SUPREME COURT WATCH 1997

HIGHLIGHTS OF THE 1996-1997 TERM

PREVIEW OF THE 1997-1998 TERM

DAVID M. O'BRIEN

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PREFACE

Supreme Court Watch—1997 examines the changes and decisions made during the Supreme Court's 1997 term. Besides highlighting the major constitutional rulings in excerpts from leading cases, I discuss in section-by-section introductions other important decisions and analyze recent developments in various areas of constitutional law. The important cases that the Court has granted review and will decide in its 1997–1998 term are also previewed here. To offer even more information in an efficient format, I have included special boxes titled "The Development of Law" and "Inside the Court."

The favorable reception of and comments received on previous editions of the *Watch* have been gratifying, and I hope that this 1997 edition will further contribute to students' understanding of constitutional law, politics, and history, as well as to their appreciation for how the politics of constitutional interpretation turns on differing interpretations of constitutional politics. I am also most grateful to Traci Nagle for doing a terrific and expeditious job of copyediting.

D.M.O.
July 1, 1997

CONTENTS

Cases in italics only are excerpted; cases within brackets are discussed and extensively quoted in the chapter introductions.

VOLUME ONE

2

LAW AND POLITICS IN THE SUPREME COURT: JURISDICTION AND DECISION-MAKING PROCESS

A. JURISDICTION AND JUSTICIABLE CONTROVERSIES

The Rehnquist Court avoided ruling on a major controversy over whether states may require public employees to speak only English by finding the case *Arizonans for Official English v. Arizona*, 117 S.Ct. 1055 (1997), to have become moot. More than twenty states have enacted laws making English the official language. In 1988, Arizona voters approved a state constitutional amendment making English the official language and requiring all government workers to do business only in English. At that time, Maria-Kelly Yniguez, a state employee handing malpractice claims, challenged the constitutionality of that law as a violation of her First Amendment right of free speech to speak Spanish to malpractice claimants, who often could not understand English. But in 1990, a few months after the federal district court handed down its initial ruling, Ms. Yniguez resigned and went to work in the private sector. The district court found the English-only amendment to be overly broad and rejected the state attorney general's narrower interpretation of the law. When Arizona's governor decided not to appeal that ruling, two newcomers, the Arizonans for Official English Committee (AOE) and Robert Park, AOE's chair, moved to intervene on the ground that they had sponsored the ballot initiative that resulted in the amendment. The district court denied them standing to intervene. But the Court of Appeals for the Ninth Circuit viewed the matter differently and permitted AOE and

Park to proceed as the appellants. Subsequently, a three-judge panel held that Arizona's English-only law violated public employees' First Amendment rights and by a six-to-five vote the Ninth Circuit en banc affirmed that decision and rejected the contention that the case had become moot when Ms. Yniguez left public employment. Writing for a unanimous Court, Justice Ginsburg vacated that decision and ordered the case dismissed because it had become moot and AOE and Park, who were not government employees, lacked standing to intervene in the suit.

The Court also avoided ruling on the merits of the controversy over the constitutionality of Congress's giving the President the power of a line-item veto of appropriations bills. But the Court did for the first time rule on the issue of standing for legislators to challenge the constitutionality of laws that they voted against. In *Raines v. Byrd* (excerpted below), Chief Justice Rehnquist denied standing to six members of Congress trying to challenge the constitutionality of the Line Item Veto Act, but held out the possibility of other challenges to the law. Dissenting Justices Stevens and Breyer would have granted standing and reached the merits of the case.

Raines v. Byrd

117 S.Ct. — (1997)

On April 4, 1996, President Clinton signed the Line Item Veto Act into law, which went into effect on January 1, 1997. That law gives the President the authority to "cancel" individual spending and tax benefit provisions contained in a bill after signing the bill into law. Because of the controversy over the constitutionality of Congress's giving the President the power of a line-item veto, the law also provided that any member of Congress "adversely affected" by the law could file a suit in federal district court, with direct expedited appeal to the Supreme Court. The day after the law went into effect, four Senators and two Congressmen in the 104th Congress (1995–1996) who had voted against the act filed a suit in the District Court for the District of Columbia against Frederick Raines (the Director of the Office of Management and Budget) and the Secretary of the Treasury. The district court held that the members of Congress had standing to sue, that the controversy was ripe even though the President had not yet used the "cancellation" authority granted him, and that the law was unconstitutional. Eight days after that ruling, an appeal was made to the Supreme Court, which granted expedited briefing and oral arguments in May 1997.

