No. 99-1843

In the Supreme Court of the United States

TOM CAMPBELL, MEMBER, UNITED STATES HOUSE OF REPRESENTATIVES, ET AL., PETITIONERS

v.

WILLIAM JEFFERSON CLINTON, PRESIDENT OF THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this case is moot because the military air operations that are the subject of petitioners' suit have been completed.

2. Whether individual Members of Congress have standing to challenge military air operations in Kosovo on the ground that the operations allegedly exceeded the President's constitutional and statutory authority.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-54a) is reported at 203 F.3d 19. The opinion of the district court (Pet. App. 55a-79a) is reported at 52 F. Supp. 2d 34.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 2000. The petition for a writ of certiorari was filed on May 18, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are 31 Members of the United States House of Representatives. They brought suit in federal district court against the President of the United States seeking a declaration that the military air operations in Kosovo initiated on March 24, 1999, violated Article I, Section 8, Clause 11 of the Constitution, which confers on Congress the power to "declare War," and the War Powers Resolution, 50 U.S.C. 1541 *et seq.* The district court dismissed the suit on the ground that petitioners lack standing to sue. Pet. App. 55a-79a. The court of appeals affirmed. *Id.* at 1a-54a.

1. In early 1998, Serbia in the Federal Republic of Yugoslavia (FRY) launched a violent crackdown against ethnic Albanians in Kosovo. Pet. App. 59a. On March 21, 1999, Ambassador Richard Holbrooke made a final diplomatic effort to resolve the conflict. *Id.* at 60a. That effort was unsuccessful. *Ibid.* On March 23, 1999, the Senate passed a concurrent resolution providing that "the President of the United States is authorized to conduct military air operations and missile strikes in cooperation with our NATO allies against the Federal Republic of Yugoslavia." S. Con. Res. 21, 106th Cong., 1st Sess. (1999); see 145 Cong. Rec. S3118 (daily ed. Mar. 23, 1999). On March 24, 1999, the North Atlantic Treaty Organization (NATO) began a series of air strikes in the FRY. Pet. App. 60a-61a. The NATO campaign included air operations conducted by United States military forces. *Ibid.* On March 26, 1999, and again on April 7, 1999, President Clinton submitted reports to the Congress regarding the military air operations. *Id.* at 61a-62a.

On April 28, 1999, the United States House of Representatives voted on four measures relevant to the pre-

sent case. The House of Representatives defeated a joint resolution that would have declared a state of war between the United States and the FRY. Pet. App. 62a (citing H.R.J. Res. 44, 106th Cong., 1st Sess. (1999)); see 145 Cong. Rec. H2427, H2440-H2441 (daily ed. Apr. 28, 1999). By a tie vote of 213 to 213, the House of Representatives defeated a concurrent resolution previously passed by the Senate (see p. 2, *supra*) that would have expressly authorized the President to conduct military air operations and missile strikes against the FRY. Pet. App. 62a (citing S. Con. Res. 21, 106th Cong., 1st Sess. (1999)); see 145 Cong. Rec. H2441, H2451-H2452 (daily ed. Apr. 28, 1999). The House of Representatives defeated a concurrent resolution that would have directed the President "to remove United States Armed Forces from their positions in connection with the present operations against the [FRY]." Pet. App. 62a-63a (quoting H.R. Con. Res. 82, 106th Cong., 1st Sess. (1999)); see 145 Cong. Rec. H2414, H2426-H2427 (daily ed. Apr. 28, 1999). And the House of Representatives passed a bill (never acted on by the Senate) to prohibit the use of Defense Department funds for deployment of United States ground forces to the FRY without specific congressional authorization. Pet. App. 63a (citing H.R. 1569, 106th Cong., 1st Sess. (1999)); see 145 Cong. Rec. H2400, H2413-H2414 (daily ed. Apr. 28, 1999).

On May 20, 1999, Congress passed a law that provided emergency supplemental appropriations for the conflict in the FRY. See 1999 Emergency Supplemental Appropriations Act, Pub. L. No. 106-31, §§ 2002, 2005-2006, 113 Stat. 79-80; Pet. App. 63a. On June 10, 1999, the President announced the termination of air strikes in Kosovo. 35 Weekly Comp. Pres. Doc. 1074-1077. On June 21, 1999, after NATO's Secretary Gen-

eral announced the official termination of the NATO air campaign, Secretary of Defense William Cohen announced the redeployment of over 300 United States aircraft back to their home bases. Pet. App. 35a.

