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HOW CONGRESS COULD DEFEND DOMA IN COURT (AND WHY THE BLAG CANNOT)

Matthew I. Hall*

In one of the most closely watched litigation matters in recent years, the Supreme Court will soon consider Edith Windsor's challenge to the Defense of Marriage Act (DOMA). The Court surprised many observers by granting certiorari, not only on the merits of Windsor's equal protection and due process claims, but also on the question whether the defendants—the United States and the Bipartisan Legal Advisory Group of the House of Representatives (the BLAG)—have Article III standing to defend DOMA. The United States has agreed with plaintiffs that DOMA is unconstitutional, prompting the BLAG to intervene for the purpose of defending DOMA's constitutionality. No lower court has yet addressed whether the BLAG has standing, so the Supreme Court will have the first crack at the issue. But it turns out that the answer is straightforward: Under settled precedent, the BLAG lacks authority to represent either the United States or Congress, and having claimed no interest of its own, it therefore lacks Article III standing. If the Court so holds—as it should—its decision will have repercussions for Edith Windsor and dozens of other litigants with DOMA cases pending in lower federal courts. And the Court's handling of the standing question may also have enduring significance for the law of legislative standing and constitutional separation of powers.

BACKGROUND

Dr. Thea Speyer died in 2009, leaving a substantial estate to her spouse, Ms. Edith Windsor. Speyer and Windsor had been partners for nearly thirty-

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five years at the time of Speyer's death, and New York law recognized them as legally married. Had Windsor been married to a man, the bequest would have been exempt from federal estate taxes under the Internal Revenue Code's "spousal exemption." But because section 3 of DOMA provides that the term "spouse" for federal law purposes excludes members of same sex couples,¹ Windsor was required to pay over \$363,000 in federal estate tax. She paid the tax and sued for a refund on the ground that DOMA's definition of spouse is unconstitutional.

Many litigants have challenged DOMA since it was enacted in 1996, and the federal government consistently defended the statute's constitutionality until February 23, 2011. On that date, Attorney General Eric Holder announced a shift in policy. The Administration had concluded, Holder said, "that classifications based on sexual orientation warrant heightened scrutiny," and that "Section 3 of DOMA is unconstitutional under that standard." Accordingly, Holder announced that "the President has instructed the Department not to defend the statute" in *Windsor* and other cases, and that DOJ would notify the courts "of our interest in providing Congress a full and fair opportunity to participate in the litigation in those cases."²

House Speaker John Boehner swiftly declared his intention to convene the BLAG to consider how the House should proceed. House Rule II.8 creates the BLAG and authorizes it to "consult" with the Speaker concerning litigation in which the House's interests are implicated.³ In April 2011, Boehner announced that the BLAG itself would defend DOMA in court.⁴ The BLAG hired former Solicitor General Paul Clement as counsel, and promptly filed briefs in several pending cases, seeking permission for the BLAG to intervene "for the limited purpose of defending the constitutionality of Section III" of DOMA.⁵

1. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2011) and 28 U.S.C. § 1738C (2011)). Section 3 of DOMA defines "spouse" to mean only "a person of the opposite sex who is a husband or a wife." *Id.*

2. Letter from Eric H. Holder, Jr., Att'y Gen. of the United States, to John Boehner, Speaker of the U.S. House of Reps. (Feb. 23, 2011), *available at* <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

3. RULES OF THE HOUSE OF REPRESENTATIVES: ONE HUNDRED TWELFTH CONGRESS, at Rule II.8 (2011), *available at* <http://www.rules.house.gov/singlepages.aspx?NewsID=160&rsbd=165>. The BLAG is composed of five members of the House leadership: the Speaker, the Majority and Minority Leaders, and the Majority and Minority Whips. *See* Press Release, Congressman John Boehner, Regarding the Defense of Marriage Act (Mar. 4, 2011), *available at* <http://boehner.house.gov/news/documentsingle.aspx?DocumentID=227399>.

