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CASE COMMENTS

TAX LAW—*MILLER V. COMMISSIONER:* DEDUCTIBILITY OF CASUALTY LOSSES AFTER VOLUNTARY ELECTION NOT TO FILE AN INSURANCE CLAIM

Taxpayers who suffer casualty losses may decide, for a variety of reasons, not to file an insurance claim for recovery of those losses.[1] Section 165 of the Internal Revenue Code of 1954 allows a deduction for "any loss sustained during the taxable year and not compensated for by insurance or otherwise."[2] Consequently, the question arises whether a taxpayer may claim a casualty loss deduction even though the taxpayer did not seek insurance reimbursement for the loss. In *Miller v. Commissioner*,[3] the United States Court of Appeals for the Sixth Circuit, in a 6-5 en banc decision, expressly overruled its previous decision in *Kentucky Utilities Co. v. Glenn*[4] and held that a taxpayer who voluntarily chooses not to file an insurance claim for recovery of a loss could still claim a section 165 deduction.[5]

Part I of this comment examines the *Miller* holding and its underlying rationale. Part II addresses the impact of *Miller* on federal income tax law and suggests that by overruling *Kentucky Utilities*, *Miller* changes the law regarding the deductibility of losses under section 165 after a voluntary election not to file an insurance claim. Part III concludes that the Sixth Circuit's literal interpretation of section 165(a)'s language "not compensated for by insurance or otherwise" is a significant defeat for the Internal Revenue Service.

I. The Holding and Its Rationale

In June 1976, Miller's friend ran Miller's boat aground causing $842.55 worth of damage to the boat.[6] Although Miller had purchased insurance covering his boat, he did not file a recovery claim with his insurance company because he feared that the in-

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1 Filing a claim may pose an administrative burden or the taxpayer may fear an increase in premiums or cancellation of the policy.

2 I.R.C. § 165(a) (1982) provides:

(a) General rule

There shall be allowed as a deduction any loss sustained during the taxable year and not compensated for by insurance or otherwise.

3 733 F.2d 399 (6th Cir. 1984).

4 394 F.2d 631 (6th Cir. 1968), *aff'g*, 250 F. Supp. 265 (W.D. Ky. 1965). For an account of the *Kentucky Utilities* decision, see text accompanying notes 20-32 *infra*.

5 733 F.2d at 404.

6 Dixon F. Miller, 49 T.C.M. (P-H) ¶ 80,550 (1980), *vacated*, 50 T.C.M. (P-H) ¶ 81,431 (1981), *aff'd*, Miller v. Commissioner, 733 F.2d 399 (6th Cir. 1984).

surer would cancel all his insurance policies.[7] Miller recovered $200 from his friend, however, reducing his actual loss from the boating accident to $642.55.[8] After applying the $100 limitation contained in section 165(c)(3),[9] Miller claimed a $542.55 casualty loss deduction on his 1976 federal income tax return.[10] The Commissioner of the Internal Revenue Service disallowed the deduction and issued a deficiency notice to the taxpayer.[11]

The Tax Court, relying upon *Kentucky Utilities Co. v. Glenn*,[12] initially concluded that the taxpayer was not entitled to a casualty loss deduction for that part of the loss that was covered by insurance[13] but later reconsidered its decision in light of *Hills v. Commissioner*[14] and allowed the deduction.[15]

On en banc review,[16] the Commissioner, relying on *Kentucky Utilities*, asserted that a taxpayer could not deduct a loss for which

7 49 T.C.M. (P-H) ¶ 80,550 (1980). The taxpayer feared the insurance company would cancel the policies covering his boat, apartment, and automobile.

8 733 F.2d at 400.

9 At the time, I.R.C. § 165(c) (1976) provided:

> (c) Limitation on losses of individuals
>
> In the case of an individual, the deduction under subsection (a) shall be limited to—
>
> (1) losses incurred in a trade or business;
>
> (2) losses incurred in any transaction entered into for profit, though not connected with a trade or business; and
>
> (3) losses of property not connected with a trade or business, if such losses arise from fire, storm, shipwreck, or other casualty, or from theft. A loss described in this paragraph shall be allowed only to the extent that the amount of loss to such individual arising from each casualty, or from each theft, exceeds $100. . . .

The Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, §§ 203(a) and (b), 96 Stat. 324, 422, raised the floor for casualty loss deductions from $100 to 10% of the taxpayer's adjusted gross income after applying the $100 floor to each casualty or theft.

10 733 F.2d at 400.

11 *Id.* at 400-01.

12 394 F.2d 631. For an account of the *Kentucky Utilities* decision, see text accompanying notes 20-32 *infra.*

13 49 T.C.M. (P-H) ¶ 80,550 (1980).

14 76 T.C. 484 (1981), *aff'd*, 691 F.2d 997 (11th Cir. 1982). For an account of the *Hills* decision, see note 78-82 *infra* and accompanying text.

15 50 T.C.M. (P-H) ¶ 81,431 (1981), *vacating*, 49 T.C.M. (P-H) ¶ 80,550 (1980). Although the Tax Court in *Miller* indicated that the facts of both *Hills* and *Miller* were distinguishable from those of *Kentucky Utilities*, 50 T.C.M. ¶ 81,431 at 1567, the court did not specify what distinguished *Hills* and *Miller* from *Kentucky Utilities*. The Tax Court's opinion concluded:

> We discern virtually no distinction between the operative facts or legal issues in this case and Hills. Accordingly, we conclude that Kentucky Utilities is distinguishable for the same reasons it was distinguishable in Hills. . . . It is our view that Kentucky Utilities is not "squarely in point," . . . .

Id. at 1567.

16 A three judge panel of the United States Court of Appeals for the Sixth Circuit initially heard the case, but did not issue an opinion. 733 F.2d at 400. Instead, the panel suggested and initiated a hearing en banc. *Id.* at 400 n.1.

the taxpayer failed to claim available insurance proceeds, even though claiming those proceeds would jeopardize the taxpayer's continued insurance coverage.[17] The court of appeals, however, could not significantly distinguish the issue presented in *Miller* from that presented in *Kentucky Utilities*.[18] Consequently, to the extent that *Kentucky Utilities* held that a voluntary election not to file an insurance claim for a loss precluded the insured-taxpayer from deducting the loss under sections 165(a) and 165(c)(3), the Sixth Circuit expressly overruled *Kentucky Utilities* and affirmed the Tax Court's decision.[19]

In *Kentucky Utilities Co. v. Glenn*,[20] the taxpayer-corporation purchased a steam generator from the Westinghouse Electric Corporation. Within a few months, a mechanical failure caused $147,537.60 in damages to the generator.[21] Kentucky Utilities had a $200,000 insurance policy on its equipment, subject to a $10,000 deductible.[22] Based on an investigation, Kentucky Utilities concluded that since the generator was under warranty, Westinghouse should pay the cost of repairs.[23] Rather than pursue a claim against Westinghouse, which denied liability for the accident, Kentucky Utilities sought indemnification from its insurer, Lloyds of London.[24] Lloyds did not, at any time, deny liability for the cost of repairs in excess of the $10,000 deductible. When Lloyds insisted on a right of subrogation against Westinghouse, Kentucky Utilities refused the insurance proceeds.[25] In a settlement agreement, Westinghouse paid $65,550.93 of the repair costs; Lloyds paid $37,500, relinquishing any right of subrogation; and Kentucky Utilities absorbed the remaining repair costs, deducting that amount, $44,486.67, on its federal income tax return.[26]

The district court concluded that Kentucky Utilities could not deduct any amount in excess of the $10,000 deductible as either a loss under section 23(f)[27] or an ordinary and necessary business

17 *Id.* at 400.

