devins, *supra* note 18, at 583.

421. *See* Koempel, *supra* note 331, at 2–6.

422. Trump v. Mazars USA, LLP, 940 F.3d 710, 748 (D.C. Cir. 2019); *see also supra* notes 232–61 and accompanying text.

423. TODD GARVEY & DANIEL J. SHEFFNER, CONG. RSCH. SERV., R45442, CONGRESS'S AUTHORITY TO INFLUENCE AND CONTROL EXECUTIVE BRANCH AGENCIES 1 (2018), https://fas.org/sgp/crs/misc/R45442.pdf [https://perma.cc/6KQ6-T8DY].

tively determine the legislature's position on inter-branch disputes (among others).[424] Is BLAG significantly more disruptive to the inter-branch design than either of these two delegations? And again, the Court's interpretation of Article III standing poses no independent bar: it generally requires the House authorize suit, but is silent as to *how* the House must do so.[425] BLAG is thus of a piece with the litany of examples discussed above, which collectively illustrate the scale and normalcy of the House's internal delegations.

These are close questions implicating complex inter-branch dynamics. Perhaps the constitutional text constrains the House's flexibility more with external-facing procedures than with purely internal matters. Theorists might also question whether the Rulemaking Clause itself authorizes all this internal delegation, or whether it has become lawful through some form of constitutional liquidation.[426] But as a working answer, it seems that BLAG falls well within the mainstream of the House's current practice.

D. Normative Stakes

The discussion of current legislative delegation begins to illustrate why the House as a normative matter should be able to vest BLAG with the power to authorize suits if it so wishes. It is worth pausing to consider those normative implications. There are costs and benefits to living in a world where BLAG can authorize suit on behalf of the House. But on the whole, the calculus is close enough that it seems desirable for the House to strike that balance for itself.

First, the BLAG delegation preserves precious floor time, allowing the House to make litigation decisions without a lengthy floor fight. This consideration cuts both ways. Some argue a lengthy floor process should be necessary, as the alternative allows the House to sue without thoroughly weighing its decision.[427] But this argument demands too much. The goal of authorization by the House, as the D.C. Circuit noted in *United States v. AT&T*,[428] is to "safeguard against aberrant subcommittee or committee demands."[429] Authorization from BLAG provides such a safeguard. A matter may be fully considered without involving the entire chamber, as is routine in the House; recall that just four members weigh information from the President regarding our nation's most sensitive military operations. To be sure, there are important trade-offs with the House litigating at all. But if the House is to be in court, BLAG seems normatively well-suited to take it there—or it at least seems normatively reasonable to allow the House to make that decision for itself .[430]

424. *See* SATURNO & LYNCH, *supra* note 395, at 3; *What GAO Does*, *supra* note 397.

425. As is the Constitution, in contrast to *Chadha*. *See supra* note 271 and accompanying text.

426. *See generally* Baude, *supra* note 274, at 3, 60 (analyzing this distinction).

427. *Cf.* Cummings v. Murphy, 321 F. Supp. 3d 92, 115 (D.D.C. 2018) ("Insisting on approval from the institution as a whole ensures that only fully considered inter-branch conflicts enter the judicial realm.").

428. 551 F.2d 384 (D.C. Cir. 1976).

429. *Id.* at 393 n.16; *see also id.* at 115 ("[R]equiring authorization protects Congress' institutional concerns from the caprice of a restless minority of Members.").

430. That is not to say there might not be limits on how the House might delegate this authority. Echoing Justice Souter's *Nixon* concurrence, for instance, the House perhaps might not lawfully make litigating decisions

And indeed, there are significant benefits to not using scarce floor time on litigation debates. "Floor time," CRS notes, "is a precious commodity in the workload-packed and deadline-driven environment on Capitol Hill."[431] Thousands of bills are introduced each Congress, and the House "simply lacks the time" to consider each.[432] Due to the sheer size of the body and the volume of issues it considers, opportunities to speak on the House floor "are restricted and highly structured."[433] Against this backdrop of a busy House triaging demands on its floor time, it seems reasonable that the House should seek an efficient way to authorize litigation. One congressional aide offered just this rationale: "There's a concern that there could be a lot of floor time eaten up if we handle these one at a time," the aide told Politico.[434] Realities of the already-packed congressional calendar thus militate towards allowing the House to set up expeditious decision-making processes, particularly as those processes preserve deliberative values.