4. Letter from John Boehner, Speaker of the House of Representatives, to Nancy Pelosi, House Minority Leader (Apr. 18, 2011), *available at* <http://boehner.house.gov/news/documentsingle.aspx?DocumentID=237443>.

5. Memorandum of Points and Authorities In Support of Unopposed Motion of the Bipartisan Legal Advisory Group of the U.S. House of Representatives to Intervene for a Limited Purpose at 4, *Windsor v. United States*, No. 10-civ-8435 (S.D.N.Y. Apr. 18, 2011).

In most of the cases in which the BLAG sought to intervene, the plaintiffs and the Department of Justice did not oppose the motion, and the courts permitted the BLAG to become a party.⁶ In Edith Windsor's case, the federal trial court permitted the BLAG to intervene, and later invalidated section 3 of DOMA. The Second Circuit affirmed in October 2012. Both the BLAG and the DOJ attorneys representing the United States petitioned for certiorari, and the Supreme Court agreed to review Ms. Windsor's case on December 7, 2012. The Court is now expected to resolve once and for all the question of DOMA's constitutionality—but only if it reaches the merits. And that may not happen. The Court signaled its concern about jurisdiction by granting certiorari not only on the merits of Windsor's constitutional claims, but also on the jurisdictional issue of “whether the [BLAG] has Article III standing in this case.”⁷ Although this question has attracted some scholarly attention,⁸ it has generated no discussion by the lower courts that have considered DOMA's constitutionality. The Court's grant of certiorari on the standing question promises to change that.

6. In at least two cases, *McLaughlin v. Panetta*, and *Dragovich v. United States Department of the Treasury*, the plaintiffs did object to the BLAG's intervention. See, e.g., Plaintiffs' Opposition to the Motion for Leave to Intervene, *McLaughlin v. Panetta*, No. 11-11905 (D. Mass. May 9, 2012); Plaintiffs' Opposition to the Motion of the Bipartisan Legal Advisory Group's Motion to Intervene, *Dragovich v. U.S. Dep't of the Treasury*, 764 F. Supp. 2d 1178, No. 10-01564 (N.D. Cal. May 10, 2011). In *Windsor* and other cases, however, no such opposition was mounted. As a doctrinal matter, the plaintiff's acquiescence is beside the point, because the question of the BLAG's standing is jurisdictional, and thus cannot be waived.

7. See *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012), cert. granted, 2012 WL 4009654 (U.S. Dec. 7, 2012) (No. 12-307). The Court also granted certiorari on the question of the standing of the United States, phrasing the issue as “Whether the Executive Branch's agreement with the court below that DOMA is unconstitutional deprives this Court of jurisdiction to decide this case.” *Id.* That question is beyond the scope of this Essay.

8. See, e.g., Matthew I. Hall, *Standing of Intervenor-Defendants in Public Law Litigation*, 80 FORDHAM L. REV. 1539 (2012); Tara L. Grove & Neal Devins, *Why Congress Cannot Represent Itself in Court* (2013) (unpublished manuscript) (on file with author); see also Amanda Frost, *Congress in Court*, 59 UCLA L. REV. 914 (2012); Abner S. Greene, *Interpretive Schizophrenia: How Congressional Standing Can Solve The Enforce-But-Not-Defend Problem*, 81 FORDHAM L. REV. 577 (Nov. 2012); Joseph Landau, *The President And The Passive Virtues: Executive Branch Constitutionalism and Individual Rights* (2013) (unpublished manuscript) (on file with author); Howard M. Wasserman, *Rejecting Sovereign Immunity in Public Law Litigation*, 80 FORDHAM L. REV. *Res Gestae* 76 (2012), available at http://ir.lawnet.fordham.edu/res_gestae/13. Cf. Linda Greenhouse, *Standing and Delivering*, N.Y. TIMES OPINIONATOR (Dec. 12, 2012, 9:00 PM), <http://opinionator.blogs.nytimes.com/2012/12/12/standing-and-delivering> (noting that “the procedural minefield the court has laid around these cases may hold implications reaching well beyond the domain of gay rights—for the relationship of states to their citizens and for the balance of power between the president and Congress.”).