2. Petitioners are 31 Members of the United States House of Representatives who voted against the proposed declaration of war and authorization of the military operation. During the pendency of the bombing campaign, petitioners filed suit in the United States District Court for the District of Columbia, naming as the defendant the President of the United States. Their complaint alleged that the President had violated the War Powers Clause of the Constitution and the War Powers Resolution by authorizing air strikes in the FRY for a period of more than 60 days without congressional authorization. Pet. App. 3a, 64a. Petitioners sought an order declaring that the United States air strikes were unlawful and that the President was required to withdraw United States forces from the FRY by May 25, 1999 (60 days after the President's initial report to Congress regarding the air campaign). *Id.* at 55a-56a, 64a-65a.

On June 8, 1999, two days before the President announced the termination of United States air strikes, the district court dismissed the complaint on the ground that petitioners lack standing to sue. Pet. App. 55a-79a. The court explained that "[t]he dispute over standing in this case centers on whether plaintiffs, suing in their capacities as members of the House of Representatives, have alleged a particularized and personal injury sufficient to establish their interest in this litigation." *Id.* at 69a. It concluded that under the applicable precedents of this Court, "the injury of which plaintiffs complain—the alleged 'nullification' of congressional votes defeating the measures declaring war and providing the

President with authorization to conduct air strikes—is not sufficiently concrete and particularized to establish standing." *Id.* at 73a.

3. The court of appeals affirmed. Pet. App. 1a-54a.

a. In holding that petitioners lack standing to sue, the court of appeals placed primary reliance on *Raines* v. *Byrd*, 521 U.S. 811 (1997), in which this Court concluded that individual Members of Congress did not have standing to bring a constitutional challenge to the Line Item Veto Act. Pet. App. 4a. The court of appeals emphasized in particular the availability of alternative means by which Members of Congress may seek to influence United States foreign policy. The court explained:

> Congress certainly could have passed a law forbidding the use of U.S. forces in the Yugoslav campaign; indeed, there was a measure—albeit only a concurrent resolution—introduced to require the President to withdraw U.S. troops. Unfortunately, however, for those congressmen who, like [petitioners], desired an end to U.S. involvement in Yugoslavia, this measure was *defeated* by a 139 to 290 vote. Of course, Congress always retains appropriations authority and could have cut off funds for the American role in the conflict. Again there was an effort to do so but it failed; appropriations were authorized. And there always remains the possibility of impeachment should a President act in disregard of Congress' authority on these matters.

Id. at 10a. The court of appeals concluded that because "Congress has a broad range of legislative authority it can use to stop a President's war making, * * * under [*Raines*] congressmen may not challenge the Presi-

dent's war-making powers in federal court." *Id.* at 11a (citation omitted).

b. Judge Randolph filed a separate opinion concurring in the judgment. Pet. App. 22a-38a. Judge Randolph concluded that "the case is moot" because "[a]ll agree that the 'hostilities' ended by June 21, 1999, after NATO's Secretary General announced the official termination of the air campaign and Secretary of Defense Cohen announced the redeployment of more than 300 U.S. aircraft back to their home bases." *Id.* at 22a, 35a. Judge Randolph rejected petitioners' contention that their suit fell within the exception to the mootness bar for issues "capable of repetition, yet evading review." *Id.* at 35a-38a. He explained, *inter alia*, that because military conflicts sometimes "last for years," the category of conduct that is the subject of petitioners' suit—"offensive wars initiated without congressional approval"—is not "'inherently' of a sort that evades review." *Id.* at 36a.

Judge Randolph also concluded that petitioners lack standing to sue. Pet. App. 24a-34a. He explained that petitioners' votes against a declaration of war were not deprived of legal effect, since they served to deny the President various powers that are available only "in time of war." *Id.* at 26a-29a. Judge Randolph further observed that petitioners' "real complaint is not that the President ignored their votes" but "that he ignored the War Powers Resolution," and that petitioners' theory of standing would logically apply whenever a President is alleged to have acted in violation of a federal statute. *Id.* at 30a. Judge Randolph found that asserted basis for standing to be "highly problematic, not only because the principle is unconfined but also because it raises very serious separation-of-powers concerns." *Ibid.*

c. Judge Silberman and Judge Tatel filed separate concurring opinions. Pet. App. 14a-21a, 45a-54a. Judge Silberman stated that "no one" is able "to challenge a President's arguably unlawful use of force," because courts "lack judicially discoverable and manageable standards" for addressing whether a President unlawfully used force. *Id.* at 14a (citation and internal quotation marks omitted). Judge Tatel explained that he did "not share [Judge Silberman's] view that the case poses a nonjusticiable political question." *Id.* at 45a. He agreed, however, that petitioners lack standing to sue. *Ibid.*