Second, the House needs a litigation power that can operate on a timeline reasonably comparable to that of the executive branch. The House isn't the only litigious government actor these days. President Trump frequently turned to the courts for recourse and has sued everyone from the House Ways and Means Committee to the New York District Attorney in attempts to block the release of his tax information.[435] Given the President generally can act more quickly than Congress, it makes sense that the House should be able to act as comparably quickly as possible.[436] This is particularly true in an era where the executive has arrogated to itself more and more power, and Congress's institutional authority has steeply declined.[437] The House needs as many tools in its toolbelt as possible to counter this trend. The debate over the proper balance of powers between Congress and the executive branch has raged for years and lies beyond the scope of this Article. Yet normatively it seems sensible that the House should seek (and have) an expeditious way to challenge the executive in court.

based on a coin toss. *Cf.* Nixon v. United States, 506 U.S. 224, 253–54 (1993) (Souter, J., concurring) (concluding the Senate could not lawfully impeach based on a coin toss). But BLAG's bipartisan composition, drawn from elected House leadership, seems about as representative of the body as such a body could be. Those concerns thus remain for another day.

431. CONG. RSCH. SERV., R44362, POST-COMMITTEE ADJUSTMENT IN THE MODERN HOUSE: THE USE OF RULES COMMITTEE PRINTS 3 (2016), https://www.everycrsreport.com/files/20160203_R44362_3c11044d1563beb7b11ff3cdcb1146d7f4033d51.pdf [[https://perma.cc/PXK6-SXED].

432. *Id.*

433. ELIZABETH RYBICKI, CONG. RSCH. SERV., RS22991, SPEAKING ON THE HOUSE FLOOR: GAINING TIME AND PARLIAMENTARY PHRASEOLOGY 1 (2018), https://fas.org/sgp/crs/misc/RS22991.pdf [https://perma.cc/K44R-MJ62].

434. Kyle Cheney & Andrew Desiderio, *House Dem Leaders to Give Chairmen Broad Power to Enforce Subpoenas*, POLITICO (June 6, 2019, 2:23 PM), https://www.politico.com/story/2019/06/06/house-chairmen-sue-trump-administration-1356454 [https://perma.cc/2RUD-GL69].

435. *See* Trump v. Mazars USA, LLP, 940 F.3d 710, 714 (D.C. Cir. 2019).

436. *Cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 629 (1952) (Douglas, J., concurring) ("The President can act more quickly than the Congress.").

437. *See generally* THOMAS E. MANN & NORMAN J. ORENSTEIN, THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK 16 (2006). *Cf.* CHAFETZ, *supra* note 53, at 35–42 (challenging argument that executive will inevitably accrue power).

Finally, there are political consequences. Some argue that BLAG primarily serves to protect House members from having to take politically unpopular votes: by delegating that responsibility to House leadership, members don't have to accept responsibility for the House's litigating decisions.[438] This argument rests on questionable assumptions about congressional political dynamics. Most obviously, it seems unclear that litigation is unpopular. Democrats' recent suit over border wall appropriations, for instance, provided red meat for the Democratic base—indeed, a poll from the same month as the House filed its border wall lawsuit found that nearly two-thirds of all Americans opposed the President's emergency declaration.[439] Some have even accused the House majority of engineering these suits for overtly political reasons.[440] Moreover, it does not seem problematic that the House should structure its affairs for political reasons. Political expediency nowhere appears as an independent limit on the rulemaking power—and if it did, wide swaths of the House rules might merit fresh scrutiny.

In sum, BLAG represents a reasonable balance of efficiency and accountability.[441] For the same reasons the Rulemaking Clause makes sense, so too does BLAG. The House has decided it prizes speed and efficiency in making litigating decisions, and so has voted to empower its leaders to make those decisions. The House remains free to alter BLAG's structure: recall the minority amendment that would have constituted the group as a nine-member, unanimity-requiring body.[442] Nonetheless, though Article III separation of powers concerns linger in the background, that full chamber delegation decision seems to be a normatively reasonable exercise of the House's prerogative to structure its affairs.

E. Who Decides?

Behind the question of whether the House's delegation is constitutional lies another, of who decides. The House has an independent legal duty to ensure the constitutionality of its actions.[443] But if the House determines it may constitute BLAG under its rulemaking authority, can the courts judge the validity of that choice? The answer turns on the application of the Court's political question doctrine. This Section concludes the doctrine likely would allow a court to find Article III prohibits BLAG from authorizing suits—but might otherwise bar courts from judging the validity of the assignment.

438. *See* Brief in Opposition to Motion to Dismiss at 14, Comm. on Ways & Means, U.S. House of Representatives v. U.S. Dep't of the Treasury (D.D.C. Sept. 23, 2019) (No. 1:19-cv-01974-TNM).

439. *See* Gary Langer, *64% Oppose Trump's Move to Build a Wall; On Asylum, Just 30% Support Stricter Rules*, ABC NEWS (Apr. 30, 2019, 6:00 AM), https://abcnews.go.com/Politics/64-oppose-trumps-move-build-wall-asylum-30/story?id=62702683 [https://perma.cc/8A3B-N7XC].