THE BLAG LACKS ARTICLE III STANDING TO DEFEND DOMA

Article III's limitations on federal jurisdiction apply to legislators and legislative institutions just as surely as they apply to other litigants. In particular, legislative litigants must establish "standing" by showing that they have a personal stake in the outcome of a case.⁹ In seeking to intervene in *Windsor* and other DOMA cases, the BLAG has not claimed to possess an interest of its own in defending DOMA; rather, it has professed to represent: (1) the interest of the United States in defending a federal law when the executive has "abdicated [his] constitutional responsibility" to do so, and (2) the interest of the House of Representatives "in defending the constitutionality of its legislative handiwork."¹⁰ Neither of these rationales can support standing for the BLAG. First, under settled law Congress lacks authority to assert the interests of the United States in litigation unless authorized by statute—and no statute permits Congress or the BLAG to defend challenged federal statutes in general, or DOMA in particular. Second, the Court has held that legislative committees such as the BLAG may not assert the interests of a chamber of Congress without explicit authorization from that chamber. Here, the House has not made any determination to defend DOMA and has not delegated to the BLAG (or to the Speaker) authority to make that decision for it. Thus, under controlling principles of law, the BLAG has no right to bring the *Windsor* case before the Supreme Court.

The BLAG May Not Litigate on Behalf of the United States Because It Lacks Statutory Authorization

One theory on which the BLAG has sought to establish standing is that it is asserting the interest of the United States itself. The United States certainly possesses an interest in defending any challenged federal law,¹¹ but the authority to assert the interests of the United States in Court is granted by statute to the Department of Justice, and not to the BLAG or to Congress. The relevant provision is 28 U.S.C. § 516, which provides that:

9. *Raines v. Byrd*, 521 U.S. 811, 819 (1997); *cf. Diamond v. Charles*, 476 U.S. 54, 62 (1986) (stating that the power to invoke judicial authority "is not to be placed in the hands of concerned bystanders who will use it simply as a vehicle for the vindication of value interests.") (citation and internal quotation marks omitted).

10. *See, e.g.*, Motion for Leave to Intervene of the Bipartisan Legal Advisory Group of the U.S. House of Representatives at 12, *Massachusetts v. U.S. Dep't. of HHS* 682 F.3d 1 (1st Cir. 2012) (No. 10-2204, 10-2207, & 10-2214) (asserting that "in light of the Department's refusal to [defend DOMA] the House should be allowed to intervene to discharge that function."); *see also* Memorandum of Points and Authorities in Support of Motion of the Bipartisan Legal Advisory Group For Leave to Intervene at 13, *McLaughlin v. Panetta*, (No. 11-11905) (D. Mass. May 1, 2012); *id.* at 9 ("The House . . . has a direct interest in defending the constitutionality of its legislative handiwork . . .").

11. *See, e.g.*, 28 U.S.C. 2403(a) (2011); Hall, *supra* note 8, at 1576-79; *cf. Diamond*, 476 U.S. at 62 ("a State has standing to defend the constitutionality of its statute.").

Except as otherwise provided by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefore, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

As the first clause makes clear, section 516 does two things: First, it grants authority to represent the United States to the DOJ. Second, it expressly *prohibits* anyone else from representing the United States unless “otherwise provided by law.” Unfortunately for the BLAG, there is no provision anywhere in the United States Code that authorizes the BLAG to represent the United States in defending a federal statute. The BLAG cites no statutory authority for its claimed standing to represent the United States—and none exists. For this simple reason, section 516 is fatal to the BLAG’s claim of standing to assert the interests of the United States.¹²