18 *Id.* at 401.

19 *Id.* at 404.

20 250 F. Supp. 265, 270 (W.D. Ky. 1965), *aff'd on this issue*, 394 F.2d 631, 632 (6th Cir. 1968).

21 *Id.*

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.* Kentucky Utilities feared that any litigation may have adversely affected its business relationship with Westinghouse and that it might have difficulty retaining insurance on its equipment if Lloyds had to pay the full claim in excess of the policy deductible. 394 F.2d at 633. *See* note 29 *infra*.

26 250 F. Supp. at 270.

27 I.R.C. § 23(f) (1952) (I.R.C. of 1939) provided:

§ 23. Deductions from gross income.

In computing net income there shall be allowed as deductions:

expense under section 23(a)[28] of the Internal Revenue Code of 1939.[29] Affirming the district court's conclusion,[30] the Sixth Circuit held that Kentucky Utilities' failure to pursue indemnification from Lloyds barred an uninsured loss deduction for any amount exceeding the policy's $10,000 deductible.[31] In two short paragraphs, Judge Edwards dismissed both of the taxpayer's contentions, writing:

> This record convinces us that the District Judge's quoted findings of fact are not clearly erroneous. [Kentucky Utilities'] loss over and above the $10,000 allowed by the District Judge was not an "uninsured loss." Sam P. Wallingford Grain Corp. v. Commissioner of Internal Revenue, 74 F.2d 453 (10th Cir. 1934).
>
> Nor does [Kentucky Utilities'] voluntary assumption of the loss for the reasons found by the District Judge seem to be either "necessary" or "ordinary" within the meaning of the tax statute.[32]

In *Miller*, the court of appeals noted that judges and commen-

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. . . .

(f) Losses by corporations.

In the case of a corporation, losses sustained during the taxable year and not compensated for by insurance or otherwise.

Although similar to § 165(a) of the 1954 Code, § 23(f) referred only to corporate losses. 733 F.2d at 401 n.5. *See* note 2 *supra*.

28 I.R.C. § 23(a) (1952) (I.R.C. of 1939) provided:

§ 23. Deductions from gross income.

In computing net income there shall be allowed as deductions:

(a) Expenses.

. . . .

All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . . .

Section 23(a) of the 1939 Code is similar to § 162 of the 1954 Code. I.R.C. § 162(a) (1982) provides:

(a) In general

There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. . . .

29 250 F. Supp. at 270-71. The district court also made the following findings of fact:

6. For business reasons, [Kentucky Utilities] did not want any litigation brought against Westinghouse. Moreover, because of possible difficulty in retaining insurance of this character on its equipment, [Kentucky Utilities] did not want Lloyds to pay all of the loss except the $10,000.00 deductible under the policy.

. . . .

8. [Kentucky Utilities] voluntarily assumed $34,486.67 of the cost of repairs to the generator to protect Westinghouse from suit by Lloyds and to avoid difficulty in obtaining insurance with Lloyds. The expenditure of $34,486.67 in this manner does not constitute a loss or an ordinary and necessary business expense.

30 394 F.2d at 633.

31 *Id.* The Sixth Circuit affirmed the judgment of the district court on the generator damage issue. The district court concluded that Kentucky Utilities was entitled to a deduction of $10,000 as a loss not compensated for by insurance or otherwise under I.R.C. § 23(f) (1952) (I.R.C. of 1939). 250 F. Supp. at 271.

32 394 F.2d at 633 (citation omitted).

tators have interpreted *Kentucky Utilities* as holding that either: (i) a taxpayer must exhaust all reasonable prospects for insurance indemnification before claiming a "sustained loss," or (ii) the phrase "not compensated for" in section 165(a) means "not covered by" insurance.[33] The *Miller* court rejected both interpretations.[34]

Initially, the court of appeals rejected the first interpretation that a taxpayer only sustains a loss after exhausting all reasonable prospects for insurance recovery because it renders the clause "not compensated by" in section 165(a) "mere surplusage."[35] The plain language of section 165(a), allowing a deduction for "any loss sustained . . . and not compensated for by insurance," supports the proposition that a taxpayer must determine the timing of a loss transaction independent of the insurance consequences.[36] Furthermore, under a rule of statutory construction, courts should construe the language of a statute to avoid making any word superfluous.[37] The court of appeals reasoned that to define a sustained loss with reference to potential indemnification by an insurer would render the compensation language of section 165(a) meaningless.[38] Any time a taxpayer sustained a loss, that loss, by definition, would not be "compensated for by insurance."[39] Because the parties stipulated that at the time of the deduction the taxpayer did not have a reasonable prospect of further recovery from his friend, the court concluded that the taxpayer sustained a loss in a "closed transaction"[40] during the taxable year.[41]

The court rejected the second interpretation which equates the terms "compensated for by" and "covered by," focusing on the plain language of section 165, its legislative history, and public policy.[42] The court noted that "compensated" is a word distinct from "covered."[43] Furthermore, the legislative history of section 165, although scant, supports the conclusion that "not compensated for

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33 733 F.2d at 402.

34 *Id.*

35 *Id.*

36 *Id.*

37 *Id. See* Fulps v. City of Springfield, 715 F.2d 1088, 1093 (6th Cir. 1983).

38 733 F.2d at 402.

39 *Id.*

40 In *Miller*, the court described the "closed transaction" doctrine as a timing principle that also requires that the taxpayer ascertain the gain or loss from a particular transaction before recognizing the transaction's tax consequences. 733 F.2d at 403 n.8. *See* Burnet v. Logan, 283 U.S. 404 (1931). According to the *Miller* court, the same principle applies to casualty loss deductions—as long as a reasonable expectation of recovery from the wrongdoer exists, the taxpayer cannot ascertain the loss; consequently, the taxpayer has not yet sustained a loss. 733 F.2d at 403 n.8.

41 *Id.* at 402-03.

42 *Id.* at 403-04.

43 *Id.* at 403 (citing Hills v. Commissioner, 691 F.2d 997, 1000, 1006 (11th Cir. 1982)).

by" does not mean "not covered by."[44] When enacting a predecessor to section 165, Congress eliminated the word "covered" from the original House version of the bill, which would have granted a deduction for "losses . . . not covered by insurance or otherwise and compensated for."[45] According to the court of appeals, the change indicates that Congress was aware of the difference between "compensated" and "covered" and intended to enact what it in fact enacted. Finally, to deny this distinction would prejudice taxpayers not engaged in a trade or business, who voluntarily decline insurance indemnification for sound and practical reasons, and indirectly benefit taxpayers who forego insurance coverage and then claim a deduction for an uncompensated loss if a casualty occurs.[46]

In a dissenting opinion, Judge Contie, joined by four other judges, agreed that the language "compensated for by insurance or otherwise" does not mean "covered by insurance or otherwise."[47] The dissenters argued, however, that the court should deny the deduction and uphold *Kentucky Utilities* for three reasons. The taxpayer's voluntary choice not to file an insurance claim, which the insurer would have paid, prevented a loss from being sustained under section 165(a).[48] Second, the transaction was not closed and completed.[49] Third, the majority's conclusion will result in preferred tax treatment for business taxpayers.[50]

According to the dissenting opinion, a voluntary election not to recover insurance proceeds prevents a casualty loss from being a sustained loss because the election severs the causal connection between the event and the loss.[51] The taxpayer's election not to accept reimbursement under his insurance policy caused the alleged loss—not the fire, storm, shipwreck, theft, or other casualty.[52]

Second, since the taxpayer possessed a bona fide claim which the insurer would have paid, the taxpayer had a reasonable pros-

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44 733 F.2d at 403.