440. *See* Jeff Stein & Rachael Bade, *House Democrats Sue Trump Administration Over President's Tax Returns*, WASH. POST (July 2, 2019, 3:29 PM), https://www.washingtonpost.com/business/2019/07/02/house-democrats-sue-trump-administration-over-presidents-tax-returns/ [https://perma.cc/PY7V-62YE] (noting some characterize the tax returns lawsuit "as a partisan maneuver to embarrass" the President).

441. The normative merits of legislative standing more broadly are beyond the scope of this analysis.

442. *See supra* notes 29–38 and accompanying text.

443. U.S. CONST. art VI ("The Senators and Representatives before mentioned . . . shall be bound by Oath or Affirmation, to support this Constitution . . . .").

The political question doctrine, like standing, is part of "the concept of justiciability, which expresses the jurisdictional limitations imposed on the federal courts by the 'case or controversy' requirement of Art[icle] III."[444] The "contours of the doctrine are murky and unsettled,"[445] and determining whether the doctrine applies requires "a delicate exercise in constitutional interpretation."[446] In its canonical formulation, the Supreme Court in *Baker v. Carr*[447] articulated six factors "[p]rominent on the surface"[448] of cases involving nonjusticiable political questions:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[449]

Although the first two factors are considered "the most important,"[450] only one of the six need be present for a case to be nonjusticiable under the doctrine.[451] Recent cases have also indicated the first two factors might be dispositive, with the others dropping from view.[452]

The Rulemaking Clause represents a "textually demonstrable constitutional commitment of the issue" to the House.[453] Indeed, in *Ballin* itself, the Court noted that "within these limitations all matters of method are open to the determination of the house . . . and, within the limitations suggested, absolute and beyond the challenge of any other body or tribunal."[454] The D.C. Circuit has affirmed those boundaries, holding that judicial review of House decisions under the Rulemaking Clause is only "appropriate where rights of persons other than members of Congress are jeopardized by congressional failure to follow its own procedures."[455] Where the House violates neither other constitutional provisions nor

444. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 215 (1974). For a more comprehensive overview of the doctrine, see LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW § 3–13 (3d ed. 2000).

445. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 803 n.8 (D.C. Cir. 1984) (Bork, J., concurring); Doe v. Bush, 323 F.3d 133, 140 (1st Cir. 2003) ("The political question doctrine . . . is a famously murky one.").

446. Baker v. Carr, 369 U.S. 186, 211 (1962).

447. *Id.* at 217.

448. *Id.*

449. *Id.*

450. Harbury v. Hayden, 522 F.3d 413, 418 (D.C. Cir. 2008).

451. Schneider v. Kissinger, 412 F.3d 190, 194 (D.C. Cir. 2005).

452. *See generally* Zivotofsky v. Clinton, 566 U.S. 189, 197 (2012) (applying only first two factors).

453. *Baker*, 369 U.S. at 217.

454. United States v. Ballin, 144 U.S. 1, 5 (1892).

455. Metzenbaum v. FERC, 675 F.2d 1282, 1287 (D.C. Cir. 1982) (citing Yellin v. United States, 374 U.S. 109 (1963); Christoffel v. United States, 338 U.S. 84 (1949); United States v. Smith, 286 U.S. 6 (1932)).

fundamental individual rights, the Constitution thus commits to the House and the House alone discretion to fashion its rules.[456]

The Supreme Court's analysis of textual commitment to congressional discretion in the impeachment context reinforces this analysis. In *Nixon v. United States*,[457] the Court considered whether the Senate could properly use a committee to hold an impeachment trial that the full Senate then ratified.[458] Although the Constitution vests in the Senate the duty to "try" impeachments,[459] the Senate had passed a rule delegating factfinding to a committee, with the full Senate voting on the paper record that committee generated.[460] The Court found this scheme nonjusticiable. In the Court's opinion, constitutional text giving the Senate the "sole" power of impeachment constituted a "textual commitment" to the Senate to determine how to try impeachments.[461] Two concurrences agreed with the result, but would hold the dispute justiciable: if the Senate decided "to adopt the practice of automatically entering a judgment of conviction whenever articles of impeachment were delivered from the House" (for Justice White)[462] or convicted "upon a coin toss" (for Justice Souter),[463] the Court should strike the practice.[464] Yet despite those concurrences, the Court found the dispute committed to the Senate and thus refused to reach the merits.[465]

To be sure, this analysis sounds suspiciously like the merits question. As a number of scholars have noted, any justiciability inquiry that turns on whether a separate constitutional right has been violated may collapse into a merits argument.[466] It also seems plausible to argue that whether a BLAG-certified party is the proper litigant in a given case is a standing question and, accordingly, cannot be a political question. Indeed, in part for these reasons, the political question doctrine appears to be on the decline.[467] The justiciability question is thus perhaps best viewed here as a postscript to the merits question. If a court finds Article III requires a full House vote, it should find the case justiciable—if Article III performs independent work beyond that of the Rulemaking Clause, the issue is justiciable under the Court's *Ballin* and *Nixon* precedents.[468] If, however, a court concludes that the Constitution does not require a full House vote, it may

456. *Cf. Smith*, 286 U.S. at 48 ("The Constitution commits to the Senate the power to make its own rules; and it is not the function of the Court to say that another rule would be better.").