ARGUMENT

Petitioners' claims are moot because the military air operations that are the subject of this action have concluded. Moreover, the court of appeals correctly held that petitioners lack standing to sue, and its decision does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Article III, Section 2 of the Constitution restricts the jurisdiction of the federal courts to "Cases" and "Controversies." "[A]n actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997) (quoting *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975)). A case is moot when the issues presented have no continuing adverse impact and there is no effective relief that a court may grant. See *O'Shea* v. *Littleton*, 414 U.S. 488, 496 (1974).

As Judge Randolph's concurring opinion explains (see Pet. App. 22a, 35a-38a), straightforward application of established principles makes clear that petitioners' claim is moot. Petitioners brought this action

to challenge the legality of the United States' participation in the NATO air campaign in the FRY. *Id.* at 3a. Petitioners acknowledge (Pet. 21) that the air campaign that was the subject of their lawsuit ended over a year ago. Petitioners' claim for declaratory relief is therefore moot.

Contrary to petitioners' contention (Pet. 21), this case does not fall within the exception to mootness for matters "capable of repetition, yet evading review." See *Southern Pac. Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911). Armed conflicts (as demonstrated by the conflicts in Vietnam and Korea) are not inherently of such short duration as to evade judicial review. Nor is there any reason to conclude that the individual petitioners in this case are likely to cast votes in circumstances analogous to those presented here.[1]

2. a. As the court of appeals correctly recognized, this Court's decision in *Raines* v. *Byrd*, 521 U.S. 811 (1997), makes clear that petitioners lack standing to sue. This Court has "consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 573-574 (1992). The Court's decision in *Raines* makes clear that the same

[1] Petitioners contend (Pet. 24) that most future United States military actions can be expected to end within 60 days. As Judge Randolph's concurring opinion explains, however, "[a]ccepting that prediction as accurate dooms [petitioners'] case," since it suggests that future disputes regarding presidential compliance with the 60-day provision of the War Powers Resolution are unlikely to arise. Pet. App. 37a.

principle applies when a Member of Congress invokes the jurisdiction of the federal courts. See 521 U.S. at 830 (holding that the challenge to the Line Item Veto Act should be dismissed because the plaintiff 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").

In *Raines*, this Court held that the plaintiff Members of Congress could not establish standing to challenge the Line Item Veto Act based on an asserted diminution of their voting power. See 521 U.S. at 821-826. As the court of appeals correctly held, petitioners' asserted injury cannot meaningfully be distinguished from the claims in *Raines*. Petitioners assert that the President violated the Constitution and the War Powers Resolution by initiating and continuing the Kosovo air campaign without obtaining adequate congressional approval. They claim "irreparable harm" resulting from a deprivation of their "right and duty * * * to commit this country to war, or to prevent, by refusing their assent, the committing of this country to war," as well as a "complete[] nullifi[cation of] their vote against authorizing military air operation and missile strikes." C.A. App. 9. Like the injury alleged in *Raines*, the harms asserted here are quintessential "institutional injur[ies]" that "damage[] all Members of Congress and both Houses of Congress equally," and that are claimed only on the basis of petitioners' official status as legislators. See *Raines*, 521 U.S. at 821. As in *Raines*, moreover, petitioners remain free to utilize the legislative process to vindicate their policy objectives. Compare *Raines*, 521 U.S. at 829 (noting that "Members of Congress * * * may repeal the [Line Item Veto] Act or exempt appropriations bills from its reach") with Pet. App. 11a (observing that "Congress has a broad

range of legislative authority it can use to stop a President's war making").[2]