45 *Id.* Noting the Eleventh Circuit's analysis in *Hills*, 691 F.2d at 1000, the court wrote:

> The initial House Ways and Means Committee language was "losses . . . not covered by insurance or otherwise and compensated for." The Senate Finance Committee amended the language to its final and enacted form of "losses . . . not compensated for by insurance or otherwise."

733 F.2d at 403. Interestingly, congressional hearings discussed by the *Miller* court took place in 1894. *See* J. SEIDMAN, SEIDMAN'S LEGISLATIVE HISTORY OF FEDERAL INCOME TAX LAWS, 1938-1861, at 1018 (1938). *See also* Comment, *Theft Loss Deductions as Relief for the Small Investor*, 1978 DUKE L.J. 849, 860-61 & nn.67-68 (discussing and citing sources for limited legislative history of § 165(c)(3)).

46 733 F.2d at 404.

47 *Id.* (Contie, J., dissenting).

48 *Id.* at 405.

49 *Id.* at 406-07.

50 *Id.* at 409.

51 *Id.* at 405.

52 *Id.* at 405-06.

pect for recovery which Treasury Regulation section 1.165-1(b)[53] required be exhausted under the closed and completed transaction doctrine[54] before the taxpayer could deduct the loss.[55] In an effort to harmonize its holding with the closed transaction doctrine, the majority relied on *Alison v. United States*,[56] noting that the taxpayer need only have exhausted reasonable prospects of recovery from the wrongdoer and not from third party insurers.[57] But the dissenters observed that the *Alison* Court was not asked to decide, and did not decide, whether exhaustion of reasonable prospects of recovery *alone* satisfies the closed transaction requirement.[58] The dissenting opinion also cited several decisions requiring exhaustion of reasonable prospects of recovery without distinguishing between wrongdoers and third parties such as insurers.[59] Consequently, the dissenters concluded that the majority improperly limited the scope of the exhaustion rule.[60]

Finally, the disparate practical effect of the majority's opinion

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53 Treas. Reg. § 1.165-1(b) (1984) provides:

> Nature of loss available. To be allowable as a deduction under section 165(a), a loss must be evidenced by closed and completed transactions, fixed by identifiable events, and, except as otherwise provided in section 165(h) and § 1.165-11, relating to disaster losses, actually sustained during the taxable year. Only a bona fide loss is allowable. Substance and not mere form shall govern in determining a deductible loss.

54 *See* note 40 *supra*. The Treasury Department codified the closed transaction doctrine in Treas. Reg. § 1.165-1(d)(2)(i) (1984), which provides:

> If a casualty or other event occurs which may result in a loss and, in the year of such casualty or event, there exists a claim for reimbursement with respect to which there is a reasonable prospect of recovery, no portion of the loss with respect to which reimbursement may be received is sustained, for purposes of section 165, until it can be ascertained with reasonable certainty whether or not such reimbursement will be received. Whether a reasonable prospect of recovery exists with respect to a claim for reimbursement of a loss is a question of fact to be determined upon an examination of all facts and circumstances. Whether or not such reimbursement will be received may be ascertained with reasonable certainty, for example, by a settlement of the claim, by an adjudication of the claim, or by an abandonment of the claim. When a taxpayer claims that the taxable year in which a loss is sustained is fixed by his abandonment of the claim for reimbursement, he must be able to produce objective evidence of his having abandoned the claim, such as the execution of a release.

55 733 F.2d at 407.

56 344 U.S. 167 (1952). In *Alison*, the Supreme Court allowed a deduction for embezzlement losses for the year the taxpayer discovered the embezzlement scheme and ascertained the amount of the losses. Since the taxpayer recovered a substantial portion of the embezzled funds 10 years after the first embezzlement occurred, the Supreme Court reasoned that the taxpayer did not "sustain" the loss at the time the embezzlement occurred.

57 733 F.2d at 402-03, 407.

58 *Id.* at 407.

59 *See, e.g.*, United States v. S.S. White Dental Mfg. Co., 274 U.S. 398, 402-03 (1927); Estate of Scofield v. Commissioner, 266 F.2d 154, 159-60 (6th Cir. 1959); Commissioner v. Harwick, 184 F.2d 835 (5th Cir. 1950); Ramsay Scarlett & Co., 61 T.C. 795, 807 (1974), *aff'd*, 521 F.2d 786 (4th Cir. 1975).

60 733 F.2d at 407.

on business and individual taxpayers "deeply troubled" the dissenters.[61] The majority's opinion allows corporations and individuals engaged in a trade or business or transactions entered into for profit to "double-dip" by deducting both their insurance premiums and their insured but unreimbursed casualty losses.[62]

II. Impact of *Miller*

The *Miller* decision expressly overrules *Kentucky Utilities*,[63] a sixteen year old decision, which has been described as "the genesis of the theory that a taxpayer may not elect to forego an insurance claim and deduct his loss under Section 165."[64] Both court decisions and administrative rulings have relied on *Kentucky Utilities* to support the Commissioner's position that a taxpayer may not deduct, under section 165, a loss for which the taxpayer failed to claim available insurance proceeds.[65] In two early decisions, the Tax Court denied a casualty loss deduction while reserving the question of the proper meaning of section 165(a)'s language "not compensated for by insurance or otherwise."[66] In *Axelrod v. Commissioner*,[67] two separate concurring opinions discussed the issue but reached opposite conclusions.[68] Judge Fay concluded that section 165 provides a deduction for insured but unrecovered casualty losses where the taxpayer, for valid business reasons, relinquishes his right to claim reimbursement from the insurance coverage.[69] Judge Fay criticized *Kentucky Utilities*, writing:

> In my view [*Kentucky Utilities*] is distinguishable from the instant one and, in any event, in light of the very brief treatment of the issue therein should not preclude a fresh consideration of this issue.[70]

Judge Quealy's opinion in *Axelrod* relied heavily on *Kentucky Utilities* in concluding that the failure to file an insurance claim for losses,

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61 *Id.* at 409.

62 *Id.*

63 *See* text accompanying notes 4-5 *supra*.

64 Summers, *Loss Deductions: The Effect of Failure to File an Insurance Claim After* Hills, 61 TAXES 275, 276 (1983).

65 *See* notes 66-77 *infra* and accompanying text.

66 *See* Axelrod v. Commissioner, 56 T.C. 248, 256 (1971) (court disallowed the casualty loss deduction because taxpayer could not substantiate the casualty loss); Cramer v. Commissioner, 55 T.C. 1125, 1133 (1971) (court did not reach issue because taxpayer had not otherwise shown that § 165 entitled her to casualty loss deduction). *See also* James Hallis, 47 T.C.M. (P-H) ¶ 78,450 (1978) (court denied deduction because taxpayers completely failed to carry their burden of proof).

67 56 T.C. 248 (1971).

68 56 T.C. 248, 259 (1971) (Fay, J., concurring); 56 T.C. 248, 260 (Quealy, J., concurring).

69 56 T.C. at 260. Two other judges joined Judge Fay's concurring opinion.

