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ENFORCING THE PRESIDENT'S CONSTITUTIONAL DUTY TO FAITHFULLY EXECUTE THE LAWS

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

SECOND SESSION

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ENFORCING THE PRESIDENT'S CONSTITUTIONAL DUTY TO FAITHFULLY EXECUTE THE LAWS

WEDNESDAY, FEBRUARY 26, 2014

HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
Washington, DC.

The Committee met, pursuant to call, at 10:17 a.m., in room 2141, Rayburn Office Building, the Honorable Bob Goodlatte (Chairman of the Committee) presiding.

Present: Representatives Goodlatte, Coble, Smith of Texas, Chabot, Bachus, Issa, Forbes, King, Franks, Gohmert, Jordan, Poe, Marino, Gowdy, Labrador, Farenthold, Holding, Collins, DeSantis, Smith of Missouri, Conyers, Lofgren, Jackson Lee, Gutierrez, Garcia, and Cicilline.

Staff present: (Majority) Shelley Husband, Chief of Staff & General Counsel; Branden Ritchie, Deputy Chief of Staff & Chief Counsel; Allison Halataei, Majority Parliamentarian & General Counsel; Zachary Somers, Counsel; Kelsey Deterding, Clerk; (Minority) Perry Apelbaum, Staff Director & Chief Counsel; Danielle Brown, Parliamentarian; and James Park, Counsel.

Mr. GOODLATTE. Good morning.

[Disturbance in the hearing room.]

Mr. GOODLATTE. Presently we do not have order in the hearing room. Members of the audience must behave in an orderly fashion or else they will be removed from the hearing room. Rule 11 of the House Rules provides that the Chairman of the Committee may punish breaches in order and decorum by censure and exclusion from the hearing. The Capitol police will remove the disruptive members of the audience immediately. The Capitol police will remove the members who are causing a disturbance.

Mr. CONYERS. Mr. Chairman, can I urge—thank you for yielding, Mr. Chairman. Could I say to our friends here that an unruly presence in the hearing room does not aid your cause in any way, my friends. I want to share that.

Mr. GOODLATTE. We welcome everyone remaining in this morning's hearing on enforcing the President's constitutional duty to faithfully execute the laws. And I will shortly begin by recognizing myself for an opening statement, but I do want to remind the other members of the audience that you are welcome to attend this hearing, but you must behave in an orderly fashion, or else we will

have to remove you from the hearing room as well. And we thank you for your cooperation in that regard.

I will now recognize myself for an opening statement. Since taking office, President Obama has increasingly pushed the boundaries on executive power beyond their constitutional limits. He has repeatedly declared that rather than faithfully executing the laws passed by the legislative branch, he will refuse to take no for answer, and that where Congress will not act, I will.

These have not been empty proclamations. From Obamacare, to welfare and education reform, to our Nation's drug enforcement and immigration laws, President Obama has been picking and choosing which laws to enforce. But the Constitution does not confer upon the President the executive authority to disregard the separation of powers and write or rewrite acts of Congress. It is a bedrock principle of constitutional law that the President must faithfully execute the laws. The President has no authority to bypass Congress and unilaterally waive, suspend, or amend the laws based on his policy preferences. President Obama's actions have pushed executive power beyond all limits and created what has been characterized as an uber-presidency.

The question that arises from the President's end runs around the legislative branch is what can Congress do to check these broad assertions of power and restore balance to our system of separated powers? Traditionally, to check presidential excesses, Congress has passed legislation to defund programs the executive branch administers and withhold confirmation for executive branch nominees. However, when the President ignores or rewrites the very legislation that places limits on his authority and circumvents the Senate confirmation process, the traditional methods of counteracting presidential ambition will not work to preserve the separation of powers. So what can be done?

The Members of Congress on our first witness panel have all introduced legislation to attempt to check presidential failures to faithfully execute the law. These proposals include requiring the executive branch to report to Congress any time it adopts a policy to refrain from enforcing Federal law, and requiring the Administration to eliminate a position within the Immigration and Customs Enforcement Agency that Congress has already defunded. Two of the most widely discussed proposals involve authorizing one house of Congress to seek judicial review of the President's failures to faithfully execute the laws.

[Disturbance in the hearing room.]

Mr. GOODLATTE. Again, we do not have order in the hearing room. Members of the audience must behave in an orderly fashion, or else they will be removed from the hearing room. The Capitol police will remove the disruptive members of the audience immediately.

Mr. CONYERS. Mr. Chairman?

Mr. GOODLATTE. The gentleman from Michigan.

Mr. CONYERS. I would like to tell the friends here that are about to be removed that this is counterproductive to the hearing and your views on what is taking place or going to take place in the hearing. So I would strenuously urge anybody else in the room that wants to display signs to only get evicted, that it is not helping

your views on it. There are other ways that you can communicate with the Members of this Committee, including the Chairman and myself, and I urge that you use that instead.

Mr. GOODLATTE. I thank the gentleman, and the Capitol police will remove the members of the audience who are acting in a disruptive fashion immediately.

Two of the most widely discussed proposals involve authorizing one house of Congress to seek judicial review of the President's failures to faithfully execute the laws. Asking the judiciary, a co-equal branch of our government, to step in and check one or the other branch's failures to stay within its constitutional limits would seem to be an obvious solution.

Unfortunately, the courts have been reluctant to exercise their constitutionally conferred power to say what the laws are when doing so would require them to determine whether either of the political branches has exceeded its authority. Instead, when presented with cases and controversies involving disputes between the President and Congress, the Federal courts have used judge-made doctrines to avoid judicial review of these inter-branch conflicts.

But this hostility toward deciding separation of powers disputes is not the role the Constitution's framers envisioned for the judiciary. The framers did not expect the judiciary to sit on the sidelines and watch as one branch aggrandized its own powers and exceeded the authority granted to it by the Constitution. Rather, the Constitution grants the Federal courts very broad jurisdiction to hear all cases arising under this Constitution and the laws of the United States.

However, over time the Federal courts have read their own powers much more narrowly, refusing to exercise a vital check over unconstitutional action by the executive branch. When the courts refuse to step in and umpire these disputes, they cede the field to this and future presidents. They effectively make the constitutional requirement that the President take care that the laws be faithfully executed an unenforceable and meaningless check on executive power.

It is up to the Congress and the courts to check the President's overreach and restore balance to our system of government. Preventing the President from overstepping the boundaries of his constitutional authority is not about partisan politics. It is about preserving the fundamental premise of our constitutional design, that a limited government, divided into 3 separate branches, exercising enumerated powers, is necessary to protect individual liberty and the rule of law.

As James Madison warned centuries ago in Federalist 47, "The accumulation of all powers—legislative, executive, and judicial—in the same hands may be justly pronounced the very definition of tyranny."

I look forward to hearing from all our witnesses today, but first we will hear from the Ranking Member of the Committee, the gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Chairman Goodlatte. I welcome the first panel of Members as witnesses, and begin this discussion from a different perspective about enforcing the President's constitutional duty to faithfully execute laws, which would be a fruitful un-

dertaking if there was any evidence that the President has, in fact, failed to fulfill his duty.

Yet today's hearing, which is very similar to the one we held in Judiciary on this same topic 3 months ago, is being held in the absence of any evidence of such failure. And although I explained much of this before, I will again highlight the reason why there is no problem.

To begin with, let us acknowledge that today's hearing is really about yet another attempt by the majority to prevent the President's implementation of duly enacted legislative initiatives that they oppose, such as the Affordable Care Act and the Dodd-Frank Protection Act. Allowing flexibility in the implementation of a new program, even where the statute mandates a specific deadline, is neither unusual nor a constitutional violation. Rather, it is the reality of administering sometimes complex programs, and is part and parcel of the President's duty to take care that he faithfully execute laws.

This has been especially true with respect to the Affordable Care Act. The President's decision to extend certain compliance dates to help phase in the Act is not novel. For example, President George W. Bush, for instance, failed to meet some of the deadlines in implementing Medicare Part D, even though it was legislation that he strongly supported. Taking steps to deal with the realities of the implementation of a complex program hardly constitutes a failure to take care that the laws are faithfully executed. It is rather a necessary part of meeting the obligation. And even though not a single court has ever concluded that the reasonable delay in implementing a complex law constitutes a violation of the take care clause in the Constitution, some of the majority insists that there is a constitutional crisis. Surely there are more issues more worthy of the full Committee's consideration than this.

Another fact that the majority appears to ignore is that the exercise of enforcement discretion is a traditional power of the executive. For example, the decision to defer deportation of young adults who were brought to the United States as children, who have not committed felonies or serious misdemeanors, and who do not pose a public safety—the Dreamers—is a classic exercise of such discretion. The Administration cannot legalize these individuals' status without a legal basis. But the Administration's decision to defer action against particular individuals is neither unusual nor unconstitutional.

Again, there is a precedent where the exercise for such discretion. In 2005, President George W. Bush's Administration announced deferred action for approximately 5,500 foreign students affected by Hurricane Katrina. And it is no surprise that the Supreme Court has consistently held that the exercise of such discretion is a function of the President's powers under the take care clause.

As the Court held in *Heckler v. Chaney*, "An agency's refusal to institute proceedings shares to some extent the characteristics of a decision of a prosecutor in the executive branch not to indict," a decision which has long been regarded as the special province of the executive branch inasmuch as it is the executive who is charged by the Constitution to take care that the laws be faithfully executed.

And for this reason, the Court concluded that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion.

I will insert the rest of my statement in the record, and yield back the balance of my time.

Mr. GOODLATTE. The Chair thanks the gentleman. Without objection, all other Members' opening statements will be made a part of the record.

[The prepared statement of Mr. Conyers follows:]

Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary

A discussion about enforcing the President's constitutional duty to faithfully execute the laws would be a fruitful undertaking if there was any evidence that the President has, in fact, failed to fulfill this duty.

Yet today's hearing—like the hearing we held on this very same topic just 3 months ago—is being held in the absence of any evidence of such failure.

Although I explained much of this before, I will again highlight the reasons why there is no problem.

To begin with, let's acknowledge what today's hearing is really about: it is yet another attempt by the Majority to prevent the President's implementation of duly enacted legislative initiatives that they oppose, such as the Affordable Care Act and the Dodd-Frank Wall Street Reform and Consumer Protection Act.

Allowing flexibility in the implementation of a new program, even where the statute mandates a specific deadline, is neither unusual nor a constitutional violation. Rather, it is the reality of administering sometimes complex programs and is part and parcel of the President's duty to "take care" that he "faithfully" execute laws.

This has been especially true with respect to the Affordable Care Act. The President's decision to extend certain compliance dates to help phase-in the Act is not a novel tactic.

President George W. Bush, for instance, failed to meet some of the deadlines in implementing Medicare Part D, even though it was legislation he strongly supported.

Taking steps to deal with the realities of the implementation of a complex program hardly constitutes a failure to take care that the laws are faithfully executed. It is, rather, a necessary part of meeting that obligation.

And, even though *not a single court* has ever concluded that reasonable delay in implementing a complex law to constitute a violation of the Take Care Clause, the Majority insists there is a constitutional crisis.

Surely, there are issues more worthy of the full Committee's consideration than this.

Another fact that the Majority appears to ignore is that the exercise of enforcement discretion is a traditional power of the executive.

For example, the decision to defer deportation of young adults who were brought to the United States as children, who have not committed felonies or serious misdemeanors, and who do not pose a threat to public safety—the "DREAMers"—is a classic exercise of such discretion. The Administration cannot legalize these individuals' status without a legal basis, but the Administration's decision to defer action against particular individuals is neither unusual nor unconstitutional.

Again there is precedent for the exercise of such discretion. In 2005, President George W. Bush's Administration announced deferred action for approximately 5,500 foreign students affected by Hurricane Katrina.

And, it is no surprise that the Supreme Court has consistently held that the exercise of such discretion is a function of the President's powers under the Take Care Clause.

As the Court held in *Heckler v. Chaney,* "an agency's refusal to institute proceedings shares to some extent the characteristics of a decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'"

For this reason, the Court concluded that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's *absolute* discretion."