Lacking statutory authority to litigate on behalf of the United States, the BLAG seeks to invoke *INS v. Chadha* for the proposition that “Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional.”¹³ But *Chadha* did not hold, as the BLAG suggests, that Congress may represent the United States whenever it perceives that the executive branch is “abdicating” its responsibility to defend a particular piece of legislation. Rather, it permitted Congress to assert its own institutional interests by defending a statute that implicated the balance of power between Congress and the President. *Chadha* concerned the constitutionality of the legislative veto, a statute that increased Congress’s power at the expense of the executive branch. The Court noted that the challenge to the statute put the executive and legislative branches in direct conflict and that Congress therefore had a stake in the outcome and was a proper party to defend the statute.¹⁴ The fact that the statute affected the allocation of power between Congress and the executive branch was central to the Court’s reasoning in *Chadha*, and is entirely lacking here. In short, because the narrow institutional-role exception laid down in *Chadha* is inapplicable here, our law requires statutory authorization for a chamber of Congress or its delegate to represent the United States in litigation. No such authorization exists with respect to DOMA.

The BLAG May Not Litigate on Behalf of the House of Representatives Without

12. See Senate Select Comm. on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51, 56 n.8 (D.D.C. 1973) (holding that section 516 is satisfied only by a statute, and not by a resolution of a single chamber of Congress).

13. See Motion for Leave to Intervene, *supra* note 10, at 13 (citing *INS v. Chadha*, 462 U.S. 919, 940 (1983)).

14. See *INS v. Chadha*, 462 U.S. 919, 930 n.5, 937-939 (1983); see also Raines, 521 U.S. at 826, 828-29 (construing *Chadha* narrowly); Hall, *supra* note 8, at 1547-49. Moreover, in *Chadha*, the House and Senate formally voted to intervene. See 462 U.S. at 923-28. As discussed below, the same is not true here.

That Chamber's Explicit Authorization

An alternative theory on which the BLAG premises its claim of standing is that it is representing not the United States as a whole, but the House of Representatives insofar as it has an interest in defending its legislative handiwork. The problem with this argument is that, even assuming that Congress has an interest in defending any challenged federal law, the Supreme Court has consistently held that components of Congress—such as individual members or committees—may not assert Congress's institutional interests in federal litigation unless authorized to do so by a full chamber vote. This requirement of full-chamber authorization protects the separation of powers by ensuring that litigation positions purportedly taken on Congress's behalf are actually "desired by Congress," and promotes democratic accountability by ensuring that the House and Senate are not "insulated" from responsibility for the conduct of their agents.¹⁵

In *Raines v. Byrd*, for instance, the Court rejected an effort by individual legislators to assert the institutional interests of their respective chambers. In *Raines*, individual members of Congress challenged the Line Item Veto Act on constitutional grounds, alleging that the Act injured them by diluting the effectiveness of their votes on spending and taxation bills. The Court noted that the plaintiffs had alleged no personal injury, but only an institutional one, observing that "If [plaintiffs] were to retire tomorrow, [they] would no longer have a claim; the claim would be possessed by [their] successors instead." The Court denied standing to assert this institutional interest, emphasizing that Congress itself had not sought judicial intervention, and holding that no suit to vindicate an institutional interest of the Congress could take place without authorization by the full chamber.¹⁶

The BLAG's counsel, Paul Clement, is well aware of this line of cases. Indeed, while employed in the executive branch, he relied on it to assert a far narrower view of legislative standing than he now asserts on behalf of the BLAG. In *Walker v. Cheney*, the Comptroller General (an agent of Congress) requested

15. See *Watkins v. United States*, 354 U.S. 178, 201, 205 (1957); see also, e.g., *Raines*, 521 U.S. at 829 (rejecting the plaintiffs' claim of legislative standing, and "attach[ing] some importance" to the fact that plaintiffs were not authorized to assert the interests of their respective chambers); *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 544 (1986) ("Generally speaking, members of collegial bodies do not have standing to perfect an appeal the body itself has declined to take."); *United States v. Ballin*, 144 U.S. 1, 7 (1892) ("The two houses of Congress are legislative bodies representing larger constituencies. Power is not vested in any one individual, but in the aggregate of the members who compose the body . . .").