70 *Id.* at 259.

admittedly covered by a valid insurance policy, barred a deduction for such losses under section 165.[71] Judge Quealy reasoned:

> Any economic disadvantage which petitioner may have sustained was not as a result of any casualty loss not being compensated for by insurance but rather was as a result of his choosing not to accept the funds available in compensation for any casualty loss.[72]

Two district courts followed *Kentucky Utilities* and Judge Quealy's concurring opinion with little discussion.[73] In *Bartlett v. United States*,[74] and *Waxler Towing Co. v. United States*,[75] the courts denied loss deductions to taxpayers that elected not to file insurance claims. Relying on these decisions, the IRS continued the trend in Revenue Ruling 78-141.[76] Similarly, the Tax Court followed *Kentucky Utilities* in a memorandum decision.[77]

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71 *Id.* at 262. Four other judges joined Judge Quealy's opinion.

72 *Id.* at 261.

73 *See, e.g.*, Waxler Towing Co. v. United States, 510 F. Supp. 297 (W.D. Tenn. 1980); Bartlett v. United States, 397 F. Supp. 216 (D. Md. 1975).

74 397 F. Supp. 216 (D. Md. 1975). In *Bartlett*, the taxpayers' son wrecked the taxpayers' car, causing $1,725 damage. Although the taxpayers owned a collision insurance policy containing a $100 deductible, they elected not to file a claim to recover the loss but deducted the loss on their income tax return. The IRS denied the deduction. The district court held that the taxpayers could only deduct the portion of the loss, exceeding § 165(c)'s $100 floor, which the insurance company would not have paid. *Id.* at 221. The *Bartlett* court relied heavily upon *Kentucky Utilities*.

75 510 F. Supp. 297 (W.D. Tenn. 1980). In *Waxler Towing*, a collision damaged the taxpayer's barge. Although the taxpayer had purchased an insurance policy covering the damage, the taxpayer did not file a claim under its insurance policy but paid for the repairs itself and deducted the repair costs on its income tax return. The Commissioner denied the deduction. The taxpayer filed an action for refund of the taxes paid, claiming that either § 165(a) or § 162(a) justified the deduction. The taxpayer contended it had a valid and compelling business reason for not filing a claim because the taxpayer's business involved the transportation of highly flammable and explosive cargoes and industry-wide regulations prohibited operating without insurance. The taxpayer's past liability and accident experience had been so poor that its previous underwriters refused to renew its coverage. The taxpayer obtained new insurance, on a limited or trial basis, at a substantial premium. The taxpayer's insurance agent advised against filing a claim because a claim would jeopardize the taxpayer's coverage or increase the taxpayer's premiums about 150%. Since the taxpayer could repair the damage for less than the increase in premiums for only one year, the taxpayer decided to pay for the claims itself and did not file an insurance claim. The district court followed *Kentucky Utilities* and *Bartlett* on the § 165 issue. The court held, however, that the taxpayer raised material questions of fact as to whether the repair costs constituted ordinary and necessary business expenses under § 162 sufficient to withstand the IRS's motion for judgment on the pleadings. *Id.* at 300.

76 Rev. Rul. 78-141, 1978-1 C.B. 58, concluded that an attorney who made a payment to a client to reimburse the client for expenses incurred as a result of erroneous advice but did not file a claim against his malpractice insurance carrier, could not deduct the payment as a loss under § 165 or as an ordinary and necessary business expense under § 162. The attorney did not file an insurance claim because the attorney feared that filing such a claim might cause a premium increase or cancellation of the policy. In its § 165 discussion, the IRS relied on Bartlett v. United States, which in turn relied heavily on Kentucky Utilities Co. v. Glenn. The § 162 analysis also relied heavily on *Kentucky Utilities*.

77 *See* F. Tyler Morgan, 47 T.C.M. (P-H) ¶ 78,116 (1978).

Then, in *Hills v. Commissioner,*[78] the Tax Court abruptly declined to follow *Kentucky Utilities.*[79] In attempting to distinguish rather than reject the holding of *Kentucky Utilities,*[80] the court, nevertheless, criticized the rationale of *Kentucky Utilities* stating:

> The Circuit Court's opinion states that "[Kentucky Utilities'] loss over and above the $10,000 allowed by the District Judge was not an 'uninsured loss.' " The term "uninsured loss" is not contained in sec. 165(a) or in the cited case, *Sam P. Wallingford Grain Corp. v. Commissioner,* 74 F.2d 453 (10th Cir. 1934). . . . An uninsured loss would clearly be commensurate with a loss that was not "covered by insurance," but that is not the statutory language before us.[81]

In the decision, which the entire Tax Court reviewed, the court held that section 165(a) entitled the taxpayers to a theft loss deduction because their loss was not "compensated for by insurance," even though the taxpayers voluntarily failed to file a claim for reimbursement with their insurance company.[82] The Court of Appeals for the Eleventh Circuit affirmed the Tax Court's decision in *Hills v. Commisioner*[83] and adopted a strict statutory interpretation of the "not compensated" language of section 165(a). In an opinion similar to *Miller,* the Eleventh Circuit concluded that "compensated" does not mean "covered."[84]

III. Conclusion

In *Miller,* the Court of Appeals for the Sixth Circuit literally interpreted the "not compensated for" language of section 165(a) and refused to equate that phrase with "not covered by." Even the dissenting judges agreed that "not compensated for" does not mean "not covered by." Through its interpretation of section 165, the court of appeals overruled *Kentucky Utilities* and its progeny, changing the law regarding the deductibility of casualty losses under section 165(a). As authority for interpreting the "not compensated for" language of section 165(a), *Miller,* arguably, could

78 76 T.C. 484 (1981). In *Hills,* a thief burglarized the taxpayers' vacation home causing a $760 loss. Although the taxpayers owned an insurance policy covering losses from vandalism, malicious mischief, and theft, the taxpayers chose not to file a claim under the policy. The taxpayers had previously filed three other theft claims and apparently feared the insurance company would cancel their policy, including their fire insurance coverage, if they filed a fourth claim. Since the vacation home was in a rural mountain area that did not have a nearby fire station, the taxpayers feared any cancellation would only dissuade insurance companies from providing fire insurance for their home.

79 *Id.* at 489.

80 76 T.C. at 490.

81 *Id.* at 490 n.7.

82 *Id.* at 491-92.

83 691 F.2d 997.

84 *Id.* at 1006.

also be considered persuasive authority for interpreting other I.R.C. sections employing the "not compensated" language at issue in *Miller*.[85]

By overruling *Kentucky Utilities*, *Miller* may deliver the death blow to the Commissioner's position that a taxpayer who foregoes an insurance claim may not deduct the loss under section 165. In both *Hills* and *Miller*, the Tax Court held that a taxpayer who voluntarily elected not to file an insurance claim could still claim a casualty or theft deduction.[86] The Sixth and the Eleventh Circuits, the only circuits that have specifically considered the question, have affirmed the Tax Court's decisions.[87] Arguably, no case law currently supports the Commissioner's position. The only cases that have done so have heavily relied on *Kentucky Utilities*.[88] By overruling *Kentucky Utilities*, the Sixth Circuit, in effect, overruled those cases as well.

The immediate benefit of *Miller* will inure to corporations and individuals engaged in a trade or business or transactions entered into for profit by allowing those taxpayers to deduct both their insurance premiums and their unreimbursed losses. As a result of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA),[89] the *Miller* decision will not directly benefit most individual taxpayers. TEFRA amended section 165[90] by changing section 165(c)(3)[91] and adding section 165(h),[92] which allows an individual to claim a theft or casualty loss as described in section 165(c)(3)

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85 Thus, *Miller* could serve as persuasive authority for interpreting I.R.C. § 213, which employs the same "not compensated" language.