I am especially dismayed that 2 of the legislative proposals that will be considered today disrespect the aspirations of DREAMers and reinforce old prejudices and inflammatory views about DREAMers, including views expressed by some Majority members of the Committee.

Indeed, the American people expect the Executive Branch, under President Obama's leadership, to work to address a whole host of issues that this House refuses to address, including enhancing protections for the environment, ensuring worker safety, and helping financially distressed homeowners, student-loan borrowers, and others who are struggling to achieve the American Dream.

Rather than wasting precious time on a hearing like this, we should be working to address these and many other critical challenges facing our Nation.

Not only are President Obama's actions constitutional, they are needed steps to helping the American people, and *that* should be the focus of our discussion today.

Mr. GOODLATTE. We welcome our first panel today, and if you all will rise. As is the custom of this Committee, we will swear you in as witnesses. Please raise your right hand.

[Witnesses sworn.]

Mr. GOODLATTE. Thank you very much. Let the record reflect that all the witnesses responded in the affirmative.

Our first witness is Jim Gerlach. Representative Gerlach represents the 6th District of Pennsylvania. He was first elected to Congress in 2002. On January 13th, Representative Gerlach introduced H.R. 3857, the Enforce the Take Care Clause Act. This legislation puts a procedure in place for the House or the Senate to authorize and bring a lawsuit to seek immediate judicial relief in the event that the President fails to take care that the laws be faithfully executed.

Our second witness is Tom Rice. Representative Rice represents South Carolina's 7th Congressional District. He is currently serving his first term in the House. On December 12th of last year, Representative Rice introduced H.Res. 442, the Stop This Overreaching Presidency Resolution. The resolution directs the House to institute legal action to require the President to faithfully execute the law.

Our third witness is Diane Black. Representative Black represents the 6th District of Tennessee. She is currently serving her second term in the House. In December, Representative Black introduced H.R. 3732, the Immigration Compliance Enforcement Act. Her bill requires the Administration to eliminate the public advocate position within the Immigration and Customs Enforcement Agency, a position that Congress has already defunded.

Our final witness on this panel is Ron DeSantis. Representative DeSantis is a Member of the Judiciary Committee and represents Florida's 6th Congressional District. He is currently serving his first term in the House. On January 29th, Representative DeSantis introduced H.R. 3973, the Faithful Execution of the Law Act. The bill strengthens existing law by requiring all Federal officials who establish or implement a formal or informal policy to refrain from enforcing a Federal law, to report to Congress on the reason for the non-enforcement.

I would ask each witness to summarize his or her testimony in 5 minutes or less. To help you stay within that time, there is a timing light on your table. When the light switches from green to yel-

low, you will have 1 minute to conclude your testimony. When the light turns red, it signals the witness' 5 minutes have expired.

As is customary, Members will not be asked to stay to answer questions. I would like to thank my colleagues for participating in this hearing.

First of all, I want to turn to Representative Gerlach, and I welcome all of the Members of the House who are participating on this panel. And we will begin with you, Jim.

TESTIMONY OF THE HONORABLE JIM GERLACH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA

Mr. GERLACH. Thank you, Mr. Chairman, and Ranking Member Conyers, and all Members of the Committee for the invitation to testify today.

There is no question that on several occasions in recent years we have witnessed an unparalleled use of executive power to selectively apply, enforce, and even ignore duly-enacted laws. Testimony presented to this Committee last December outlined a number of instances where, by regulation or executive order, the President has acted contrary to his power and duty under Article 2 to faithfully execute all laws.

The Affordable Care Act is just one, and perhaps the most glaring, example. The ACA has been revised, altered, and effectively rewritten by the President and his Administration 23 times since July, with the most recent executive action coming 2 weeks ago when the President unilaterally declared a 1-year delay of the employer mandate for companies with 50 to 99 full-time workers.

My reading of the testimony presented in the hearing in December made it quite clear that the President, through his actions on the ACA, as well as other areas of executive action, is fundamentally altering the delicate constitutional balance among the 3 branches of our Federal system, and the concept of an imperial presidency has reentered our national dialogue. It was because of this powerful testimony that I began thinking about how we in the Congress, as a co-equal branch of government, can work to preserve that critical balance between the legislative and executive branches that our framers worked so hard to establish.

To start, I think we can agree that Congress has fairly limited means of redress in the event that the executive branch circumvents the legislative branch through its decisions not to enforce certain Federal law. Congress can try to pass new laws to either remedy or defund a violating action, but a president who undertook the action will not likely support the measure. Where the action rises to a high crime or misdemeanor, the House may initiate an impeachment proceeding, but such an avenue would surely be extremely divisive within Congress and the Nation generally, and would divert the attention of Congress from other important issues of the day.

Finally, judicial relief could be sought, but we well know that that process can take years and years while the underlying transgression continues.

So these thoughts ultimately led me to introduce H.R. 3857, the proposed Enforce the Take Care Clause Act. I drafted the bill to

provide either house of Congress with a new fast-track process to have the Federal courts quickly and thoroughly review questions of whether a president is properly executing this take care clause, and, if not, present a mechanism for immediate judicial relief to remedy the situation.

Specifically, this legislation authorizes the House or Senate, upon passage of a resolution in either chamber by a 60 percent super majority, to bring an expedited action before the U.S. District Court for the District of Columbia seeking review and declaratory or injunctive relief in the event a president fails to meet the constitutional requirements to faithfully execute the law. That Court's decision would have to be issued within 90 days and would be immediately and directly appealable to the U.S. Supreme Court for a final determination of whether a president has acted in a constitutional manner.

Some have questioned whether Congress has standing to bring a legal action against a president in such a situation. I believe it does. Article I vests Congress with all legislative power, including in Section 8 the power to make all laws which shall be necessary and proper for carrying into execution all other powers vested by the Constitution, in the Government, or any officer thereof. One of the other powers is a president's executive power under Article 2, the power and duty to faithfully execute the law.

Further, the Supreme Court has the authority to hear any cases arising from this legislation because the judicial power conveyed to it in Article 3 extends to all cases arising under this Constitution and the laws of the United States. In other words, I believe the Court may hear a case procedurally brought to it by a duly-enacted law on the issue of whether the Congress believes a president has failed to properly execute his constitutionally-vested power.

Given the number of examples where this President has clearly failed to execute all law, I believe it is time for Congress to put in place a procedure for a fast-track, independent review of those executive actions. Consequently, I look forward to working with the Members of the Committee to implement the common sense procedural reform outlined in this legislation so that we can, one, establish a practical mechanism to resolve serious questions of executive overreach; two, retain the deep-rooted constitutional balance between the legislative and executive branches; and, three, help restore the public's overall confidence in our system of governance.

Thank you very much, Mr. Chairman, for the opportunity to testify.

[The prepared statement of Mr. Gerlach follows:]

U.S. House of Representatives
Committee on the Judiciary

Hearing:
Enforcing the President's Constitutional Duty to Faithfully Execute the Laws

February 26, 2014

Written Statement

Rep. Jim Gerlach
Pennsylvania – Sixth Congressional District

Thank you Mr. Chairman, Ranking Member Conyers, and all members of the Committee for the invitation to testify at today's hearing.

There is no question that on several occasions in recent years, we have witnessed an unparalleled use of executive power to selectively apply, enforce, and even ignore duly–enacted laws. Testimony presented to this Committee last December outlined a number of instances where, by regulation or executive order, the President has acted contrary to his power and duty under Article II to faithfully execute all laws.

The Affordable Care Act is just one, and perhaps the most glaring, example.

The ACA has been revised, altered and effectively rewritten by the President and his Administration 23 times since July – with the most recent executive action coming two weeks ago when the President unilaterally declared a one-year delay of the employer mandate for companies with 50-99 full-time workers.

My reading of the testimony presented at the hearing in December made it quite clear that the President, through his actions on the ACA, as well as in other areas of executive action, is fundamentally altering the delicate constitutional balance among the three branches of our federal system, and the concept of an "Imperial Presidency" has reentered our national dialogue.

It was because of this powerful testimony that I began thinking about how we, in Congress, as a co-equal branch of government, can work to preserve that critical balance between the legislative and executive branches that our Framers worked so hard to establish.

To start, I think we can agree that Congress has fairly limited means of redress in the event that the executive branch circumvents the legislative branch through its decisions not to enforce certain federal law. Congress can try to pass new laws to either remedy or defund a violating action – but a president who undertook the action will not likely support the measure. Where the action rises to a "high crime or misdemeanor," the House may initiate an impeachment proceeding. But, such an avenue would surely be extremely divisive within the Congress and the nation generally, and would divert the attention of Congress from other important issues of the day.

Finally, judicial relief could be sought, but we well know that that process can take years and years while the underlying transgression continues.

So these thoughts ultimately led me to introduce H.R. 3857, the proposed Enforce the Take Care Clause Act.

I drafted this bill to provide either house of Congress with a new "fast- track" process to have the federal courts quickly and thoroughly review questions of whether a president is properly executing this Take Care Clause power and, if not, present a mechanism for immediate judicial relief to remedy the situation.

Specifically, this legislation would authorize the House or Senate, upon passage of a resolution in either chamber by a 60% supermajority, to bring an expedited action before the U. S. District Court for the District of Columbia seeking review and declaratory or injunctive relief in the event that a president fails to meet the constitutional requirement that the law be faithfully executed. That Court's decision would have to be issued within 90 days and would be immediately and directly appealable to the U.S. Supreme Court for a final determination of whether a president has acted in a constitutional manner.

Some have questioned whether Congress has "standing" to bring a legal action against a president in such a situation. I believe it does. Article I vests Congress with all legislative power including, in Section 8, the power "to make all Laws which shall be necessary and proper for carrying into Execution …all other Powers vested by the Constitution in the Government of the United States… or any officer thereof."

One of the "other powers" is a president's "executive power" under Article II - the power and duty to faithfully execute the laws.

Further, the Supreme Court has the authority to hear any cases arising from this legislation because the "judicial power" conveyed to it in Article III extends to "all Cases…arising under this Constitution [and] the Laws of the United States." In

other words, I believe the Court may hear a case procedurally brought to it by a duly-enacted law on the issue of whether the Congress believes a president has failed to properly execute his constitutionally-vested power.

Given the growing number of examples where this President has clearly failed to faithfully execute all laws, I believe it is time for Congress to put in place a procedure for a fast-track, independent review of those executive actions.

Consequently, I look forward to working with all the members of the Committee to implement the commonsense procedural reform outlined in my legislation so that we can: (1) establish a practical mechanism to resolve serious questions of executive overreach; (2) retain the deep-rooted constitutional balance between the legislative and executive branches; and (3) help restore the public's overall confidence in our system of governance.

Thank you again for the opportunity to testify today.

Mr. GOODLATTE. Thank you, Mr. Gerlach.

Congressman Rice, welcome.

TESTIMONY OF THE HONORABLE H. TOM RICE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF SOUTH CAROLINA

Mr. RICE. Chairman Goodlatte, Ranking Member Conyers.

Mr. GOODLATTE. You may want to pull that a little closer still.

Mr. RICE. Chairman Goodlatte, Ranking Member Conyers, and Members of the Judiciary Committee, thank you for inviting me to discuss the constitutional concerns raised by President Obama's unwillingness to faithfully execute the law as required by Article 2, Section 3 of the Constitution. We are a Nation of laws, and no man, including the President, is above the law.

When charged with enforcing an unpopular tax in the Whiskey Rebellion, President George Washington noted in a letter to Alexander Hamilton, "It is my duty to see the laws executed. To permit them to be trampled upon with impunity would be repugnant to that duty." Two hundred and twenty years later, President Obama has repeatedly proven himself willing to pick and choose which laws or portions thereof he wishes to enforce or rewrite the laws at his whim.

My resolution, House Resolution 442, entitled Stop This Overreaching Presidency, or the STOP Resolution, is intended to enforce the separation of powers. If adopted by a majority of the House of Representative, the STOP Resolution would require that the House as an institution bring a lawsuit against the President to require that he carry out his duties pursuant to the take care clause of the Constitution.