b. Petitioners' reliance (Pet. 9-13) on *Coleman* v. *Miller*, 307 U.S. 433 (1939), is misplaced. In *Coleman*, 21 (out of 40) state senators brought a mandamus action in the Kansas Supreme Court. *Id.* at 436. The gravamen of their suit was that the State's Lieutenant Governor, as presiding officer of the Senate, had improperly cast a tie-breaking vote in support of the ratification of a proposed amendment to the United States Constitution. *Id.* at 435-436. The state supreme court entertained the suit on the merits, concluded that the Lieutenant Governor was authorized to cast the deciding vote, and held on that basis that the proposed amendment had been properly ratified by the Kansas Legislature. *Id.* at 437. The plaintiffs then sought review in this Court, which held that "at least the twenty senators whose votes, if their contention were sustained, would have been sufficient to defeat the resolution ratifying the proposed constitutional amendment, have an interest in the controversy which, treated by the state court as a basis for entertaining and deciding the federal questions, is sufficient to give the Court jurisdiction to review that decision." *Id.* at 446; see *Raines*, 521 U.S. at 822-823 (summarizing *Coleman*).

In *Raines*, this Court held that "*Coleman* stands (at most) for the proposition that legislators whose votes

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[2] Petitioners also contend (Pet. 12) that the court of appeals' decision conflicts with the prior decision of the District of Columbia Circuit in *Chenoweth* v. *Clinton*, 181 F.3d 112 (1999), cert. denied, 120 S. Ct. 1286 (2000). An intra-circuit conflict typically provides no basis for invoking this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). In any event, no true conflict exists, since the court in *Chenoweth* also held that the plaintiff Representatives lacked standing. See 181 F.3d at 113-117.

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." 521 U.S. at 823 (citation omitted).[3] The plaintiffs in *Raines*, by contrast, could "not allege[] that they voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless deemed defeated." *Id.* at 824. While acknowledging that the Line Item Veto Act might in some sense reduce the "effectiveness" of the plaintiffs' votes on future appropriations bills (see *id.* at 825), the Court explained that "[t]here is a vast difference between the level of vote nullification at issue in *Coleman* and the abstract dilution of institutional legislative power that is alleged here. To uphold standing here would require a drastic extension of *Coleman*. We are unwilling to take that step." *Id.* at 826.

Like the petitioners in *Raines* (and unlike the plaintiffs in *Coleman*), petitioners cannot claim that they comprised all or part of a legislative majority that would have enacted (or defeated) a specific legislative measure but for the action of the President. Petitioners emphasize (Pet. 9) that the House of Representatives failed to pass a declaration of war and failed to authorize United States air strikes. But the defeat of those concurrent resolutions did not constitute a legislative command to cease all military actions in Kosovo. Indeed, on the same day that it failed to pass those resolutions, the House of Representatives defeated a measure that purported to require the President to "re-

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[3] The Court in *Raines* reserved the question whether the analysis in *Coleman* would apply to a suit brought by federal legislators. See 521 U.S. at 824-825 n.8.

move United States Armed Forces from their positions in connection with the present operations against the Federal Republic of Yugoslavia." Pet. App. 63a (citing H.R. Con. Res. 82, *supra*). Congress subsequently appropriated funds to carry out the military campaign in Kosovo. See Pet. App. 10a, 63a; p. 3, *supra*. The President did not "nullify" any congressional vote by spending appropriated funds to conduct the Kosovo air campaign.

As Judge Randolph observed, petitioners' "real complaint is not that the President ignored their votes," but "that he ignored the War Powers Resolution." Pet. App. 30a. The injury that petitioners allege is nothing more than the "wholly abstract" diminution of legislative power that can be asserted whenever the Executive Branch is alleged to have acted in violation of applicable statutes. *Raines*, 521 U.S. at 829. Under this Court's decision in *Raines*, petitioners' attempt to assert a generalized institutional injury based on Presidential actions funded by Congress was properly dismissed for lack of standing. To recognize standing in this case would vest individual Members of Congress with unfettered access to the courts to challenge the validity of any Executive Branch action they believe to be unlawful—a result severely at odds with the separation of powers principles that underlie Article III standing requirements.

3. Petitioners also contend (Pet. 13-20) that this case raises important questions of constitutional law regarding the allocation of responsibility between Congress and the President for the development of United States military policy. This case is an unsuitable vehicle for resolution of those questions, however, since (as the courts below correctly held) petitioners' suit does not satisfy the requirements of Article III. For the same

reason, there is no merit to petitioners' suggestion (Pet. 25) that "[t]his Court should resolve the disagreement between Judges Silberman and Tatel as to whether the issues presented in this case are justiciable." Independent of their comments concerning justiciability, Judge Silberman and Judge Tatel agreed that petitioners lack standing to bring this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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