86 *See* notes 15, 78-82, *supra* and accompanying text.

87 *See* notes 19, 83-84, *supra* and accompanying text.

88 *See* notes 73-75, 77, *supra* and accompanying text.

89 Pub. L. No. 97-248, 96 Stat. 324 (1982).

90 Pub. L. No. 97-248, §§ 203(a) and (b), 96 Stat. 324, 422 (1982).

91 As a result of TEFRA, I.R.C. § 165(c)(3) (1982) now provides:

(c) Limitation on losses of individuals

In the case of an individual, the deduction under subsection (a) shall be limited to—

. . . .

(3) except as provided in subsection (h), losses of property not connected with a trade or business, if such losses arise from fire, storm, shipwreck, or other casualty, or from theft.

92 I.R.C. § 165(h)(1) (1982) provides:

(h) Casualty and theft losses

(1) General rule

Any loss of an individual described in subsection (c)(3) shall be allowed for any taxable year only to the extent that—

(A) the amount of loss to such individual arising from each casualty, or from each theft, exceeds $100, and

(B) the aggregate amount of all such losses sustained by such individual during the taxable year (determined after application of subparagraph (A)) exceeds 10 percent of the adjusted gross income of the individual.

only to the extent that: (1) the amount of loss arising from each casualty or theft exceeds $100, and (2) the total amount of the individual's theft and casualty losses during the taxable year exceeds ten percent of the individual's adjusted gross income after applying the $100 limitation to each casualty or theft loss. Consequently, although *Miller* potentially benefits taxpayers who own insurance, most individuals not engaged in a trade or business or transactions entered into for profit cannot deduct their unreimbursed casualty losses. Nevertheless, *Miller* represents a significant defeat for the Internal Revenue Service.

Matthew J. Barrett
Stephen J. Dunn
Robert H. Kurnick, Jr.

CONSTITUTIONAL LAW—*MOORE V. U.S. HOUSE OF REPRESENTATIVES:* A POSSIBLE EXPANSION OF CONGRESSMEN'S STANDING TO SUE

In *Moore v. U.S. House of Representatives*,[1] the United States Court of Appeals for the District of Columbia Circuit addressed the question of whether individual congressmen have standing to sue the Congress. In *Moore*, members of the House of Representatives sought declaratory relief to invalidate the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA).[2] The congressmen contended that TEFRA originated in the Senate in violation of the origination clause of the United States Constitution,[3] which requires that bills for raising revenue originate in the House of Representatives. Although the District of Columbia Circuit ultimately denied relief on the basis of prudential considerations,[4] it held, significantly, that the congressmen had standing to bring suit in federal court.[5] Thus, the *Moore* court determined that the federal court had jurisdiction over the controversy but that, because of prudential concerns, that power should not be exercised.

Part I of this comment outlines the facts and holding of *Moore*. Part II examines the standing analysis which the court employed and concludes that the *Moore* court's finding of standing does not comport with traditional tests for standing. Finally, Part III discusses the court's decision to deny relief based on prudential considerations. This comment concludes that, contrary to the *Moore* holding, denial of relief should have been the consequence of constitutional command rather than judicial discretion.

I. *Moore v. U.S. House of Representatives*

In December 1981, the House of Representatives approved H.R. 4961, a bill which would amend the Internal Revenue Code to reduce tax revenues.[6] The Senate substantially amended the bill and renamed it "The Tax Equity and Fiscal Responsibility Act of 1982" (TEFRA). As amended, the bill, rather than reducing tax revenues, proposed to significantly increase tax revenues. This change prompted Representative Rousselot, one of the plaintiffs in *Moore*, to propose a resolution in the House stating that the Sen-

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1 733 F.2d 946, 948 (D.C. Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3372 (U.S. Nov. 13, 1984) (No. 84-389).

2 Pub. L. No. 97-248, 96 Stat. 324.

3 U.S. CONST. art. I, § 7, cl. 1.

4 733 F.2d at 956.

5 *Id.*

6 H.R. 4961, 97th Cong., 2d Sess., 127 CONG. REC. H9607-10 (daily ed. Dec. 15, 1981).

ate's amendments violated the origination clause of the Constitution.[7] The House voted to table Rousselot's resolution.[8] Each of the plaintiffs, eighteen members of the 97th Congress, voted against the motion to table.[9] The House then voted to send the bill to a Senate conference without first referring it back to the House Committee on Ways and Means. Again, the plaintiffs were outvoted.[10] In August 1982, TEFRA passed both the House and Senate;[11] all plaintiffs voted against its passage.[12]

The plaintiffs brought suit in federal district court against the House, the Senate, and certain officers of both bodies,[13] seeking a declaratory judgment that TEFRA unconstitutionally originated in the Senate in violation of the origination clause. The district court dismissed the complaint, holding that the plaintiffs lacked standing, and alternatively, that in the court's remedial discretion, declaratory relief should be withheld.[14] The court of appeals affirmed, agreeing with the district court's dismissal based upon prudential concerns. Significantly, however, the court of appeals held that the legislators had standing to sue in federal court.[15]

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7 H.R. Res. 541, 97th Cong., 2d Sess., 128 CONG. REC. H4776 (daily ed. July 28, 1982). The resolution provides:

> Resolved, that the Senate Amendments to the bill, H.R. 4961, in the opinion of the House, contravene the first clause of the seventh section of the first article of the Constitution of the United States, and are an infringement of the privileges of this House and that the said bill, with amendments be respectfully returned to the Senate with a message communicating this resolution.

8 *Id.* at H4776-77. A vote to table a resolution results in suspending consideration of the resolution.

9 The plaintiffs were:

Edward Bethune, R-AR
Laurence E. Craig, R-ID
Daniel B. Crane, R-IL
Philip M. Crane, R-IL
Billy Lee Evans, D-GA
Carroll Hubbard, Jr., D-KY
James Jeffries, R-KS
Elliot H. Levitas, D-GA
James G. Martin, R-NC
Lawrence P. McDonald, D-GA
W. Henson Moore, R-LA
Stephen L. Neal, D-NC
Ron Paul, R-TX
John H. Rousselot, R-CA
James D. Santini, D-NV
Richard T. Schulze, R-PA
Richard C. Shelby, D-AL
Bob Stump, D-AZ

Telephone conversation with the clerk's office of the Court of Appeals for the District of Columbia Circuit (September 18, 1984).

10 H.R. Res. 541, 97th Cong., 2d Sess., 128 CONG. REC. H4786-87 (daily ed. July 28, 1982).

11 H.R. Con. Res. 398, 97th Cong., 2d Sess., 128 CONG. REC. S10946, H6635-36 (daily ed. July 28, 1982).

12 *Id.* at H6635-36.

13 Named as co-defendants in the suit were: Thomas P. O'Neill, Jr., the Speaker of the House; George Bush, the President of the Senate; Edmund L. Henshaw, Jr., the Clerk of the House; and William F. Hildenbrand, the Secretary of the Senate. *Moore*, 733 F.2d at 948.

14 Moore v. U.S. House of Representatives, 553 F. Supp. 267, 271 (1982).

15 *Moore*, 733 F.2d at 956.