I have heard from many of my colleagues or from some of my colleagues that a legal action against the President would be radical. But, my friends, I believe when the President repeatedly says that if Congress fails to act on his agenda that he will enact his agenda through executive order, he is trampling our Constitution and our very freedom, and that is far more radical.

The STOP resolution highlights four instances in which President Obama's Administration overstepped its bounds in enforcing our laws. One is the unilateral decision to delay the employer mandate for business owners. And I want to dwell on that for a minute.

My history is as a tax lawyer as a CPA, and the Supreme Court has ruled that these penalties under these mandates are a tax. The President simply has no right to decide when and to whom he is going to apply the tax. If a President has that right, then what would prevent the next President from saying I do not like any of the mandates under Obamacare, and, therefore, I am not going to enforce any of them? Or what would stop the next President from saying, you know, I think the maximum tax bracket is too high; therefore, I am not going to enforce that?

And all of these consistent changes to the Affordable Care Act. You know, businesses have to implement that, and unlike the Federal Government, they have more than a 3-month time horizon. So they plan out in the future. And when we have these constant changes at the President's whim, think about what that does to businesses' planning capabilities, to their hiring capabilities, to

their expansion capabilities. And we should not wonder why our economy is struggling.

Also, my act mentions the 1-year extension of the substandard insurance policy under the Affordable Care Act. After the President's promise, if you like your plan you can keep it, was judged the biggest lie of the year, the President opted for a quick political fix: the President's adoption by executive order of the Dream Act, which Congress considered and failed to take up, and the waiver of the work requirements under the TANF laws.

Standing. My office has provided to this Committee a legal brief on H.Res. 442 in general and the standing issue in particular. In addition, since I introduced this resolution, several experts in constitutional law, including some in the panel behind me here, have weighed on the viability of H.Res. 442 in the media.

To summarize, while standing is not guaranteed, we have a good argument based upon several factors. The first is this would be brought by the House as institution, not by a few random congressmen. Second, as opposed to prior cases, such as *Raines*, the President's actions here are in direct violation of existing law.

STOP has garnered 117 co-sponsors, as well as significant interest from Americans across the country. I understand there are a number of alternatives here to enforce to enforce Article 2, Section 3, but this resolution has one distinct advantage: it only requires House action. As my colleagues are well aware, the Senate rarely acts on House-passed legislation.

This is not a partisan issue. We have all heard then Senator Obama's concerns about executive overreach by President Bush, and another failed promise that he has as president to work with Congress. A hundred and seventeen of my colleagues and I support STOP because we believe, as our founders did, that we are a Nation of laws. And no person, including the President, is above the law. A government of the people, by the people, and for the people is more than just a broken campaign promise. It is the wellspring of our freedom, and it must not be ignored.

My friends, we all took an oath when we took this office. We pledged to God to protect and defend our Constitution. President Obama took that same oath. We should not allow that oath to be one more broken campaign promise. Let us adopt H.R. 442 and require the President to abide by his word.

Thank you. I yield back.

[The prepared statement of Mr. Rice follows:]

Written Statement
H. Tom Rice,
United States Representative, South Carolina Seventh Congressional District
"The President's Constitutional Duty to Faithfully Execute the Laws"
Committee on the Judiciary
United States House of Representatives
2141 Rayburn House Office Building
February 26, 2014

Chairman Goodlatte, Ranking Member Conyers, and Members of the Judiciary Committee,

Thank you for inviting me to discuss the constitutional concerns raised by President Obama's ability to faithfully execute the law.

In 1792, when charged with enforcing an unpopular tax on whiskey in the face of rebellion, President George Washington noted in a letter to Alexander Hamilton, "It is my duty to see the Laws executed: to permit them to be trampled upon with impunity would be repugnant to" that duty. Understanding the overwhelming power of a monarch, the Founding Fathers did not seek to grant one man the power to unilaterally create and execute the law; instead, they created a carefully-crafted democracy. They protected that new citizenry by dividing it into three branches and providing checks and balances to limit the power of each branch. The legislative branch creates the law. The executive branch enforces the law. The judicial branch interprets the law.

However, more than 220 years after Washington recognized his duty, we find ourselves confronted with a Commander in Chief eager to forget his duty.

The "take care" clause in Article II, section 3 of the Constitution provides that the President shall "take care that the laws be faithfully executed." While the President has the right to exercise reasonable discretion, he may not choose which laws shall be enforced. This is fundamental to our constitutional framework. Knowing the expectations for the executive branch, I have watched President Obama's various actions with great dismay.

My constituents overwhelmingly share this dismay. Throughout my first months in office, my constituents continually voiced the same refrain: President Obama is overstepping the bounds of his office and Congress is doing nothing to stop his power grabs. Some have even suggested impeachment. If the President can continually use his discretion to rewrite laws without congressional approval, the House of Representatives and the Senate may as well cease to exist. This erosion of our separation of powers diminishes our democracy; leaving us with an imperial presidency.

Troubled by the implications of a careless executive branch, I have consulted many constitutional scholars for direction on how the House of Representatives could attempt to

restore our separation of powers without requiring a vote in the Senate. From these conversations, I drafted the Stop This Overreaching Presidency (STOP) Resolution, H.Res.442.

STOP highlights four instances in which President Obama's Administration overstepped its bounds in enforcing our laws. The first two are in reference to the Patient Protection and Affordable Care Act (ACA): the delay of the employer mandate and the extension of "substandard" healthcare plans.

Last summer, President Obama's Administration delayed the employer mandate for business owners, but deliberately chose not to delay the individual mandate. It is deeply disconcerting to believe that the executive branch may choose when or when not to enforce a tax against a selected group of Americans. This announcement was made two days before the Fourth of the July on a Department of Treasury blog post, in the hopes that many Americans would miss it. When the House of Representatives responded to this selective tax delay by supporting a delay of the individual mandate, President Obama threatened to veto any delay of the individual mandate. To be very clear, President Obama's Administration announced a one-year delay of the employer mandate **without involving Congress**.

After receiving overwhelmingly negative feedback regarding the ACA's implementation, specifically negative feedback concerning the false claim that "if you like your healthcare plan, you can keep it," President Obama unilaterally extended cancelled plans by one year. These plans were substandard by the ACA's definition, but concerned by the political implications of the "biggest lie of the year[1]," President Obama opted for a quick fix. His Administration announced the change in a letter rather than work with Congress to correct this issue. To be very clear, President Obama announced an administrative fix in regard to cancelled healthcare plans **without involving Congress.**

While President Obama's actions regarding the ACA are troublesome, those are only two examples of his overreach. What if the President unilaterally decided to open our nation's borders to whomever, whenever, without the need for background checks, visas or green cards? When President Obama's Administration legislated via memorandum Deferred Action for Childhood Arrivals (DACA), he approved special treatment for a specified class of immigrants. While President Obama has prosecutorial discretion, he does not have the authority to exempt a specified class of up to 1.76 million individuals. DACA also resembled efforts of the DREAM Act, legislation that has failed in Congress. To be very clear, President Obama's Administration granted temporary status to illegal immigrants who entered the United States **without involving Congress**.

The last example cited in STOP is in reference to significant changes to the Temporary Assistance for Needy Families (TANF) program by memorandum. In June 2012, the Administration provided a waiver initiative for the welfare work requirement under TANF. The TANF work requirement was one of the heralded successes from the 1996 welfare reform, and

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[1] Angie Drobnic Holan, *Lie of the Year: 'If you like your health care plan, you can keep it'*, POLITIFACT.COM, (Dec. 12, 2013, 4:44 PM), http://www.politifact.com/truth-o-meter/article/2013/dec/12/lie-year-if-you-like-your-health-care-plan-keep-it/. (The fact-checking organization PolitiFact declared President Obama's "If you like your health care plan, you can keep it" as 2013's "Lie of the Year".)

unfortunately, the Administration has chosen to roll back this success without congressional consultation. To be very clear, President Obama's Administrative provided a waiver initiative for the welfare work requirement under TANF **without involving Congress**.

In prior cases between the legislative and executive branches, the court has questioned if a particular Member of Congress has suffered from vote nullification, also known as the *Raines* standard[2]. Standing in a suit is difficult to establish if legislative remedies are available. However, a legislative remedy is not plausible as President Obama's Administration wilfully ignores the laws that Congress passes. Thereby, Congress's hands are tied. Congress may pass laws to address President Obama's behavior, but if he declines to enforce said laws – which is likely – Congress's voice and vote are silenced. Feeling that Congress has no other legislative remedy available, STOP directs the House to authorize legal action as an institutional body alleging an institutional injury.

Since its introduction in December, STOP has gathered 114 cosponsors, as well as significant interest from Americans across the country. If adopted by a majority of the House, this resolution will require the House to take legal action against the President for his failure to uphold our Nation's laws.

I understand that there are many bills designed to protect Section II, article 3, but this resolution has a distinct advantage. **It only requires House action.** Allow me to be very clear. As my colleagues are well aware, the Senate rarely acts on House-passed legislation. Since STOP is a House-specific resolution, we are not at the mercy of the Senate. We can move forward to protect our Constitution as soon as STOP passes. It directs the House to take action, rather than idly watch President Obama's Administration continually erode our separation of powers. We owe it to our constituents to protect our Constitution. As Representatives, we have stated that we would like for 2014 to be a year of action. If we are sincere in this belief, STOP takes action.

Opponents of such a measure are sure to dismiss it as a conservative vendetta, a Republican versus Democrat partisan battle, or personal animosity against the President. My friends across the political spectrum may also point out the number of executive orders President Obama has issued in comparison to his predecessors. **It is important to note that the four instances outlined in this testimony are not the product of executive orders. Rather, they are the product of executive action.** Knowing that executive action does not receive the same scrutiny as executive orders makes this Administration's oversteps even more unsettling.

One hundred and fourteen of my colleagues and I support STOP because we believe, as our Founders did, that one man is not greater than the Constitution, and that a government of the people, by the people, and for the people is more than just a broken campaign promise. It is who we are as Americans and it must not be ignored.

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[2] *Raines v. Byrd* is the Supreme Court case that established the current standard for evaluating whether individual Members of Congress have standing to sue the executive branch. *See Raines*, 521 U.S. 811 (1997).

Mr. GOODLATTE. Thank you, Mr. Rice.

Congresswoman Black, welcome.

TESTIMONY OF THE HONORABLE DIANE BLACK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TENNESSEE

Ms. BLACK. Thank you, Mr. Chairman, for asking me to testify here today.

By circumventing our Nation's laws, the Obama Administration has ignored constitutional duties and completely discredited itself, losing good will along the way with Members of Congress. While this Administration's lawlessness has been most widely noticed with President Obama's implementation of Obamacare, it applies to areas far beyond healthcare.

For instance, in February of 2012, U.S. Immigration and Customs Enforcement appointed a so-called public advocate to act as a lobbyist for illegal and criminal aliens within the agency. This lobbyist disrupted detention procedures and undermined the hard-working men and women who have dedicated their careers to securing our borders and protecting the American people. In fact, Chris Crane, the president of the National ICE Council—the ICE employee's union—called this position, and I quote, "nothing but waste, fraud, and abuse."

In response to this outrageous appointment, I introduced an amendment, H.R. 5855, the Department of Homeland Security Appropriations Act of 2013, to defund this position. This amendment passed the House of Representatives by a voice vote, and this same language was included in H.R. 933, the Continuing Resolution, that was signed into law by President Obama on March the 26th, 2013. The clause read, and I quote, "None of the funds made available by this Act may be used to provide funding for the position of the public advocate with the U.S. Immigration and Customs Enforcement."

After we thought that the matter had been taken care of by an Act of Congress, approved by the President, last August, thanks to information obtained by the watchdog group, Judicial Watch, we learned that the most transparent Administration in history had quietly changed the title of the position to avoid complying with the very law that the President had signed. The Administration changed the title of "public advocate" to "deputy assistant director of custody programs and community outreach. It was a change in name only. The Administration kept the very same person in the position and made no change to the job itself.