16. *Raines*, 521 U.S. at 814, 821, 829; see also *id.* at 829 & n.10 (noting that appellees had alleged no individual injury, and had not been authorized by their respective chambers to assert the institutional interests thereof; further citing *Bender*, 475 U.S. at 544, and *Ballin*, 144 U.S. at 7 for the proposition that legislative bodies must generally act collectively in seeking judicial review).

documents from Vice President Dick Cheney as part of a congressional investigation. The Vice President refused to produce some of those documents, leading to a suit by the Comptroller General, who alleged institutional injury to Congress. Then-Deputy Solicitor General Clement's brief in support of the Vice President's successful motion to dismiss argued that "[w]hile *Raines* left open the question of whether Congress itself could bring suit for institutional injuries through a majority vote of its members (or the members of one chamber), it makes clear that anything short of such collective action does not satisfy Article III."¹⁷

As Mr. Clement argued in *Walker v. Cheney*, according standing to a purported agent of Congress without explicit authorization by the full chamber would be contrary to established Article III standing doctrine. Mr. Clement argued that the Comptroller General was "simply acting as a surrogate for *two individual members* of Congress, purportedly to vindicate an institutional Legislative Branch interest." In such circumstances, he explained, any claim of standing is foreclosed by Article III: "As in *Raines*, neither House of Congress has authorized any action on behalf of either the Senate or the House. *Raines* thus makes clear that individual Members of Congress cannot assert Congress's institutional interests."¹⁸

The BLAG's effort to defend DOMA on Congress's behalf is not meaningfully different from the Comptroller General's failed attempt to assert Congress's institutional interest in *Walker v. Cheney*. Although the BLAG claims to be representing the House, that chamber has never authorized the BLAG to defend DOMA. The House Rule that created the BLAG endows it only with the authority to "consult with the Speaker" concerning the conduct of litigation in which the House is involved. There is no House Rule or House Resolution granting the BLAG (or the Speaker) a general authority to prosecute litigation on the House's behalf, and the House has not adopted a resolution authorizing a legal defense of DOMA by the BLAG (or by the Speaker, or by anyone else). Indeed, the only members of Congress who have voted to authorize DOMA's

17. Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss and in Opposition to Plaintiff's Motion for Summary Judgment at 15-16, *Walker v. Cheney*, 230 F. Supp. 2d 51 (D.D.C. 2002) (No. 02-340), 2002 WL 32388017 [hereinafter Vice President's Memorandum of Points and Authorities] (emphasis added). Compare *id.* at 14-16 (arguing that *Raines* requires a full chamber vote authorizing the assertion of Congress's institutional interest) with Motion for Leave to Intervene, *supra* note 10, at 5, 14-17 (arguing that the House has an institutional interest in defending DOMA and that the BLAG can assert that interest without a full chamber vote). For a thorough and insightful discussion of these issues see Plaintiffs' Opposition to the Motion of the BLAG for Leave to Intervene at 12, *McLaughlin v. Panetta*, No. 11-11905 (D. Mass. May 9, 2012).

18. Vice President's Memorandum of Points and Authorities, *supra* note 17, at 14-15 (emphasis added).

legal defense are the three Republican Representatives who serve on the five-member BLAG.¹⁹

Despite these facts, the BLAG has assured the courts that it is acting pursuant to specific authorization by the House, stating that “the House *has formally determined to defend [DOMA]*.”²⁰ But this assertion is simply false—a point made clear by the fact that the only authority the BLAG is able to cite for this alleged “formal” authorization is a press release issued by the Speaker’s office, indicating that three members of the BLAG voted to authorize the defense of DOMA. Whatever else this press release and the vote it reports might be, they do not constitute a “formal” determination—of anything at all—by the House itself. The BLAG cites no House Resolution or other determination by the full chamber to defend DOMA, because none exists.

In short, whatever may be Congress’s constitutional authority to participate in litigation to defend a federal statute, the Court has consistently required at least that a chamber of Congress itself must exercise that authority—and neither the House nor the Congress as a whole has done so with respect to DOMA. With neither an interest of its own nor authority to assert the House’s purported interest, the BLAG simply has no right to defend DOMA.