II. The *Moore* Court's Standing Analysis

In determining that the congressmen had standing, the *Moore* court applied the four pronged test which the Supreme Court announced in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*[16] Under *Valley Forge*, a plaintiff has standing when: (a) "he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant;"[17] (b) his injury falls within the "zone of interests" protected by the constitutional provision allegedly violated;[18] (c) the injury "can be traced to the challenged action" of the defendant;[19] and (d) the injury is "likely to be redressed by a favorable decision" of the court.[20] The *Valley Forge* Court recognized the complexity of standing, noting that "the concept cannot be reduced to a one-sentence or one-paragraph definition."[21] The Court, however, declared, "of one thing we may be sure: those who do not possess Art. III standing may not litigate as suitors in the courts of the United States."[22] Thus, if the plaintiff lacks standing, the court lacks subject matter jurisdiction because there is no "case or controversy" within the meaning of Article III of the Constitution.

In addressing the first prong of the *Valley Forge* analysis, the court of appeals concluded that the congressional plaintiffs had alleged a "specific injury in fact to a cognizable legal interest."[23] The court, however, recognized that suits brought by congressmen against coordinate branches of government present separation of powers concerns which may affect standing in the federal courts.[24] Therefore, the court required that the representatives' alleged injury be "specific and cognizable" in order to give rise to standing.[25] The court ruled that denial of the opportunity to debate and vote on the origination of legislation, in a manner prescribed by the Constitution, inflicted a "specific and concrete" injury on the plaintiffs.[26]

Although the *Moore* court included separation of powers concerns as a factor in its search for a specific injury in fact to each

16 454 U.S. 464 (1982).

17 *Id.* at 472 (quoting Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979)).

18 *Id.* at 475.

19 *Id.* at 472 (quoting Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976)).

20 *Id.*

21 *Id.* at 475.

22 *Id.* at 475-76.

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

24 *Id.*

25 *Id.*

26 *Id.* at 952.

plaintiff, the court emphasized that standing and the political question doctrine are distinct tenets.[27] Specifically, the court cautioned against an encroachment into standing analysis by political question concerns. The court warned that such an intrusion would "greatly curtail the exercise of federal court jurisdiction over matters that touch upon a coordinate branch of government."[28]

The court of appeals readily disposed of the remaining prongs of the standing test. In addressing the second prong, the court relied on its previous holdings that congressmen have standing to sue to assert violations of constitutionally prescribed procedure.[29] The *Moore* court concluded that an individual congressman's right to initiate legislation is within the "zone of interests" protected by the origination clause.[30]

The *Moore* court determined that the congressional plaintiffs satisfied the third prong of the *Valley Forge* test because the injury was "traceable to the challenged actions of the defendants."[31] The plaintiffs' alleged injury, the unconstitutional denial of the chance to debate and vote on the origination of TEFRA, occurred exclusively within the legislative branch. Both the House and Senate enacted the disputed legislation. Thus, according to the court, the alleged injury was traceable to the defendants' actions. Finally, the *Moore* court held that the court's power to grant declaratory and injunctive relief provided sufficient capacity to redress the claimed injury, thereby satisfying the fourth prong of the *Valley Forge* test.[32]

Moore's holding that the representatives had standing to sue the Congress may provide congressmen greater accessibility to the federal courts.[33] But, the court's decision to address a dispute con-

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27 *Id.* at 953.

28 *Id.*

29 The court refers to Goldwater v. Carter, 617 F.2d 697 (D.C. Cir.) (en banc), *vacated on other grounds*, 444 U.S. 996 (1979) and Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974).

30 The "zone of interests" requirement, as its language suggests, is intended to be generously applied. The requirement seeks primarily to eliminate from adjudication cases in which the connection between the purpose of the protection and the interest asserted is too tenuous to justify judicial determination on that basis. Therefore, "the challenging party need only show that it is an intended beneficiary of the statute and not necessarily the primary one." Constructores Civiles de Centroamerica v. Hannah, 459 F.2d 1183, 1189 (D.C. Cir. 1972).

31 *Moore*, 733 F.2d at 954.

32 Redressability has been characterized as "the connection between the alleged injury and the action requested of the court." Community Nutrition Inst. v. Block, 698 F.2d 1239, 1248 (D.C. Cir. 1983). Further, the requirement is not that the injury will certainly be redressed but rather that it "is likely to be redressed by a favorable decision." *Valley Forge*, 454 U.S. at 472 (1981) (quoting Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976)).

33 For purposes of standing analysis, the court assumes the validity of the plaintiff's claim and, without addressing the merits, construes the complaint in the plaintiff's favor. *See* Warth v. Seldin, 422 U.S. 490, 501 (1975). Thus, the holding in *Moore* is not limited to

fined to the legislative branch, brought by lawmakers who debated and voted on the contested legislation, may circumvent the requirement that a plaintiff suffer a specific injury in fact. For example, in *Moore*, each plaintiff alleged a violation of his constitutional right to participate as a representative of the House in the *origination* of revenue raising legislation.[34] Yet, Congress settled this dispute to the satisfaction of a majority of its members in a manner consistent with its established procedures.[35] Furthermore, the *Moore* court recognized that suits brought by congressional plaintiffs against a branch of the government "pose separation-of-powers concerns which may affect a complainant's standing."[36] Perhaps this concern should be emphasized when an individual congressman alleges an injury to his office although the Congress finds no harm.[37] As noted in the concurring opinion in *Goldwater v. Carter*,[38] "[w]here Congress it-

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the enactment of legislation in violation of the origination clause. Rather, the court required an injury to an "interest positively identified by the Constitution." *Moore*, 733 F.2d at 951. As noted in the concurring opinion, the courts, following *Moore*, could resolve disputes between legislators concerning any constitutional provision that regulates legislative procedures. *Id.* at 958. For example, article I, section 5, clause 4 of the Constitution provides that "[n]either House, during the Session of Congress, shall, without the consent of the other, adjourn for more than three days." And article I, section 4, clause 4 states that "[t]he Vice President of the United States shall be President of the Senate." *Moore* permits a congressional plaintiff to allege a personal injury resulting from violation of either provision and have standing to sue the Congress in the federal courts.

34 Although the plaintiffs alleged that they were denied the opportunity to participate in the origination of TEFRA, the legislative history casts some doubt on their claim. First, H.R. 4961, although substantially altered by the Senate, did in fact originate in the House and was passed by the House on December 15, 1981. H.R. 4961, 97th Cong., 2d Sess., 127 CONG. REC. H9607-10 (daily ed. Dec. 15, 1981). TEFRA retained the House number in the Senate. Second, the plaintiffs voted against the motion to table Representative Rousselot's resolution, which alleged that TEFRA unconstitutionally originated in the Senate. They voted against the motion to send TEFRA to Senate conference, and they voted against enacting TEFRA as legislation. *See* notes 8, 10, 12 *supra*. The district court noted: "Plaintiffs fully participated in the legislative process which culminated in the passage of the act they now challenge. They were simply outvoted." *Moore*, 553 F. Supp. at 270.

35 On July 28, 1982, the House voted to table Representative Rousselot's resolution, which alleged that TEFRA unconstitutionally originated in the Senate. H.R. Res. 541, 97th Cong., 2d Sess., 128 CONG. REC. H4776-77 (daily ed. July 28, 1982). Also on July 28, the House voted to send TEFRA to conference with the Senate, after debate on the constitutionality of the Senate's amendments to TEFRA. *Id.* at H4777-88. Finally, TEFRA passed both houses on August 19, 1982. H.R. Con. Res. 541, 97th Cong., 2d Sess., 128 CONG. REC. S10946, H6635-36 (daily ed. Aug. 19, 1982).