This kind of outrageous shell game is a perfect example of this pen and phone President circumventing the will of Congress to force his own agenda, and is exactly why the American people cannot trust this Administration. Despite the House and the Senate passing language to defund this position and stop this waste of precious taxpayer dollars, this Administration and its ICE officials blatantly skirted the law and allowed the agency's employees to continue their activities as though nothing had changed.

ICE records indicated that for exactly 1 week, the public advocate, Andrew Lorenzen-Strait, served as a management and programs analyst, only to be given yet another job title on April 1.

And since that date, he has served as the deputy assistant director for customs programs and community outreach. This program did not exist prior to March the 26th of 2013, and since its creation has housed a number of programs and staff members who previously operated within the Office of the Public Advocate.

When the reports of this shameless maneuvering began to surface, my office immediately began seeking an explanation from ICE, only to be repeatedly stonewalled. And on September 23, of 2013, after a month of constant requests for information, sometimes including several calls a day, yet given no clear answers for this behavior, I sent a formal letter to then-acting director, John Sandweg, requesting information about ICE's action following the enactment of H.R. 933. On December the 12th of 2013, following months of evasion and failure to respond by ICE, I introduced H.R. 3732, the Immigration Compliance Enforcement Act, legislation that would force the agency to comply with the law by shutting down any form of this illegal alien lobbyist.

Specifically, the ICE Act would defund both the position and prohibit the creation of any new position within ICE that would allow the agency to ignore the law and continue its pro-illegal immigration activities. It is of the utmost importance that ICE be required to comply with the will of the American people as expressed through Congress.

President Obama's flouting of the law cannot be allowed to continue, and if this Administration wants to maintain any credibility with Congress or the American people, they would stop flagrantly ignoring the laws that Congress writes and the President signs.

Thank you for my time here today, and I yield back the balance of my time.

[The prepared statement of Ms. Black follows:]

Written Statement

Representative Diane Black

Tennessee – Sixth Congressional District

Before the

HOUSE COMMITTEE ON THE JUDICIARY

Hearing on:

Enforcing the President's Constitutional Duty to Faithfully Execute the Laws

February 26, 2014

Thank you Mr. Chairman for asking me to testify here today.

By circumventing our nation's laws, the Obama Administration has ignored its constitutional duties and completely discredited itself, losing good will along the way from Members of Congress.

While this Administration's lawlessness has been most widely noticed with President Obama's implementation of Obamacare, it applies to areas far beyond health care.

For instance, in February 2012, U.S. Immigration and Customs Enforcement appointed a so-called "Public Advocate" to act as a lobbyist for illegal and criminal aliens within the agency. This lobbyist disrupted detention procedures and undermined the hardworking men and women who have dedicated their careers to securing our borders and protecting the American people. In fact, Chris Crane, the President of the National ICE Council -- the ICE employees union -- called this position "nothing but waste, fraud, and abuse."

In response to this outrageous appointment, I introduced an amendment to H.R. 5855, the Department of Homeland Security Appropriations Act of 2013 to defund this position. This amendment passed the House of Representatives by a voice vote and this same language was included in, H.R. 933, the Continuing Resolution that was signed into law by President Obama on March 26, 2013. The clause read: *"None of the funds made available by this Act may be used to provide funding for the position of Public Advocate within U.S. Immigration and Customs Enforcement."*

After we thought the matter had been taken care of by an Act of Congress approved by the President, last August, thanks to information obtained by the watchdog group Judicial Watch, we learned that the "most transparent administration in history" had quietly changed the title of the position to avoid complying with the very law the President had signed. The administration changed the title of "Public Advocate" to "Deputy Assistant Director of Custody Programs and Community Outreach." It was a change in name only: The

administration kept the same person in the position and made no changes to the job itself.

This kind of outrageous shell game is a perfect example of this pen and phone president circumventing the will of Congress to force his own agenda and is exactly why the American people cannot trust this Administration.

Despite the House and Senate passing language to defund this position and stop this waste of precious taxpayer dollars, this Administration and its ICE officials blatantly skirted the law and allowed agency employees to continue their activities as though nothing had changed.

ICE records indicate that for exactly one week, Public Advocate Andrew Lorenzen-Strait served as a "Management and Programs Analyst," only to be given yet another job title on April 1. Since that date, he has served as Deputy Assistant Director for Custody Programs and Community Outreach. This program did not exist prior to March 26, 2013 and since its creation has housed a number of programs and staff members who previously operated within the Office of the Public Advocate.

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On December 12, 2013, following months of evasion and failure to respond by ICE, I introduced H.R. 3732, the *Immigration Compliance Enforcement Act*, legislation that would force the agency to comply with the law by shutting down any form of this illegal alien lobbyist.

Specifically, the ICE Act would defund both positions and prohibit the creation of any new position within ICE that would allow the agency to ignore the law and continue its pro-illegal immigration activities.

It is of the utmost importance that ICE be required to comply with the will of the American people as expressed through Congress.

President Obama's flouting of the law cannot be allowed to continue, and if this Administration wants to maintain any credibility with Congress or the American people, they should stop flagrantly ignoring the laws Congress writes and the President signs.

Thank you for your time here today.

Mr. GOODLATTE. Thank you.

Congressman DeSantis, welcome to have you on the other side of the table there on this Committee, and pleased to hear your testimony now.

TESTIMONY OF THE HONORABLE RON DeSANTIS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. DESANTIS. Thank you, Mr. Chairman. It is often said that ours is a government of laws, not of men. If there is any one principle that embodies this maxim, it is the constitutional separation of powers. The framers of the Constitution considered the protection of individual liberty to be the primary function of government, and they designed the Constitution so that the major delegated powers—legislative, executive and judicial—were lodged in separate branches of that government.

Article 1 of the U.S. Constitution states, "All legislative powers herein granted shall be vested in a Congress of the United States." The Constitution delegates no legislative authority to the President. Instead Article 2, Section 3 of the Constitution imposes upon the President the duty to take care that the laws be faithfully executed. Under our Constitution, the President cannot amend, suspend, or ignore duly-enacted, constitutionally-valid laws, but must instead faithfully execute the laws on the books. Yet in a number of areas ranging from welfare work requirements, to illegal immigration, to ObamaCare, the current Chief Executive has failed to fulfill this important and long-standing duty to take care that the laws be faithfully executed.

Now, the justifications that have been offered in defense of the President's conduct have ranged from weak to completely baseless. First, the fact that some Presidents have issued more executive orders than the current incumbent is irrelevant. The number of executive orders does not tell us anything about their constitutional propriety. A President could issue hundreds of executive orders about rudimentary executive branch business as authorized by law and not threaten the constitutional order at all, while an executive that issued merely a handful of executive orders could pose a real threat to liberty if those orders exceed the boundaries set by the law and the Constitution.

Second, concern for executive branch lawlessness is not limited to, or even primarily concerned with, formal executive orders. The suspension of Obamacare's employer mandate, for example, was done not through executive order, but via a blog post. When the President purported to "extend the ObamaCare grandfather provisions" last November, he issued a statement from the White House press room, not a formal executive order.

Third, it is not correct to say that the President can simply do what he wants unless and until a court stops him. Article 3 courts, as has been mentioned, have traditionally been limited to deciding concrete cases and controversies. The framers did not expect courts to simply referee disputes regarding the separation of powers absent the existence of a concrete legal case.

As Madison argued in The Federalist, 51, the framers designed the system so that ambition would counteract ambition; that is, they expected Members of Congress in both the House and the Sen-

ate to place the institutional interests of the legislative branch ahead of their personal political interests and to check the executive when he attempted to usurp legislative authority.

Fourth, the President's constitutional authority as commander-in-chief of the armed forces is qualitatively different than the President's obligation to enforce domestic law. Presidents such as Lincoln and Roosevelt have exercised Article 2 authority during wartime in a manner which still provokes considerable controversy. The scope of that power is important, but also inapposite to whether the current incumbent is satisfying the take care clause by faithfully enforcing domestic laws regarding issues such as healthcare, immigration, and welfare.

Finally, the Supreme Court decision in *Heckler v. Chaney* does not justify the President's conduct. That case involved a lawsuit filed by death row inmates who claimed that Federal law compelled the Food and Drug Administration to review the drugs that State officials were planning to use to kill them via lethal injection. The Court recognized that, given limited resources, the executive branch has the discretion to prioritize enforcement actions. But possessing the discretion to prioritize how to enforce a statute does not mean the President possesses the ability to decide whether to enforce a statute at all.

As the Supreme Court observed in *Kendall v. United States* in 1838, "to contend that the obligation imposed on the president to see the laws faithfully executed implies a power to forbid their execution is a novel construction of the Constitution, and is entirely inadmissible."

I think the President's conduct needs to be scrutinized by the American people. That is why I recently introduced the Faithful Execution of the Law Act. Currently, the Attorney General is required to report to Congress any time the Department of Justice stops enforcement of a law on the grounds that it is unconstitutional. My bill strengthens this provision by extending the reporting requirement to include any Federal officer who implements a formal or informal policy of non-enforcement, regardless of whether it is being done on constitutional or policy grounds. My hope is that this sunlight will prove to be a disinfectant that will serve to hinder the President from usurping the authority of Congress.

The President is not a king. We are supposed to be a government of laws, not of men. The framers designed the Constitution to establish a system based on the rule of law in order to protect the liberty of the people. We in Congress have an obligation to use our authority to vindicate the intent of our founders and to check this executive.

Thank you.

[The prepared statement of Mr. DeSantis follows:]

Enforcing the President's Constitutional Duty to Faithfully Execute the Laws

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Testimony of Representative Ron DeSantis
2-26-2014

It is often said that ours is a "government of laws, not of men." If there is any one principle that embodies this maxim, it is the constitutional separation of powers.

The framers of the Constitution considered the protection of individual liberty to be the primary function of government. They designed the Constitution so that the major delegated powers – legislative, executive and judicial – were lodged in separate branches of government.

Article I of the U.S. Constitution states: "All legislative powers herein granted shall be vested in a Congress of the United States." The Constitution delegates no legislative authority to the President; instead, Article II, Section 3 of the Constitution imposes upon the President the duty to "take care that the laws be faithfully executed." Under our Constitution, the President cannot amend, suspend or ignore duly-enacted, constitutionally-valid laws but must instead faithfully execute the laws on the books.

Yet, in a number of areas ranging from welfare work requirements to illegal immigration to ObamaCare, the current chief executive has failed to fulfill this important and long-standing duty to take care that the laws be faithfully executed.

The justifications that have been offered in defense of the President's conduct by his political supporters have ranged from weak to completely baseless.

First, the fact that some past Presidents have issued more executive orders than the current incumbent is irrelevant to the issue at hand. The number of executive orders does not tell us anything about their constitutional propriety. A President could issue hundreds of executive orders about rudimentary executive branch business as authorized by law and not threaten the constitutional order at all, while an executive that issued merely a handful of executive orders could pose a real threat to liberty if those orders exceed the boundaries set by the law and Constitution.

Second, concern for executive branch lawlessness is not limited to (or even primarily concerned with) formal executive orders. The suspension of ObamaCare's employer mandate, for example, was done not through executive order but via a blog post on a Department of Treasury website. When the President purported to "extend" the ObamaCare grandfather provisions last November, he issued a statement from the White House press room but did not promulgate a formal executive order.

Third, it is not correct to say that the President can simply do what he wants unless and until a court stops him. Article III courts are limited to deciding concrete cases and

controversies. The Framers did not expect courts to referee disputes regarding the separation of powers between the Congress and the President absent the existence of a concrete legal case.

As James Madison argued in *The Federalist* No. 51, the Framers designed the system so that ambition would counteract ambition; that is, they expected members of Congress in both the House and the Senate to place the institutional interests of the legislative branch ahead of their personal political interests and to check the executive when he attempted to usurp legislative authority.