CONCLUSION

The BLAG’s effort to defend DOMA raises thorny separation of powers questions about the power of Congress, or a component of Congress, to choose to defend federal laws in the face of executive non-defense. There may come a time when the Court must address those larger questions, but now is not that time because the BLAG is not authorized to speak for the United States or for Congress. Even assuming that the separation of powers permits legislative defense of statutes, the BLAG cannot defend DOMA, because of two controlling principles: First, the BLAG lacks statutory authorization to represent the interests of the United States itself, as required by 28 U.S.C. section 516. Second, even if the House itself could defend DOMA, it has not authorized the BLAG to do so. The Supreme Court permits congressional litigants to assert the institutional interests of Congress only upon a full chamber vote, and Congress has taken no action to authorize the BLAG to defend DOMA on its behalf. Thus,

19. See Jill Jackson, *House GOP Moves to Defend DOMA*, CBS NEWS (March 4, 2011, 5:04 PM), http://www.cbsnews.com/8301-503544_162-20039457-503544.html. In contrast, over 140 members of the House have joined an amicus brief filed in *Windsor* and other DOMA cases indicating that the BLAG “does not speak for a unanimous House.” See Brief of Members of the U.S. House of Representatives—Including Objecting Members of the Bipartisan Legal Advisory Group—As Amici Curiae in Support of Plaintiff-Appellee and Urging Affirmance at 1, *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012), 2012 WL 4338882. Notably, even the BLAG has not contended that the Speaker alone may unilaterally initiate litigation to assert the House’s institutional interests.

20. Motion for Leave to Intervene, *supra* note 10, at 5.

the BLAG has no authority under federal statutes, House rules, or House resolutions to participate in the *Windsor* case on behalf of either the United States or the House.

Congress could solve these problems by statute or resolution, but until it does so the BLAG is a mere bystander, with no stake in defending DOMA. This lack of standing may play a decisive role in the *Windsor* litigation. Both the BLAG and the executive branch defendants appealed the District Court's judgment to the Second Circuit, and petitioned the Supreme Court for certiorari. If the BLAG lacks standing, however, then it had no authority to appeal or to seek Supreme Court review, and the Court's jurisdiction must turn on whether the United States, which has agreed with the plaintiff that DOMA is unconstitutional, has standing to proceed with the case. Interestingly, the BLAG itself has argued that no such standing exists—a controversial position that is beyond the scope of this short piece. But if the BLAG is correct, then there is no case or controversy before the Court, and the Court will have to dismiss for lack of jurisdiction. The widespread expectation that *Windsor* will be a significant decision appears to be well-founded. But it remains to be seen whether its significance will lie in the area of individual rights or in the areas of federal court jurisdiction and the separation of powers.

Author's Note, February 1, 2013

When the BLAG intervened in April 2011, appealed in July 2012, and ultimately petitioned for certiorari in December 2012, it claimed to act on behalf of the House of Representatives, an assertion that necessarily referred to the House of Representatives of the 112th Congress. We know this because the House of Representatives is not a continuing body, and each Congress adopts its Rules and constitutes its committees (including the BLAG) anew.²¹ Thus, the BLAG that acted during the 112th Congress (from January 3, 2011 to January 3, 2013) was constituted by the 112th Congress, and possessed only the authority granted to it by that Congress. As I argued in the Essay, that authority did not include the power to assert the interest of the House in defending DOMA.

A few commentators have inquired whether a recent factual development—the new 113th Congress's adoption of a resolution authorizing the BLAG to defend the constitutionality of section 3 of DOMA—affects my analysis of BLAG's standing. With respect to the *Windsor* case, the answer is no, for the simple reason that the BLAG's intervention, appeal, and petition for cer-

21. See *Gojack v. United States*, 384 U.S. 702, 706 n. 4 (1966) (“[A]uthorization of a [Committee's actions] must occur during the term of the Congress in which the [action] takes place. Neither the House of Representatives nor its committees are continuing bodies. It is the practice of the House to adopt its Rules—including the Rule which establishes [its committees] and defines the scope of [their] authority—at the beginning of each Congress.” (citations omitted)).

tiorari were all taken during the 112th Congress, when the BLAG's only lawful authority was to "consult" with the Speaker concerning the directions to be given to the General Counsel of the House regarding litigation in which the House was involved. House Rule II.8 under the 112th Congress gave the BLAG no power to intervene in litigation on its own behalf, or to represent the House's interests in court, and the House during the 112th Congress never granted the BLAG any additional authority to defend DOMA.