The Court's decision was seven to two and its opinion delivered by Chief Justice Rehnquist. Justice Souter filed a concurring opinion, which Justice Ginsburg joined. Justices Stevens and Breyer filed dissenting opinions.

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Under Article III, Section 2 of the Constitution, the federal courts have jurisdiction over this dispute between appellants and appellees only if it is a "case" or "controversy." This is a "bedrock requirement." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982).

One element of the case-or-controversy requirement is that appellees, based on their complaint, must establish that they have standing to sue. The standing inquiry focuses on whether the plaintiff is the proper party to bring this suit, although that inquiry "often turns on the nature and source of the claim asserted," *Warth v. Seldin*, 422 U.S. 490 (1975). To meet the standing requirements of Article III, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737 (1984). We have consistently stressed that a plaintiff's complaint must establish that he has a "personal stake" in the alleged dispute, and that the alleged injury suffered is particularized as to him.

We have also stressed that the alleged injury must be legally and judicially cognizable. This requires, among other things, that the plaintiff have suffered "an invasion of a legally protected interest which is . . . concrete and particularized," *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), and that the dispute is "traditionally thought to be capable of resolution through the judicial process," *Flast v. Cohen*, 392 U.S. 83 (1968).

We have always insisted on strict compliance with this jurisdictional standing requirement. And our standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional. . . .

We have never had occasion to rule on the question of legislative standing presented here. In *Powell v. McCormack*, 395 U.S. 486 (1969), we held that a Member of Congress' constitutional challenge to his exclusion from the House of Representatives (and his consequent loss of salary) presented an Article III case or controversy. But *Powell* does not help appellees. First, appellees have not been singled out for specially unfavorable treatment as opposed to other Members of their respective bodies. Their claim is that the Act causes a type of institutional injury (the diminution of legislative power), which necessarily damages all Members of Congress and both Houses of Congress equally. Second, appellees do not claim that they have been deprived of something to which they personally are entitled—such as their seats as Members of Congress after their constituents had elected them. Rather, appellees' claim of standing is based on a loss of political power, not loss of any private right, which would make the injury more concrete. Unlike the injury claimed by Congressman Adam Clayton Powell, the injury claimed by the Members of Congress here is not claimed in any private capacity but solely because they are Members of Congress. If one of the Members were to retire tomorrow, he would no longer have a claim; the claim would be possessed by his successor instead. The claimed injury thus runs (in a sense) with the Member's seat, a seat which the Member holds (it may quite arguably be said) as trustee for his constituents, not as a prerogative of personal power.

The one case in which we have upheld standing for legislators (albeit state legislators) claiming an institutional injury is *Coleman v. Miller*, 307 U.S. 433 (1939). Appellees, relying heavily on this case, claim that they, like the state legislators in *Coleman*, "have a plain, direct and adequate interest in maintaining the effectiveness of their votes" sufficient to establish standing. In *Coleman*, 20 of Kansas' 40 State Senators voted not to ratify the proposed "Child Labor Amendment" to the Federal Constitution. With the vote deadlocked 20–20, the amendment ordinarily would not have been ratified. However, the State's Lieutenant Governor, the presiding officer of the State Senate, cast a deciding vote in favor of the amendment, and it was deemed ratified (after the State House of Representatives voted to ratify it). The 20 State Senators who had voted against the amendment, joined by a 21st State Senator and three State House Members, filed an action in the Kansas Supreme Court seeking a writ of *mandamus* that would compel the appropriate state officials to recognize that the legislature had not in fact ratified the amendment. That court held that the members of the legislature had standing to bring their *mandamus* action, but ruled against them on the merits.