Fourth, the President's constitutional authority as commander-in-chief of the armed forces is qualitatively different than the President's obligation to enforce domestic law. Presidents such as Abraham Lincoln and Franklin Roosevelt have exercised Article II authority during wartime in a manner which still provokes considerable controversy. The scope of the commander-in-chief power is important but also inapposite to whether the current incumbent is satisfying the Take Care Clause by faithfully enforcing domestic laws regarding issues such as health care, immigration and welfare.

Finally, the Supreme Court decision in *Heckler v. Chaney*, 470 U.S. 821 (1985) does not justify the President's conduct. That case involved a lawsuit filed by death row inmates who claimed that federal law compelled the Food and Drug Administration to review the drugs that state officials were planning to use to kill them via lethal injection. The Court sensibly recognized that, given limited resources, the executive branch has the discretion to prioritize enforcement actions. Possessing the discretion to prioritize how to enforce a statute does not mean the president possesses the ability to decide whether to enforce a statute at all.

As the Supreme Court observed in *Kendall v. United States*, 37 U.S. 524 (1838), "[t]o contend that the obligation imposed on the president to see the laws faithfully executed implies a power to forbid their execution is a novel construction of the Constitution, and is entirely inadmissible."

I think the President's conduct needs to be scrutinized by the American people. That's why I recently introduced the Faithful Execution of the Law Act. Currently, the Attorney General is required to report to Congress any time the Department of Justice stops enforcement of a law on the grounds that it is unconstitutional. My bill strengthens this provision by extending this reporting requirement to include any federal officer who implements a formal or informal policy of non-enforcement, regardless of whether it is being done on constitutional or policy grounds.

My hope is that this sunlight will prove to be a disinfectant that will serve to hinder the President from usurping the authority of Congress.

The President is not a king. We are supposed to be a government of laws, not of men. The framers designed the Constitution to establish a system based on the rule of law in order to

protect the liberty of the people. We in Congress have an obligation to use our authority to vindicate the intent of our founders and to check this ambitious executive.

Mr. GOODLATTE. Thank you, and I want to thank all the Members of the panel for your testimony, for the legislation that you have introduced, and the ideas you have contributed to the Committee on how to address this serious problem.

As I indicated earlier and as is customary, the Members will not be asked to stay to answer questions, and I would like to thank my colleagues for participating in this hearing. And you are all excused.

We now welcome our second panel today. And before you sit down, I am going to ask the other two to rise. As is customary, we will begin by swearing in the witnesses. If you would raise your right hand.

[Witnesses sworn.]

Mr. GOODLATTE. Thank you very much. Let the record reflect that all of the witnesses responded in the affirmative.

Our first witness is Jonathan Turley, the Shapiro Professor of Public Interest Law at the George Washington University Law School. Professor Turley is a nationally-recognized legal scholar who has written extensively in areas ranging from constitutional law, to legal theory, to tort law. He has published over 3 dozen academic articles and over 750 articles in newspapers, including the New York Times, USA Today, and Wall Street Journal.

Professor Turley has been recognized as the second most cited law professor in the country.

Our second witness is Christopher Schroeder, the Murphy Professor of Law and Public Studies at the Duke University School of Law. In December 2012, he returned to the faculty at Duke after serving for nearly 3 years as Assistant Attorney General in the Justice Department's Office of Legal Policy. Professor Schroeder has also served as Acting Assistant Attorney General in the Office of Legal Counsel at the Justice Department, and as chief counsel to the Senate Judiciary Committee.

He is currently working on a book on presidential powers.

Our final witness Elizabeth Price Foley, a professor of law at the Florida International University College of Law. She is the author of 3 books and several review articles, and is a frequent media commentator. Professor Foley has authored op-eds that have appeared in publications, including the Wall Street Journal, the New York Times, and the Washington Post.

Prior to joining the faculty at Florida International, she was a professor at Michigan State University College of Law, and executive director of the Florida Chapter of the Institute for Justice.

Welcome to you all. Your entire statements will be made a part of the record, and we ask that you summarize your testimony in 5 minutes or less. To help you stay within that time, there is a timing light on your table. When the light switches from green to yellow, you will have 1 minute to conclude your testimony. When the light turns red, it signals the witness' 5 minutes have expired.

We will begin with Professor Turley, and welcome.

TESTIMONY OF JONATHAN TURLEY, SHAPIRO PROFESSOR OF PUBLIC INTEREST LAW, GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

Mr. TURLEY. Thank you, Chairman Goodlatte, and thank you, Ranking Member Conyers, Members of the Committee, and also my esteemed panel that is joining me today. It is an honor to speak with you about a subject that is obviously important to everyone in this room, Members and citizens alike.

I testified at the earlier hearing about the separation of powers, its history and its function, and also my view that the President has, in fact, exceeded his authority in a way that is creating a destabilizing influence in a tripartite or three-branch system.

Now, I want to emphasize, of course, that this problem did not begin with President Obama. I was critical of his predecessor, President Bush, as well. But the rate at which executive power is being concentrated in our system is accelerating, and, frankly, I am very alarmed by the implications of that aggregation of power. What also alarms me, however, is that the two other branches appear not just simply passive, but inert, in the face of this concentration of authority. The fact that I happen to think the President is right on many of these policies does not alter the fact that I believe the means he is doing it is wrong, and that this can be a dangerous change in our system. And our system is changing in a very fundamental way, and it is changing without a whimper of regret or opposition.

And so, it is a great honor to speak with you again today about the implications, but also about what this branch can do to assert its powers and to regain balance in the system. I am a typical Madisonian scholar. I tend to view all branches as equal, but some more equal than others, and that would be the legislative branch. If you take a look at Article 1 and Article 2, even a glance, you will see what I mean. The framers, particularly James Madison, spent a great deal of time developing this institution. It is the thumping heart of our system, and it has lost a great deal of power. And that power has largely been transferred to the executive branch.

Before I talk about those options, I just simply want to note priorities and policies, and, yes, even presidents change. Our system is not supposed to change. It is the guarantee that we all have. It is an article of faith that we have with one another. It is a thing that has weathered wars and depression and social unrest. In our system, there is no license to go it alone. There is no freelancing. That does not mean that this is not difficult. It does not mean that we do not have divisions.

I want to emphasize that last point. Recently, Congress has seemed, frankly, feckless and uncertain as to its authority. It surprises me given the institution created by people like James Madison. I do not, however, believe our dysfunctional government as it currently exists is simply the result of dysfunctional politics. It is simply untrue that we are living different or unprecedented times. The framers lived in these times.

While people say you are acting like you want to kill one another, when the framers first joined this institution, they were literally trying to kill each other. They were using things like the Alien and Sedition Act to try to arrest their opponents. Thomas

Jefferson referred to his opponents as the reign of the witches. This is not a different political time, and it should not be used as an excuse for extra constitutional action.

Indeed, the branch that I blame the most for the problems we are having is the branch that is rarely mentioned, and that is the judicial branch. It was once referred to at least dangerous branch, but has made itself into the least relevant branch after *Raines* and other cases. Specifically, it has created barriers for Members' standing or legislative standing, which I think is key if we are going to rebalance this system. What is strange is that the Supreme Court has dealt with this by saying they are defending separation of powers by refusing to reinforce it. It is like a fire department refusing to put out fires because only you can prevent forest. They are tasked with the job of maintaining the separation of powers.

I have listed the options in my testimony that this body can consider from direct legislative means, to things like appointments, to some of the legislation that is pending. I do want to emphasize one thing, however, in closing. This common article of faith that we have in our system has served us well. The short-term insular victories that are achieved in this term will come with prohibitive costs. I happen to agree with many of those policies, but I do not agree with the means.

I believe we are now at a constitutional tipping point in our system. It is a dangerous point for our system to be in, and I believe that your response has to begin before this President leaves office. No one in our system goes it alone.

Now, in closing, the fact is we are stuck with each other, whether we like it or not, in a system of shared powers, for better or worse. We may deadlock. We may even despise each other. The framers foresaw such periods. They lived in such a period. But whatever problems we have today in politics are of our making. We should not destroy the system that has maintained this country so well, that should be passed to future generations.

And I thank you again for allowing me to address you.

[The prepared statement of Mr. Turley follows:]

Written Statement

Jonathan Turley,
Shapiro Professor of Public Interest Law
George Washington University

"Enforcing the President's Constitutional Duty to Faithfully Execute the Laws"

Committee on the Judiciary
United States House of Representatives

2141 Rayburn House Office Building

February 26, 2014

Chairman Goodlatte, Ranking Member Conyers, and members of the Judiciary Committee, my name is Jonathan Turley and I am a law professor at George Washington University where I hold the J.B. and Maurice C. Shapiro Chair of Public Interest Law. It is an honor to appear before you today to discuss the available means of Congress to compel the President to faithfully execute the law in accordance with Article II of the United States Constitution. U.S. CONST. art. II, § 3, cl. 4.

I recently testified before this Committee on the history and function of the separation of powers in our system.[1] I also discussed how, in my view, President Obama has repeatedly violated this doctrine in the circumvention of Congress in areas ranging from health care to immigration law to environmental law. I will not repeat that discussion here because this hearing is not about the existence of such violations but the possible corrective measures that can be taken in light of those violations.

Given the issues at stake in this debate, it is vital that we speak plainly about the current conflicts between the Executive Branch and the Legislative Branch. We are in the midst of a constitutional crisis with sweeping implications for our system of government. There has been a massive gravitational shift of authority to the Executive

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[1] The President's Constitutional Duty to Faithfully Execute the Laws *Before the H. Comm. on the Judiciary*, 113th Cong. (2013) (statement of Jonathan Turley, Professor, The George Washington University Law School). I also testified in 2012 on the controversy surrounding these recess appointments. *See Exec. Overreach: The President's Unprecedented "Recess" Appointments Before the H. Comm. on the Judiciary*, 112th Cong. 35-57 (2012) (statement of Jonathan Turley, Professor, The George Washington University Law School). *See also* Jonathan Turley, *Recess Appointments in the Age of Regulation*, 93 B.U. L. REV. 1523 (2013); Jonathan Turley *Constitutional Adverse Possession: Recess Appointments and the Role of Historical Practice in Constitutional Interpretation,* 2103 WIS. L. REV. 965 (2013); Jonathan Turley, *The Rise of the Fourth Branch of Government*, WASH. POST (May 24, 2013), at C1.

Branch that threatens the stability and functionality of our tripartite system. To be sure, this shift did not begin with President Obama. However, it has accelerated at an alarming rate under this Administration. These changes are occurring in a political environment with seemingly little oxygen for dialogue, let alone compromise. Indeed, the current anaerobic conditions are breaking down the muscle of the constitutional system that protects us all. Of even greater concern is the fact that the other two branches appear passive, if not inert, as the Executive Branch has assumed such power.

As someone who voted for President Obama and agrees with many of his policies, it is often hard to separate the ends from the means of presidential action. Indeed, despite decades of thinking and writing about the separation of powers, I have had momentary lapses where I privately rejoiced in seeing actions on goals that I share, even though they were done in the circumvention of Congress. For example, when President Obama unilaterally acted on greenhouse gas pollutants, I was initially relieved. I agree entirely with the priority that he has given this issue. However, it takes an act of willful blindness to ignore that the greenhouse regulations were implemented only after Congress rejected such measures and that a new sweeping regulatory scheme is now being promulgated solely upon the authority of the President.[2] We are often so committed to a course of action that we conveniently dismiss the means as a minor issue in light of the goals of the Administration. Many have embraced the notion that all is fair in love and politics. However, as I have said too many times before Congress, in our system it is often more important *how* we do something than *what* we do. Priorities and policies (and presidents) change. What cannot change is the system upon which we all depend for our rights and representation.