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

37 The concurring opinion, disagreeing with the court's conclusion that the plaintiffs had standing, noted:

> [W]e sit here neither to supervise the internal workings of the executive and legislative branches nor to umpire disputes between those branches regarding their respective powers. Unless and until those internal workings . . . brings forth a result that harms private rights, it is no part of our constitutional province, which is "solely, to decide on the rights of individuals."

Id. at 959 (Scalia, J., concurring) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803)).

38 617 F.2d 697 (D.C. Cir.) (en banc), *vacated on other grounds*, 444 U.S. 996 (1979).

self, and not the Executive, renders an individual legislator's vote ineffective, the courts have no role."[39]

Although the *Moore* court focused considerable attention on whether the plaintiffs had sustained "injury in fact,"[40] the court rather summarily disposed of the other *Valley Forge* criteria,[41] including the zone of interests analysis.[42] The court's disposition of this latter criterion may prove to be the most significant aspect of *Moore* in future litigation. Injury in fact analysis involves a determination that concrete harm has occurred.[43] Therefore, the nature of the inquiry is factual and necessarily dependent on the circumstances of the particular case. That the injury is within the zone of interests protected by the Constitution, on the other hand, looks to the nature of that injury. In finding that a particular type of injury is protected, the court directly adjusts the constitutional limits to its jurisdiction. Thus, by expressly stating that the "interests of individual legislators were within the zone of interests protected by constitutional provisions,"[44] the Court of Appeals for the District of Columbia Circuit has expanded congressional standing.[45]

Though the nature of the injury protected in *Moore* may prove crucial in future litigation, the court did not delineate which of the plaintiffs' specific interests the Senate may have violated by allegedly originating TEFRA. Prior congressional standing cases enumerate three basic interests that congressmen have in a constitutionally prescribed procedure: the interest of congressmen

39 *Goldwater*, 617 F.2d at 712 (Wright, J., concurring).

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

41 *Id.* at 953-54.

42 *Valley Forge*, 454 U.S. at 475. As noted earlier, *see* note 30 *supra*, the zone of interests requirement has received generous application. But, the requirement has remained essential to the analysis, preventing standing where the interest asserted is either so common to people generally or so indirectly the result of constitutional infringement that the injury could not serve as a basis of judicial precedent. *See* Flast v. Cohen, 392 U.S. 83 (1968).

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

44 *Id.* at 953-54.

45 Both *Goldwater*, 617 F.2d 697, and Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974), upon which the court relies to establish a zone of interest, *see Moore*, 733 F.2d at 954 n.36, involved controversies between separate branches of government. *Moore* is distinguishable. *Moore* presents an action by congressmen against the Congress; therefore, the case does not involve the necessities for judicial determination reflected in the previous decisions. In *Moore*, alternative means of redress were available within the Congress itself. Congress as a body recognized the possible deviation from congressional priority but voted to table Representative Rousselot's resolution. *See Moore*, 733 F.2d at 949. Thus, without expressly saying so, the court has asserted jurisdiction beyond the precedential basis.

Goldwater v. Carter, 617 F.2d 697 (D.C. Cir) (en banc), *vacated on other grounds*, 444 U.S. 996 (1979), involved a suit by members of Congress challenging the President's unilateral termination of a mutual defense treaty with Taiwan allegedly in violation of the treaty's provisions.

Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974), involved a suit by Senator Kennedy challenging an alleged "pocket veto" of S. 3418 in violation of article I, section 7 of the Constitution.

as representatives of individual citizens; the interest of congressmen as representatives of Congress as an institution; and the individual interests of congressmen as private plaintiffs asserting personal rights. Apparently, the last of these interests is the injury which the *Moore* court found.

One of the interests that the origination clause[46] protects is the right of citizens to have taxing authority restricted by the powers of popular vote.[47] Neither the district court[48] nor the court of appeals[49] denied that private plaintiffs would have standing to challenge TEFRA. In this respect, the congressmen may have been acting as representatives of the people. Prior to *Moore*, however, courts relied on prudential considerations to deny representative plaintiffs standing to sue.[50] Recognizing the risks of insufficient representation of the third party's interest and the possibility that the third party may not want the suit litigated, courts have required the plaintiff to show an independent basis for asserting standing to sue.[51] This independent basis is usually concrete personal injury to the plaintiff. Therefore, a congressman's status as representative of the people alone should not be enough to establish standing. Though the injury to the public is within the constitutionally protected zone of interest, an individual congressman may not assert the public interest without personal injury.

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46 U.S. CONST. art. I, § 7, cl. 1.

47 The origination clause derived from the fear of delegates of the larger states at the Constitutional Convention that if revenue raising power were placed in the Senate, the smaller states, because of equal representation, would have disproportionate control of the purse strings. The theory behind the clause is that national taxing authority should be placed in the legislative branch which is more responsive to popular opinion. The House of Representatives satisfied this goal in two respects. First, the House was selected more often and therefore more sensitive to public influence. Second, the House provided a better forum for debate—members were both more numerous and more representative of national popular vote. But, in the bargaining and compromise of the convention, the Senate was given almost unlimited power to amend or reject revenue bills. Therefore, the power remaining in the House over revenue bills consisted solely in their origination. Many argue that their power is still significant in that it effectively gives the House the power to "set the legislative agenda." That is, by originating revenue bills, the House effectively controls the structure and direction of legislative debate. *See*, Comment, *The Origination Clause, the Tax Equity and Fiscal Responsibility Act of 1982, and the Role of the Judiciary*, 78 NW. U.L. REV. 419 (1983). *See generally* C. WARREN, THE MAKING OF THE CONSTITUTION (1928).

48 *Moore*, 553 F. Supp. at 271-72.

49 *Moore*, 733 F.2d at 956.

50 "[T]he plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Warth v. Seldin, 422 U.S. 490, 499 (1975); *see* Frothingham v. Mellon, 262 U.S. 447 (1923) (involving taxpayer standing).

51 *See* Harrington v. Bush, 553 F.2d 190, 199 n.41 (D.C. Cir. 1977). The *Harrington* court recognized this approach to standing as "derivative" and in regard to asserting such a claim recognized that "it may make it substantially more difficult to meet the minimum requirements of Art. III . . . ." 553 F.2d at 199 n.41 (quoting Warth v. Seldin, 422 U.S. 490, 504-05 (1975)).

A second possible basis for standing in *Moore* is that violation of the origination clause injured the Congress as an institution and thereby injured the congressional plaintiffs as members of that institution.[52] Arguably, Congress is an intended beneficiary of the origination clause,[53] but the Congress elected not to enforce its right to strike down TEFRA.[54] Thus, this justification is also without merit.

Therefore, it appears that the court's decision was substantially based on personal injury to the congressmen. As previously discussed, however, it is difficult to conceptualize how this harm is within the zone of interests protected by the origination clause. As Judge Scalia argued in his concurring opinion, "the authority [under the origination clause] was conferred for the benefit not of the governors but the governed."[55] Thus, *Moore's* holding that the harm is within the zone of interests protected by the origination clause will create an unwarranted and unconstitutional expansion of federal jurisdiction in suits brought by congressmen.