This Court affirmed. By a vote of 5–4, we held that the members of the legislature had standing. In explaining our holding, we repeatedly emphasized that if these legislators (who were suing as a bloc) were correct on the merits, then their votes not to ratify the amendment were deprived of all validity. . . .

[O]ur holding in *Coleman* stands (at most) for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.

It should be equally obvious that appellees' claim does not fall within our holding in *Coleman*, as thus understood. They have not alleged that they voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless deemed defeated. In the vote on the Line Item Veto Act, their votes were given full effect. They simply lost that vote. . . .

Not only do appellees lack support from precedent, but historical practice appears to cut against them as well. It is evident from several episodes in our history that in analogous confrontations between one or both Houses of Congress and the Executive Branch, no suit was brought on the basis of claimed injury to official authority or power. The Tenure of Office Act, passed by Congress over the veto of President Andrew Johnson in 1867, was a thorn in the side of succeeding Presidents until it was finally repealed at the behest of President Grover Cleveland in 1887. . . .

Similarly, in *INS v. Chadha*, 462 U.S. 919 (1983), the Attorney General would have had standing to challenge the one-House veto provision because it rendered his authority provisional rather than final. By parity of reasoning, President Gerald Ford could have sued to challenge the appointment provisions of the Federal Election Campaign Act which were struck down in *Buckley v. Valeo*, 424 U.S. 1 (1976), and a Member of Congress could have challenged the validity of President Coolidge's pocket veto that was sustained in *The Pocket Veto Case*, 279 U.S. 655 (1929).

There would be nothing irrational about a system which granted standing in these cases; some European constitutional courts operate under one or another

variant of such a regime. But it is obviously not the regime that has obtained under our Constitution to date. Our regime contemplates a more restricted role for Article III courts, well expressed by Justice Powell in his concurring opinion in *United States v. Richardson*, 418 U.S. 166 (1974):

> "The irreplaceable value of the power articulated by Mr. Chief Justice Marshall [in *Marbury v. Madison*, 1 Cranch 137 (1803)] lies in the protection it has afforded the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action. It is this role, not some amorphous general supervision of the operations of government, that has maintained public esteem for the federal courts and has permitted the peaceful coexistence of the countermajoritarian implications of judicial review and the democratic principles upon which our Federal Government in the final analysis rests."

In sum, appellees have alleged no injury to themselves as individuals (contra *Powell*), the institutional injury they allege is wholly abstract and widely dispersed (contra *Coleman*), and their attempt to litigate this dispute at this time and in this form is contrary to historical experience. . . . We also note that our conclusion neither deprives Members of Congress of an adequate remedy (since they may repeal the Act or exempt appropriations bills from its reach), nor forecloses the Act from constitutional challenge (by someone who suffers judicially cognizable injury as a result of the Act). Whether the case would be different if any of these circumstances were different we need not now decide.

We therefore hold that these individual members of Congress do not have a sufficient "personal stake" in this dispute and have not alleged a sufficiently concrete injury to have established Article III standing. The judgment of the District Court is vacated, and the case is remanded with instructions to dismiss the complaint for lack of jurisdiction.

Justice SOUTER, concurring in the judgment, with whom Justice GINSBURG joins, concurring.

Under our precedents, it is fairly debatable whether this injury is sufficiently "personal" and "concrete" to satisfy the requirements of Article III. . . . Because it is fairly debatable whether appellees' injury is sufficiently personal and concrete to give them standing, it behooves us to resolve the question under more general separation-of-powers principles underlying our standing requirements. Although the contest here is not formally between the political branches (since Congress passed the bill augmenting Presidential power and the President signed it), it is in substance an interbranch controversy about calibrating the legislative and executive powers, as well as an intrabranch dispute between segments of Congress itself. Intervention in such a controversy would risk damaging the public confidence that is vital to the functioning of the Judicial Branch by embroiling the federal courts in a power contest nearly at the height of its political tension.