Convenience has long been the enemy of principle in politics. It is not enough to refer to the value of a program to justify its extraconstitutional means. Such constitutional relativism cuts the entire system free of its moorings; leaving the system adrift in a sea of politics where the ability to act is treated as synonymous with the authority to act. There is no license in our system to act, as President Obama has promised, "with or without Congress"[3] in these areas. During periods of political division, compromise is clearly often hard to come by. That reflects a divided country as a whole. Such opposition cannot be the justification for circumvention of the legislative branch. Otherwise, the separation of powers would only be respected to the extent that it serves to ratify the wishes of a president—leaving only the pretense of democratic

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[2] In fairness to the Administration, the Supreme Court in 2007 ruled that the 1970 Clean Air Act allowed, if not required, actions on greenhouse gases if they were found to be harmful to the public health. *See Massachusetts v. E. P. A.*, 549 U.S. 497 (2007). The Supreme Court is currently considering new and potentially sweeping regulations issued in *Utility Air Regulatory Group v. E. P. A.* concerning stationary greenhouse gas emitters, such as coal-fueled power plants. This makes the greenhouse gas regulations more defensible but it remains problematic to have such sweeping rules issued without congressional involvement. I have written about the shift of governing authority to the federal agencies as an emerging "fourth branch" within our system. *See supra* n. 1.

[3] David Horsey, *State of the Union: Congress Will Stall Obama's "Year of Action,"* L. A. TIMES, January 29, 2014.

process. Circumvention is used to avoid any compromise and instead to force victory on the unilateral terms of one branch.

As I will discuss, the Framers gave the Congress a variety of means to protect its institutional authority. However, these means have lost much of their vitality due to the changes in the federal government. Moreover, the Framers never expected Congress to be solely responsible for the maintenance of the separation of powers. The current crisis is the result not simply of executive overreach but also of judicial avoidance in the face of that growing encroachment. The courts are now absent—without constitutional leave—in the midst of one of the most fundamental conflicts in the history of our country. That will make corrective measures all the more important (and all the more difficult) for Congress.

I. Judicial Avoidance and the Loss of Judicial Review in Separation Conflicts

The very fact that we are having this hearing captures how far we have drifted from our original constitutional origins. For much of our history, the Congress has been a rock of representative power—balancing the authority of presidents with its own authority to force deliberation and compromise in national goals. This is precisely what the Framers foresaw in delineating the legislative powers in Article I. Yet, today, Congress often appears feckless and uncertain as to how it can assert its authority when openly circumvented or ignored by a president. It is understandable that many of us are left wondering how we came to this.

The answer to that question is not the obvious political divisions in our country. While politicians often describe their opponents as being unprecedented in their obstructionist or hostile attitudes, politics in the United States has always been something of a blood sport—literally. At the start of our Republic, the Republicans and Federalists were not "trying to kill one another" in the contemporary figurative sense. They were trying to kill each other in the literal sense through measures like the Alien and Sedition Acts. Thomas Jefferson once described the Federalist period as "the reign of the witches." In other words, this is not the first President to encounter a hostile minority party or even an entirely hostile Congress. Our system was designed to force opposing factions to deal and compromise with each other. It is a system designed for political division, not political consensus.

Accordingly, I do not subscribe to the common view that our current dysfunctional government is solely the result of political division and deadlock, which is nothing new in our system. While never mentioned in analysis of our current controversies, I believe considerable blame rests not with the "political branches" but with the Judicial Branch. By refusing to review many separation-based conflicts, the Court has left these controversies to simmer and has left the branches to use raw power moves to block each other. While once described as "the least dangerous branch,"[4] it has re-made itself into the least relevant branch in separation of powers cases. The self-

[4] THE FEDERALIST NO. 78 (Alexander Hamilton).

removal of the courts from these conflicts has served to prolong and deepen conflicts between the political branches.

The irony is that in the last few decades the Supreme Court has removed itself from separation of powers cases . . . in the name of separation of powers. Indeed, in its decision in *Raines v. Byrd*, the Court insisted that "we must put aside the natural urge to proceed directly to the merits of this important dispute and to 'settle' it for the sake of convenience and efficiency. Instead, we must carefully inquire as to whether appellees have met their burden of establishing that their claimed injury is personal, particularized, concrete, and otherwise judicially cognizable."[5]

Some of the most important questions to the Framers, like the declaration of war,[6] have been avoided by the courts under claims that the judiciary is somehow strengthening the separation of powers by refusing to reinforce the lines of separation. It is akin to fire departments allowing houses to burn under the claim that citizens are best source for fire protection. Thus, the reasoning goes, if "only you can prevent wildfires," then only you can put them out The policing of the lines of separation is the single most important duty of the courts since the separation of powers was designed as a protection of individual liberty. It is the concentration of authority in any one branch that threatens individual rights. While checks and balances exist, the protection of the structural integrity of the system (as with federalism guarantees) rests with the courts as neutral arbiters. In these cases, the courts are not asked to resolve political questions but are instead asked to resolve conflicts regarding the process through which such questions are resolved.

The removal of the federal courts from the equation in these conflicts has placed even greater stress on the system of checks and balances. However, the measures available to Congress are no substitute for judicial review, particularly given the changes in our federal system. As I have discussed in earlier writings, a fourth branch has emerged in our tripartite system that is highly insulated and independent from Congress. Today, the vast majority of "laws" governing the United States are not passed by Congress but are issued as regulations. Recently, this Supreme Court added to this insulation and authority with a ruling that agencies can determine their own jurisdictions—a power that was previously believed to rest with Congress. In his dissent in *Arlington v. FCC*, Chief Justice John Roberts warned: "It would be a bit much to describe the result as 'the very definition of tyranny,' but the danger posed by the growing power of the administrative state cannot be dismissed."[7] With this shift toward agency power, Congress is practically limited in the measures that it can take to limit

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[5] 521 U.S. 811, 820 (1997).

[6] For the record, I represented members of both parties challenging the assertion of unilateral war powers, but we were unable to even secure a hearing from the federal court which avoided the question on standing grounds. *See* Jonathan Turley, *Members of Congress Challenge Libyan War in Federal Court*, JONATHAN TURLEY: RES IPSA LOQUITUR ("THE THING ITSELF SPEAKS") (June 15, 2011), http://jonathanturley.org/2011/06/15/members-of-congress-challenge-libyan-war-in-federal-court/ (discussing representation of members challenging the intervention by President Obama in the Libyan War).

[7] 133 S. Ct. 1863, 1879 (2013).

Executive action. In refusing to adjudicate separation of powers questions, courts often list these checks like some self-authenticating mantra: the power of the purse, oversight jurisdiction, and, of course, impeachment. On closer examination, however, the new realities of federal governance have diminished the viability of these measures for checking Executive Power in the United States.

II. The Erosion of Checks on Executive Power Within the Modern Madisonian System

The classic check on executive over-reaching is the power of the purse. While the President may control the machinery of the state, it is Congress that supplies the gas needed to run those machines. However, the idea of the purse strings as a meaningful check on executive power is often presented in highly generalized and unrealistic terms. Congress is unlikely to cause a cascading failure by cutting off all of the funding for an agency or even a subagency office. More importantly, the Executive Branch routinely moves billions of dollars around in discretionary or undesignated funding. Cutting off the funding of a given part of the government does not have immediate impacts and may in fact not prevent funding as intended.

The Obama Administration has shown how the power of the purse has diminished under modern fiscal systems. Consider the health care controversy. As the *Washington Post* reported, "[t]he Obama administration plans to use $454 million in Prevention Fund dollars to help pay for the federal health insurance exchange. That's 45 percent of the $1 billion in Prevention Fund spending available [in 2013]."[8] Even leading Democratic members denounced this act as "a violation of both the letter and spirit of this landmark law."[9] However, that open disregard of the power of the purse resulted in nothing of consequence for the Administration. Congress was simply circumvented and the President effectively self-appropriated federal funds for his own priorities. Constitutional objections amounted to little more for the President than what Macbeth described as voices "full of sound and fury,/ Signifying nothing."[10]

This was of course not the first such shifting of funds to support unilateral action. Indeed, when we challenged the Libyan War on behalf of Democratic and Republican members, we showed how the Administration funded an entire military campaign by shifting billions in money and equipment without the need to ask Congress for a dollar. President Obama not only said that he alone would define what is a war in circumvention of the declaration power but also unilaterally funded the war as just another discretionary

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[8] Sarah Kliff, *The Incredible Shrinking Prevention Fund*, WASH. POST, April 9, 2013.

[9] Statement of Sen. Tom Harkin, *The Importance of the Prevention Fund to Save Lives and Money*, May 7, 2013 ("Mr. President, I was deeply disturbed, several weeks ago, to learn of the White House's plan to strip $332 million in critical funding from the Prevention and Public Health Fund and to redirect that money to educating the public about the new health insurance marketplaces and other aspects of implementing the Affordable Care Act.")

[10] William Shakespeare, MACBETH, V.v.27–28.

expense. Federal appropriations have become so fluid and discretionary spending so lax that presidents are now more insulated than ever before from the threat of de-funding. This is not to say that the power of the purse is no potential hold on Administrations. Congress needs to be more specific on the use of funds and reduce the degree to which funds are given for discretionary uses, particularly during periods of circumvention and tension.

The other oft-cited power checking the Executive Branch is direct legislative action and oversight authority. Once again, however, recent years have shown how presidents can insulate themselves from legislative inquiry into questions of misconduct or misappropriation. Recently, the Administration refused to turn over material to oversight committees and the House moved to hold Attorney General Eric Holder in contempt.[11] The Administration responded by blocking any prosecution of Attorney General Holder by the United States Attorney for the District of Columbia. Thus, while the Executive Branch has long insisted that only it can prosecute such offenses, it has used this authority to block its own investigation or prosecution. The Administration then tried to block any lawsuit by Congress to enforce a subpoena against Holder.[12]

I recently published two studies on the diminishment of congressional power in the context of the circumvention of congressional power over federal appointments.[13] I have argued that appointments fights have become more intense because of the diminishing checks on executive power and the rise of a fourth branch within the federal agencies. Faced with the refusal of agencies to answer questions or supply documents, appointments have become a key avenue to resolve some of these disputes for Congress. It is a poor vehicle, to be sure, but it is one of the remaining measures for Congress to have an immediate impact on executive action. I previously testified that I believe that President Obama clearly violated the Constitution in his recess appointment of Richard

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[11] Sari Horwitz, *Justice Department Confirms It Will Not Prosecute Holder*, WASH. POST (June 29, 2012), http://www.washingtonpost.com/world/national-security/justice-department-confirms-it-will-not-prosecute-holder/2012/06/29/gJQAbHgACW_story.html; Eyder Peralta, *Justice Will Not Prosecute Holder for Contempt of Congress*, NPR (June 29, 2012), http://www.npr.org/blogs/thetwo-way/2012/06/29/156002660/justice-will-not-prosecute-holder-for-contempt-of-congress.

[12] *See Comm. on Oversight and Gov't Reform v. Holder*, 2013 WL 5428834 (D.D.C. Sept. 30, 2013). In *Holder*, the House Committee on Oversight and Government Reform sought to enforce a subpoena seeking information related to the "Fast and Furious" operation by the Bureau of Alcohol, Tobacco and Firearms. Notably, the House of Representatives then passed authorization of the Chairman of the Oversight and Government Operations Committee to initiate the civil lawsuit and the court refused to deny the lawsuit on standing grounds. The Court ruled that "[t]o give the [executive] the final word would elevate and fortify the executive branch at the expense of the other institutions that are supposed to be its equal, and do more damage to the balance envisioned by the Framers than a judicial ruling on the narrow privilege question posed by the complaint." *Id* at *8.

[13] *See* n. 1.

Cordray to serve as the first Director of the Consumer Financial Protection Bureau and three individuals to the National Labor Relations Board.[14] While Congress holds the power of the purse, the exercise of that power to cut off funding to agencies that administer critical social programs or perform critical social functions is considered by many to be the ultimate "nuclear option." The shared appointment power, by contrast, offers Congress a less drastic method by which it may express its opposition to presidential power or policy. The Cordray controversy is now before the Supreme Court, in *NLRB v. Noel Canning*. However, regardless of how the Court rules, I believe that Congress needs to go further in reinforcing the appointments power to rebalance the tripartite system.