457. 506 U.S. 224, 232 (1993).

458. *Id.*

459. *See* U.S. CONST. art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments.").

460. *See Nixon*, 506 U.S. at 227–28.

461. *Id.* at 228–29.

462. *Id.* at 246 (White, J., concurring in the judgment).

463. *Id.* at 253 (Souter, J., concurring in the judgment).

464. *See also* Michael J. Gerhardt, *Rediscovering Nonjusticiability: Judicial Review of Impeachments After* Nixon, 44 DUKE L.J. 231, 236–37 (1994).

465. *Nixon*, 506 U.S. at 226, 238.

466. *See, e.g.*, Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 597–99 (1976).

467. Many have argued that the Court's ruling in *Zivotofsky v. Clinton* severely curtailed the reach of the doctrine. 566 U.S. 189 (2012); *see, e.g.*, JARED P. COLE, CONG. RSCH. SERV., THE POLITICAL QUESTION DOCTRINE: JUSTICIABILITY AND THE SEPARATION OF POWERS 22–24 (2014) (querying "[w]hat's left of the political question doctrine?").

468. *See* United States v. Ballin, 144 U.S. 1, 9 (1892); *Nixon*, 506 U.S. at 237.

just as likely do so by declaring the issue nonjusticiable.[469] In either event, the outcome ultimately turns on the merits question—justiciability merely offers another way the court might express its answer.

Rangel v. Boehner[470] provides a recent example of this analysis in practice. There, former Congressman Charlie Rangel brought a claim against the House Speaker and several other defendants, seeking to have his censure removed from the House Journal based on alleged procedural violations during his disciplinary proceedings.[471] Judge Bates—as affirmed by the D.C. Circuit—found the question of whether the House had properly disciplined Rangel to be a nonjusticiable political question and thus dismissed the claim.[472] Judge Bates determined that Rangel had not identified a constitutional right that the House had allegedly violated. Applying the *Ballin* framework, he noted that Rangel pointed to neither a "fundamental right" nor a "constitutional provision" limiting the House's discretion.[473] As a result, then, the court did not rule on the merits of his claim. It instead held that the question of how to discipline Rangel was "textually committed to the House" and declined to disturb the House's analysis.[474]

The analysis here might go much the same way. A court sympathetic to the House's internal delegation could well decline to reach the merits and instead hold as a threshold matter that the House's litigation decisions were textually committed to the House under the Rulemaking Clause. This Article focuses on the merits question, rather than entering the thicket of the Court's current political question jurisprudence. But it observes that a court might decide the issue by invoking the political question doctrine and finding it beyond the province of the judiciary to assess BLAG either way.

IV. CONCLUSION

The immediate takeaway from this analysis is that the House has properly delegated to BLAG the authority to decide when the chamber sues. To be sure, reasonable minds may disagree. Some might take a stricter approach to the Article III analysis in *Raines* and find institutional approval requires a full vote; others may seek to upend legislative standing entirely, in one of several directions. The House has created a novel structure by which it makes important decisions that implicate all three branches of government. Regardless of what the reader thinks of the doctrinal claim that BLAG is constitutional, this Article seeks to spark further engagement and debate.

In a larger sense, this Article aims to highlight one important way in which the House has delegated authority to a sub-component of the chamber. In so doing, it has taken a tour through the diverse landscape of internal delegations that characterize our twenty-first century Congress. Nondelegation questions have

469. *See Ballin*, 144 U.S. at 9; *Nixon*, 506 U.S. at 237.
470. 20 F. Supp. 3d 148 (D.D.C. 2013), *aff'd*, 785 F.3d 19 (D.C. Cir. 2015).
471. *Id.* at 157.
472. *Id.* at 166, 171.
473. *Id.* at 172–73.
474. *Id.* at 174.

filled countless law review pages, and the Supreme Court appears interested in revitalizing the doctrine.[475] Intra-congressional delegation, by contrast, has received next to no scholarly attention. As our legislative bureaucracy grows, and Congress delegates ever-greater power to its sub-components, it is worth thinking broadly about how much intra-congressional delegation is both legal and desirable. This Article aims to help open that conversation.

475. *See, e.g.*, Aditya Bamzai, *Delegation and Interpretive Discretion:* Gundy, Kisor, *and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164, 199 (2019) (noting the plurality decision in *Gundy v. United States*, 139 S. Ct. 2116 (2019), "signals further development ahead").