Accordingly, as I wrote in the Essay, the BLAG's assertion in court filings that the House had "formally determined to defend DOMA" was false. Standing is assessed at the outset of the case, and standing to appeal requires the appellant to show that it is aggrieved by the judgment appealed from. The 112th Congress's expiration without the House having authorized a defense of DOMA makes it impossible to conclude that the House was aggrieved at the relevant times.²² Only after the Supreme Court had raised, in its grant of certiorari, concerns about the BLAG's standing, did the 113th Congress hastily attempt to paper over the defective foundation for the BLAG's standing. But the 113th Congress can no more give retroactive validation to the BLAG's actions during the 112th Congress than it can authorize the BLAG or other committees to act during the 114th Congress.²³

This is not to say that the BLAG may not participate in merits briefing in *Windsor* as *amicus curiae*. And if section 3 of DOMA is not struck down in *Windsor*, and the BLAG seeks to intervene, to appeal, or to petition for certiorari in other cases on behalf of the House of Representatives of the 113th Congress, it will at least be able to claim the full authority of the House of Representatives. But as matters stand today, the BLAG has not validly petitioned for certiorari on behalf of the House of Representatives.²⁴

22. See Brief of Court-Appointed Amicus Curiae Addressing Jurisdiction at 18, *United States v. Windsor*, No. 12-307 (U.S. Jan. 24, 2013), 2013 WL 315234. The BLAG, as the party seeking relief, "must carry throughout the litigation the burden of showing that [it] is properly in court." *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936). In order to establish standing to appeal, a prospective appellant must show that it has suffered some actual or threatened injury from the judgment or order appealed from. See Joan Steinman, *Shining a Light in a Dim Corner: Standing to Appeal and the Right to Defend a Judgment in the Federal Courts*, 38 GA. L. REV. 813, 831 (2004).

23. See *Gojack*, *supra* note 21, at 706 n.4; *cf.* *McGrain v. Daugherty*, 273 U.S. 135, 181 (1927) (contrasting Senate committees, which may continue from one Congress to the next because the Senate is "a continuing body," with House Committees, which, the Court suggested, cannot continue "in any parliamentary function beyond the end of the session without the consent of the other two branches" because the members of the House "are all elected for the period of a single Congress" (internal quotation mark omitted)).

24. Nor can it do so now. The Court of Appeals decision was entered on October 18, 2012, and petitions for certiorari must be brought within ninety days of the date of entry of the judgment or decree appealed from. See 28 U.S.C. § 2101(c); see also Supreme Court Rule 13. Thus, the time for the 113th Congress to petition for certiorari expired on January 16, 2013.

Finally, it bears mentioning that even if the House of Representatives of the 113th Congress has conferred authority on the BLAG to assert its interests, it remains far from clear that those interests are sufficient to support Article III standing. As I discuss in the Essay, there is no authority for the proposition that Congress has standing to defend run-of-the-mill federal statutes when the executive has declined to do so. The only authority the BLAG points to—*INS v. Chadha*—is readily distinguishable, because the statute there directly affected Congressional prerogatives. And even if the Court were prepared to recognize that Congress has standing to defend a law like DOMA, it is not clear that the House acting alone can assert Congress' interest without the Senate's concurrence.²⁵

25. See Brief of Court-Appointed Amica Curiae, *supra* note 22, at 19; see also Marty Lederman, *Understanding Standing: The Court's Article III Questions in the Same-Sex Marriage Cases (IV)*, SCOTUSBLOG (Jan. 19, 2013, 7:18 AM), <http://www.scotusblog.com/2013/01/understanding-standing-the-courts-article-iii-questions-in-the-same-sex-marriage-cases-iv/>.