The final authority often cited by courts is the impeachment power. As one of those who testified during the Clinton impeachment and the lead counsel in the most recent judicial impeachment case, I do not take this power lightly, and I strongly disagree with those who treat it as a readily available check on presidential abuse. Let me be clear. In my view, some actions of recent presidents—from the approval of torture to the unilateral commitment of our country to war—should raise questions of impeachment. However, the courts have enabled presidents in these abuses by treating the issues as political questions or rejecting challenges to such authority. As a result, presidents have a plausible claim to be acting under their interpretation of past cases. I do not believe that President Obama has committed impeachable offenses in these areas even though I believe that he has knowingly and repeatedly violated the Constitution. The recess appointment controversy is a good example. As I stated in earlier testimony, I was astonished by the low quality of the opinion issued by the Office of Legal Counsel supporting those recess appointments. However, the prior avoidance by courts created a basis (albeit a rather thin one) to claim a good faith interpretation of the broader scope of the President's recess appointment powers.

The solution to this crisis will not be found in the impeachment clause. What is striking, however, is how the courts have elevated impeachment as a recourse by denying the more appropriate and less traumatic avenue of judicial review. No system can long survive with impeachment as the critical means for deterring executive abuse. It is akin to running a nuclear power plant with no safeguards and merely an "on or off" switch. That will not bring stability to a system that is already dangerously out of kilter.

III. Restoring Balance in a Tripartite System: Options for Congress in Combating Executive Usurpation of Legislative Authority

The current threat to legislative authority in our system is comprehensive—spanning from the misappropriation of funds to the circumvention of appointments to negation of legislative provisions. Any solution, therefore, must also be comprehensive.

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[14] *See Exec. Overreach: The President's Unprecedented "Recess" Appointments Before H. Comm. on the Judiciary*, 112th Cong. (2012) (statement of Jonathan Turley, Professor); *see also* Jonathan Turley, *Recess Appointments and The Abuse of Power*, USA TODAY, Feb. 15, 2012.

For that reason, the current proposals should not be considered in isolation but as part of a broader package of legislative countermeasures. The proposed legislation on legislative or member standing is particularly of interest to me, as I stressed in my earlier testimony.

A. Member Standing

I have repeatedly testified before Congress on the single most valuable change that would counter the usurpation of legislative authority: legislative or member standing. I have long advocated the right of members to seek judicial review in alleged violations of the separation of powers. While I understand the reluctance of courts to consider political questions, a separation-based challenge is not a political but a structural question that is committed to the courts. Indeed, "standing" does not appear anywhere in the Constitution as a term or even by reference. It is a creation of the courts and has radically changed over the years to create a growing barrier for access to the courts. We now face a situation where major alleged violations of the Constitution are raised but there is no one who clearly has the standing to force judicial review.

The classic elements for standing are an injury-in-fact, a showing of an injury that is fairly traceable to the defendant's conduct, and redressability by the court. It is the first of these elements that has been the source of the most difficulty for members in establishing legislative standing.

There are certainly good faith disagreements on the scope of standing that should be allowed given the limitation under Article III of review of only "cases" and "controversies,"[15] but the wholesale removal of the courts from many separation controversies, in my view, was never envisioned by the Framers. The Court has allowed a narrow window for standing for members in cases involving personal injury or institutional injury.[16] Personal injury claims are always preferred in litigation on behalf of members as they are the most likely to prevail (as with citizens with personal injuries). However, they also tend to be the most limited in scope and relief. For example, in *Powell v. McCormack*,[17] Congressman Adam Clayton Powell sued (with a small number of constituents) over his exclusion from the House chamber after a scandal involving expense accounts. The Supreme Court found that Powell had standing based on his personal injury[18] and that his exclusion from the House presented a justiciable case or controversy, and it has subsequently made clear that *Powell* is a case involving a private legislator injury.

It is the second category of institutional injury that holds the most promise for Congress in separation cases, albeit limited given the overtly hostile attitude of the

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[15] U.S. CONST. art. II, § 2 ("The judicial Power shall extend to all Cases in Law and Equity, arising under this Constitution, and Treaties made . . . under their Authority . . . ;– to Controversies to which the United States shall be a Party; – to Controversies between two or more States . . . .").

[16] Chenoweth v. Clinton, 997 F. Supp. 36, 38–39 (D.D.C. 1998).

[17] 395 U.S. 486 (1969).

[18] This was later amplified as a distinction in *Raines*. *See Raines*, 521 U.S. at 821.

current federal bench.[19] *Raines*, however, adopted a severely limited view of such injury. In that case, four senators and two House members challenged the Line Item Veto Act. The low number of members clearly undermined the challenge. The Court viewed these members as having lost in Congress and as advancing a type of "sore losers" claim.[20] Much of the challenge was based on "a type of institutional injury (the diminution of legislative power) which necessarily damages all Members of Congress and both Houses of Congress equally."[21] The Court, however, saw any diminishment as being experienced by *all* members and thus too defused for standing.[22] It also did not help that the members in *Raines* were injured by their own colleagues as opposed to the unilateral action of the President.[23] The greatest difficulty facing a legislative solution to this morass is that the Court has actively sought to bar lawsuits by basing many of its decisions on its interpretation of Article III as opposed to prudential considerations.[24] Congress can alter standing under prudential principles but cannot alter the constitutional meaning of Article III.[25] Absent a constitutional amendment, a change in the interpretation of Article III can only come from the Court itself.[26]

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[19] This hostility was evident in the rejection of our challenge to the Libyan War in *Kucinich v. Obama*, 821 F. Supp. 2d 110 (2011).

[20] I have long disagreed with this view because it is possible for a majority of Congress to relent to unconstitutional acts. Indeed, a Congress can be controlled by a President's party or simply cowed by his popularity. The fact that a few members challenge the unconstitutional act does not diminish the argument on the merits. Indeed, such control of a president reflects the greatest danger in a democratic system—a popular but potentially authoritarian leader.

[21] *Raines,* 521 U.S. at 821.

[22] I disagree with that view and fail to see why a generally experienced diminishment of power reduces its viability for standing. This view reminds one of the standing for public nuisance where an individual with clear injury is denied if everyone else experienced the same substantial injury. The problem is that in public nuisance, government agencies can sue and there remains private nuisance actions. In separation cases, the denial of these members leaves a president often unchallenged in the usurpation of legislative authority.

[23] A similar problem was faced in *Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999), *cert. denied* 529 U.S. 1012 (2000), where a handful of members sought to enjoin the President's implementation of the American Heritage Rivers Initiative. The five members sought to legislatively stop the initiative, but the bill was effectively killed by their colleagues.

[24] *See generally* Dep't of Commerce v. House of Representatives, 525 U.S. 316, 328–29 (1999).

[25] *See Raines*, 521 U.S. at 820 n.3.

[26] The Court drew this distinction in the recent decision in *Windsor*, observing that "Rules of prudential standing, by contrast, are more flexible 'rule[s] . . . of federal appellate practice,' *Deposit Guaranty Nat. Bank* v. *Roper*, 445 U. S. 326, 333 (1980), designed to protect the courts from 'decid[ing] abstract questions of wide public significance even [when] other governmental institutions may be more competent to

One obvious area of action is to empower institutional claims to be taken on behalf of Congress or a house or even a committee. Such a committee was found to have standing in *Committee on the Judiciary v. Miers* on the basis of institutional injury. Notably, however, this was to enforce a congressional subpoena where the committee was "expressly authorized by the House of Representatives as an institution."[27] Standing arguments can be based on actions taken by a president to nullify the vote of members. However, the Supreme Court in *Raines* warned that it would not allow claims that it considers to be based on "abstract and widely dispersed" injuries.[28]

The strongest claim is found in acts that strip legislators of their power to legislate. It has to be an action that denies any legislative response because it nullifies the power of Congress. In *Kucinich*, we argued (among other points) that the circumvention of Congress in declaring or approving of war represented such nullification, but the district court refused to even give the members a hearing on the question.[29] This was the same result seen in *Campbell v. Clinton*,[30] where the D.C. Circuit denied standing to thirty-one members of the House who opposed the committal of troops by President Clinton in Kosovo as a violation of both the War Powers Act and the War Powers Clause of the Constitution.

Legislative standing is most compelling, as noted in *Committee on the Judiciary v. Miers*, when it "ha[s] been expressly authorized by the House of Representatives *as an institution*" to bring the suit by House resolution.[31] Such a case was presented in *Coleman v. Miller* where twenty-one Kansas senators sued under a mandamus action to prevent authentication of Kansas's ratification of a proposed federal Child Labor Amendment.[32] Notably, in a forty-member house, this was a majority of members and the Kansas senate had rejected the amendment by a 20-20 vote. The Court recognized that the claim represented a direct nullification claim and that the members had presented

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address the questions and even though judicial intervention may be unnecessary to protect individual rights.'" *United States v. Windsor*, 133 S. Ct. 2675, 2686 (2013) (quoting *Deposit Guaranty Nat. Bank* v. *Roper*, 445 U.S. 326, 333 (1980) and *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975)).

[27] Such subpoena cases tend to have the strongest track record but could be viewed as a narrow ground for more general separation-based challenges. *See United States v. Am. Tel. & Tel. Co.*, 419 F. Supp. 454, 458 (D.D.C. 1976); *Ashland Oil, Inc. v. FTC*, 548 F.2d 977 (D.C. Cir. 1976); *In re Beef Indus. Antitrust Litig.*, 457 F. Supp. 210, 212 (N.D. Tex. 1978).

[28] *Raines,* 521 U.S. at 826.

[29] *Kucinich*, 821 F. Supp. at 120 (ruling that *Raines* nullification "necessitates the absence of a legislative remedy.").

[30] 203 F.3d 19 (D.C. Cir.), *cert. denied* 531 U.S. 815 (2000).

[31] In *Miers*, the U.S. District Court for the District of Columbia held that the Committee had standing to sue to enforce a congressional subpoena in part because it "had been expressly authorized by the House of Representatives *as an institution*" to bring the suit.

[32] Coleman v. Miller, 307 U.S. 433 (1939).

a "plain, direct and adequate interest in maintaining the effectiveness of their votes."[33]

Legislative standing is a modest extension of standing to a relatively small group, but it would have a pronounced impact on separations controversies. Standing limitations are often defended by the courts under the theory that those with the most at stake in disputes are the most likely to present the strongest arguments. When it comes to separations conflicts, members have such resources and such an interest to present strong cases. To use colloquial parlance, they have "skin in the game" when it comes to the separation of powers.

The problem with securing legislative standing is the specific grounds laid bout by the Supreme Court for its past decisions. Any change in the Article III limitations would have to come from that same Court. The only alternative would be a constitutional amendment. The situation is, in my view, so serious that I believe we may have to consider such a move, even though I have long opposed constitutional amendments as a general principle. I have been reluctant to suggest such a resolution because I believe the Court is dead wrong on standing and that this is a barrier created by the courts rather than the Constitution. These decisions have overwhelmingly tended to favor the expansion of executive power. I still hope to see a correction of these decisions and much prefer any alternative to a constitutional amendment, which I readily admit is a difficult proposition.

The effort reflected in H. Res. 442 to create institutional standing is commendable. Despite the hostile reception given to past legislative standing efforts, it is important for Congress to continue to press the courts for access on separation of powers questions. Indeed, the bill is written not as a challenge to the merits of the regulatory changes but to the means used for those changes. Absent individual injury of a member, such institutional challenges are the only option short of a constitutional amendment. While I would alter the language of the bill, the premise remains sound as an effort to secure judicial review of a violation of the separation of powers.[34]

The current controversies of the faithful execution of the laws contain some elements that should be emphasized in any legislative record. First, to the extent that any lawsuit would be authorized by statute on behalf of the institution, it would be substantially advanced compared to prior groups of aggrieved members. Second, such authorization would reflect the view that Congress is the most aggrieved party and the

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[33] *Coleman*, 307 U.S. at 438; *see also Kerr v. Hickenlooper*, 880 F. Supp. 2d 1112, 1131 (D. Colo. 2012).