III. The *Moore* Court's Remedial Discretion Analysis

Although the *Moore* court found that the congressional plaintiffs had standing to challenge the constitutionality of TEFRA, it nevertheless chose to abstain from awarding declaratory relief to the congressmen.[56] The basis of the court's abstention was the doctrine of remedial discretion.[57] The court indicated that "when a congressional plaintiff's dispute is primarily with other members of Congress and when private plaintiffs would have standing to challenge the allegedly unconstitutional conduct, the doctrine of remedial discretion counsels judicial restraint in affording the congressional plaintiff declaratory or injunctive relief."[58] This comment concludes, as noted earlier, that the congressional plaintiffs in *Moore* lacked standing. A proper review of the use of equitable discretion, however, must proceed under the assumption that the plaintiffs had standing to sue the Congress.

The *Moore* court's use of equitable discretion to abstain from awarding declaratory relief is significant because it will hinder congressional plaintiffs in seeking a remedy for their violated rights. In

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52 At a minimum, Congress has an interest in the origination clause inasmuch as the clause promotes an orderly process for legislating revenue bills.

53 Plaintiffs also asserted injury as members of the House Ways and Means Committee. The Constitution, however, provides no specific protection for this committee as a body and protest must be on other grounds.

54 *See Moore*, 733 F.2d at 960 (Scalia, J., concurring).

55 *Id.*

56 *Moore*, 733 F.2d at 956.

57 *Id.*

58 *Id.*

using the equitable discretion doctrine, the *Moore* court followed its decision in *Riegle v. Federal Open Market Committee*[59] and its subsequent related decisions in *Vander Jagt v. O'Neill*[60] and *Crockett v. Reagan*.[61] In *Riegle, Vander Jagt*, and *Crockett*, the District of Columbia Circuit held that when legislative remedies are available to a congressional plaintiff, the court must dismiss the case on the basis of prudential concerns.[62] Thus, because the *Moore* court found that the plaintiffs could vindicate their rights through the enactment, repeal, or amendment of TEFRA,[63] it affirmed dismissal of the case on the basis of prudential concerns. The *Moore* court, however, overstated the availability of such a remedy. To obtain legislative redress, congressional plaintiffs must persuade the majority of their colleagues to amend or repeal the bill at issue. This task is almost insurmountable since congressional plaintiffs typically represent a small minority of all the congressmen. Because legislative redress is likely to be unsuccessful for the congressional plaintiffs, they are left with a violated right and no remedy. The law of equity was created to avoid such a situation, not produce it.[64]

The standards to employ in determining whether to abstain, on the basis of equitable discretion, in a congressional plaintiff case were first set forth in *Riegle*.[65] The *Riegle* court developed a two-prong standard, holding that when (1) the congressional plaintiffs can attain legislative redress, and (2) a private plaintiff may bring a similar action, prudential concerns counsel for dismissal of the congressional plaintiffs' action.[66]

In analyzing the subsequent application of the *Riegle* standards, it is apparent that the District of Columbia Circuit has failed to consistently apply such standards. *Vander Jagt* and *Moore* exemplify this inconsistency. In *Vander Jagt*, fourteen Republican members of the House of Representatives sued the Democratic leaders of the House. The Republican members contended that the Democrats had systematically discriminated against them by providing them with fewer seats on House committees and subcommittees than they were proportionally due.[67] The court dismissed the entire case despite the fact that the Republicans had sued in their individual capacities as voters.[68] In noting the court's inconsistency with

59 656 F.2d 873 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981).
60 699 F.2d 1166 (D.C. Cir.), *cert. denied*, 104 S. Ct. 91 (1983).
61 720 F.2d 1355 (D.C. Cir. 1983).
62 *Moore*, 733 F.2d at 956.
63 *Id.* at 955.
64 *Id.* at 962 n.9 (Scalia, J., concurring).
65 656 F.2d 873 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981).
66 *Id.* at 882.
67 699 F.2d at 1167.
68 *Id.* at 1168.

Riegle, Judge Bork, in his concurring opinion in *Vander Jagt*, indicated:

> If they were applying *Riegle*, my colleagues would dismiss the action by plaintiffs in their capacities as legislators because legislative redress is available and a similar action could be brought by a private plaintiff. But they could not dismiss the entire action since there are private plaintiffs before us: the congressmen also sued in their capacities as voters and as representatives of the classes of all voters represented in the House by Republicans.[69]

Rather than rely on the principled rationale of *Riegle*, the *Vander Jagt* court withheld declaratory relief due to "the startlingly unattractive" idea of telling the Speaker of the House of Representatives what he must do to comply with the Constitution.[70] Such a rationale lacks the "general applicability" which Judge McGowan argued was necessary to properly use equitable discretion.[71]

Moore continues the inconsistent application of the equitable discretion doctrine. In *Moore*, the court indicated it could withhold "declaratory relief regardless of the availability of other forms of relief."[72] This approach varies from that outlined by the United States Supreme Court in *Younger v. Harris*[73] where the Court stated that "courts of equity should not act . . . when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief."[74]

Although the majority in *Moore* indicated that the congressional plaintiffs did have other available judicial remedies, the court did not elaborate.[75] Whatever adequate remedies at law the congressional plaintiffs may have had in *Moore* were denied when the court dismissed the case. Furthermore, given the substantial barriers to legislative redress, it is apparent that the plaintiffs have suffered ir-

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69 *Id.* at 1183 (Bork, J., concurring).

70 *Id.* at 1176.

71 *See* McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241, 251 (1981). McGowan contends that the standing doctrine is difficult to apply in congressional plaintiff cases due to the doctrine's inability to reflect separation of powers concerns that are inherent in such cases. He argues that the political question doctrine is incapable of resolving congressional plaintiff cases due to its inherent deceptiveness and its general disfavor among judicial and academic authorities. He further contends that the ripeness doctrine is inappropriate in congressional plaintiff cases because, like the standing doctrine, it fails to consider the separation of powers concerns prevalent in congressional plaintiff cases. *Moore*, 733 F.2d at 955.

72 *Moore*, 733 F.2d at 955.

73 401 U.S. 37 (1971).

74 *Id.* at 43-44.

75 *Moore*, 733 F.2d at 954. It should be noted that Judge Scalia contends in his concurring opinion that the plaintiffs do not have any other available judicial relief. *Id.* at 962 n.9. If so, the majority has extended the use of equitable discretion well beyond its originally intended use.

reparable injury because the court refused to grant declaratory relief. Thus, the *Moore* court failed to apply the equitable discretion doctrine developed in *Younger* and later extended in *Riegle* to congressional plaintiff cases. The District of Columbia Circuit should have provided clear and concise principles, capable of consistent application, for employing equitable discretion in congressional plaintiff cases.

IV. Conclusion

In holding that the congressmen had standing to sue in the federal courts, the *Moore* court has made the federal courts more accessible to congressional plaintiffs. By alleging an injury to the right to debate and vote in Congress, a potential congressional plaintiff will meet the requirement of standing and thus confer jurisdiction upon the federal court. *Moore*, perhaps unintentionally, allows congressional plaintiffs to overcome the difficult jurisdictional requirement, leaving only the less difficult equitable discretion hurdle. In essence, congressmen will not have to convince the court that it has jurisdiction. After *Moore*, congressmen need only convince a court that it should *exercise* its jurisdiction. It appears, however, that the *Moore* court circumvented the requirement that the congressional plaintiffs suffer a concrete and specific injury within the zone of interests protected by the origination clause. The court in *Moore* should have dismissed the case not because of prudential concerns, but rather because the plaintiffs lacked standing, a prerequisite to federal court jurisdiction.

Jeffrey L. Elverman
Thomas E. Lange
David C. Link