[34] The proposed H.R. 3857 takes the same general approach in trying to lay the groundwork for institutional standing and adds the rulemaking element and specified vote requirements. Once again, I commend the premise though I would alter some of the language. The law sweeps more broadly and would more aggressively deal with the rise of the fourth branch within the tripartite system. However, it would also present a more difficult foundation in the likely challenge before the courts since it extends to a challenge of any regulation or act of "agency administrative guidance." That could be challenged as intruding too far into executive actions by members and could reinforce the concern of some judges of a "slippery slope" in allowing member standing. At this time, a more limited bill might be advisable given the hostility of the Court to separation-based challenges by members.

best party to advance these arguments. Indeed, there may not be any readily apparent private party available in some of these actions. Third, since the President is nullifying provisions in the law and shifting funds without authorization, he has already ignored the authority of Congress to dictate such matters. It hardly seems logical to require Congress to pass additional laws to address the negation of prior laws that were ignored. While it could be argued that Congress could still retaliate by denying appropriations in their entirety, the White House has already moved funds dictated to other purposes. That presents one of the stronger nullification records of prior conflicts between the branches.

B. Legislative Action

The loss of legislative authority is not only attributable to the expansion of presidential powers but also to the rise of a fourth branch of federal agencies. Congress is becoming marginalized in the actual laws governing citizens. Most of the legal obligations faced by citizens now come from hundreds of thousands of regulations that are promulgated without direct congressional action and outside the system created by the Framers to force compromise and consensus in a representative system. There have clearly been great benefits associated with this administrative system, and modern government would be impossible without some agency deference. However, a fundamental change is occurring in our system with relatively little deliberation by Congress, which has lost the most from the emergence of a fourth branch. In my view, greater control has to be asserted by Congress in promulgation of large new regulatory schemes. This would require more restrictive language on agency authority and, by extension, would require more work (and probably staff) in the legislative branch in playing a more active role in addressing more changes as legislative rather than solely agency matters.

Congress can take meaningful action to require congressional review and approval of major regulations like the greenhouse regulations and immigration regulations. For that reason, the change proposed in H.R. 3973 would have the benefit of forcing greater disclosure and discussion on new policies of nonenforcement. The law already establishes this duty for the Justice Department and would extend it more broadly. It would also extend the grounds for such reports beyond constitutional objections by the Executive Branch to the enforcement of a law. Obviously, enforcement of this law as currently written, let alone in its amended form, remains a problem. The Justice Department has already shown a willingness to block contempt cases against Administration officials. Putting that aside, as someone who has long warned about the marginalization of Congress in the new model of federal governance, any required disclosures of such policies can only assist the Legislative Branch. Moreover, it is hard to see the argument against such disclosures. Too often, Congress has been informed of major changes by leaks to the media in what has become an increasingly pedestrian role for the Legislative Branch.

I also commend the focus of some in Congress on the recent controversies over the withdrawal from the defense of federal laws like the Defense of Marriage Act ("DOMA"). Once again, I share President Obama's opposition to DOMA and I have strongly supported same-sex marriage. However, I was appalled by the confusion and uncertainty over standing created by the withdrawal of the defense of the laws. It did not

serve the legal process to obscure the important legal issues in the recent Supreme Court cases with questions of standing and representation. I understand Attorney General Eric Holder's position that he felt that he could not ethically support the law, even though the Administration once did defend the laws. However, the solution, in my view, is not to abandon the law, let alone the Legislative Branch. DOMA was still a law passed by Congress and signed by President William Clinton. As with the contempt controversy, one cannot assert absolute right to represent the Legislative Branch and then refuse to defend laws. Holder should have appointed outside counsel to defend the law in the name of the government if he found the task to be ethically barred. While I support the Administration's general position, there were good faith arguments on both sides of the DOMA question—as was the case with the California referendum. We should all want a full and fair consideration of those arguments without artificial limitations presented by litigation abandonment.

In *United States v. Windsor*, the Court was divided on the standing of members to defend DOMA with both Chief Justice Roberts and Associate Justice Scalia rejecting standing arguments by the House of Representatives' Bipartisan Legal Advisory Group (BLAG). The majority, however, found sufficient Article III standing despite the fact that the Obama Administration abandoned defense of the federal law. It found prudential reasons for accepting the case to guarantee adversarial process and other interests.[35] Notably, however, standing was rejected in *Hollingsworth v. Perry* after the California Attorney General withdrew from the defense of the state referendum. Just yesterday, Attorney General Eric Holder encouraged state Attorney Generals to follow this same course in abandoning defense of their own state laws.[36] Given the division over standing in *Windsor* and the denial of standing in *Hollingsworth*, General Holder's advice is troubling and inimical to the legal process. There is a difference between refusing to personally defend a law and leaving a law undefended. The interests of justice demand that courts are given an adversarial presentation of arguments—a requirement that is openly obstructed when the government withdraws from representation and fails to appoint individuals to defend a law.

C. Appointments

I will not repeat my earlier testimony or writings on reasserting congressional power over appointments. However, regardless of what the Supreme Court rules this

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[35] Justice Kennedy specifically noted "the prudential problems inherent in the Executive's unusual position" and the risk that the abandonment of the defense of the law would deny the Court of a "real, earnest and vital controversy." *Windsor*, 133 S. Ct. at 2687. The Court held that "prudential considerations demand that the Court insist upon 'that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

[36] Evan Perez, *Eric Holder Becomes An Activist Attorney General*, CNN, Feb. 25, 2014.

term, Congress should try to reach consensus on how to respond to future circumventions on recess appointments. First, one of the most dangerous forms of recess appointments remains judicial recess appointments. Such appointments have existed from the earliest period of the Republic. Indeed, the first five Presidents made thirty-one such appointments, including five to the Supreme Court. However, such appointments were necessitated by the long congressional recesses and a limited number of federal judges (and a six-person Supreme Court). That is not the case today. Modern judicial appointments are often a form of retaliation against Congress for refusing to confirm nominees and undermines the guarantee under Article III for independent judges. A recess-appointed judge is dependent on the Administration to put forward his or her name for a later confirmation. That individual is also aware that any decisions rendered during the recess appointment could be used against him or her. Congress should maintain an unwavering rule that anyone given a recess appointment to a judicial position would be categorically rejected for subsequent confirmation.

Second, the Congress should maintain the same rule for an intrasession recess appointments or appointments during three-day recesses. If the Court does not rule such appointments to be unconstitutional, Congress should resolve that any such nominees would be barred from later confirmation to that post. Third, Congress should, at a minimum, bar any later confirmation to any nominee who received a recess appointment after being previously submitted to Congress in the earlier session. Indeed, I believe that no recess appointment should be allowed where a vacancy existed in the prior term (as opposed to arising during a recess). Since I view appointments as one of the few remaining avenues for Congress to influence federal agencies, I would encourage a bright-line rule on such recess appointments. Congress could temper this rule with a formal waiver of the bar on confirmation if, before the end of the prior session, it passed a resolution acknowledging that certain nominees (who did not receive a final vote) could be legitimately given a recess appointment. This resolution would merely acknowledge that the nominees were not rejected (or filibustered) on the merits and Congress would not treat the appointment as a circumvention of its authority. Obviously, nothing would stop a president from making abuse appointments, subject to court challenges. However, if Congress were to maintain this principled line regardless of the party of the president, it would greatly reduce the abuse of this Clause. If nominees were truly left unconfirmed due to administrative or logistical problems, the two branches could agree that those nominees would not be barred due to any recess appointment.

Congress should consider a comprehensive resolution on future recess appointments. While this will not be binding on future Congresses, it could constitute a bipartisan policy that would guide future Congresses. It would also put future presidents on notice that the abuse of recess appointment powers will have consequences. If the Court does find that President Obama violated the Constitution in the Cordray controversy, such a new piece of legislation would be well-timed to try to reach a consensus on how to handle disputes in the future. Since any decision is likely to be limited to the specific issues in the case before the Court, such legislation would ideally help avoid future conflicts and reinforce the institutional obligations of both parties.

IV. Conclusion

The subject of this hearing is fraught with passions and politics. I do not wish to add to the hyperbolic rhetoric surrounding the current controversies. To be clear, I do not view President Obama as a dictator, but I do view him as a danger in his aggregation of executive power. It is not his motives but his means that I question. It is the danger described by Louis Brandeis in his dissent in *Olmstead v. United States*,[37] where he warned that the "greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding."

It is my sincere hope that both parties will join in fulfilling their sworn duty to this branch and to the Constitution in putting aside petty or political differences to restore balance to our system. While this may be an exercise of hope over experience of a constitutional scholar, I know from personal experience that there are many constitutionalists on both sides of the aisle. Through the years, I have had many exchanges with Republican and Democratic members who reflected their deep understanding and love for our system. That common article of faith between members once transcended politics and I believe it can do so again. While strong institutional voices like that of Senator Harry Byrd and others are now silent, I am hoping that new voices will be heard in these chambers. What is required is for members to recognize that there is a horizon for this country that extends beyond the term of the current president.

The only thing that joins us is our common faith in a system that has weathered wars, depression, and civil unrest. The current passivity of Congress represents a crisis of faith for members willing to see a president assume legislative powers in exchange for insular policy gains. The short-term, insular victories achieved by this President will come at a prohibitive cost if the current imbalance is not corrected. Constitutional authority is easy to lose in the transient shifts of politics. It is far more difficult to regain. If a passion for the Constitution does not motivate members, perhaps a sense of self-preservation will be enough to unify members. President Obama will not be our last president. However, these acquired powers will be passed to his successors. When that occurs, members may loathe the day that they remained silent as the power of government shifted so radically to the Chief Executive. The powerful personality that engendered this loyalty will be gone, but the powers will remain.

We are now at the constitutional tipping point for our system. If balance is to be reestablished, it must begin before this President leaves office and that will likely require every possible means to reassert legislative authority. No one in our system can "go it alone" – not Congress, not the courts, and not the President. We are stuck with each other in a system of shared powers—for better or worse. We may deadlock or even despise each other. The Framers clearly foresaw such periods. They lived in such a period. Whatever problems we are facing today in politics, they are problems of our own making. They should not be used to take from future generations a system that has safeguarded our freedoms for over 250 years.

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[37] 277 U.S. 438 (1928).

Mr. GOODLATTE. Thank you, Mr. Turley.

Mr. Schroeder, welcome.

TESTIMONY OF CHRISTOPHER H. SCHROEDER, CHARLES S. MURPHY PROFESSOR OF LAW AND PROFESSOR OF PUBLIC POLICY STUDIES, AND CO-DIRECTOR OF THE PROGRAM IN PUBLIC LAW, DUKE UNIVERSITY

Mr. SCHROEDER. Thank you, Chairman Goodlatte, Ranking Member Conyers, Members of the Judiciary Committee. Thank you for the opportunity to testify before you today. You have my written testimony, and I will simply summarize its main points, illustrate them with one example, and then go to the general question of the meaning of the take care clause.

When the executive branch exercises delegations of discretionary authority granted by law, it is executing the law. In deciding how to exercise discretion, the executive branch may appropriately consider equitable considerations and policy priorities that are not specifically prescribed by the Congress. Almost all statutes grant discretionary authority, including the discretion to set priorities and to determine not to engage in all possible enforcement actions. These choices are not intentioned with executing the laws. They are part and parcel of executing the law.

Some of these actions may resemble legislative action in the words of the Chadha v INS Court, but the Court went on to say, "The test of their legality is not that kind of eye test. Rather the test is to check them against the terms of the legislation that authorized them." Now, both DHS' deferred action decision and the actions the Treasury Department have taken, among others, but just to pick those two examples, have been explicitly justified as exercises of statutorily-delegated authority and prosecutorial discretionary authority.

The Administration is not claiming any authority to suspend, nullify, or dispense with any law. Even assuming that it is possible to see a resemblance between these administrative actions and such labels, the proper approach to analyzing the actions must begin by taking the Administration at its word because if they are defensible as exercises of discretion granted by law, their resemblance to these other things is immaterial.

So while Secretary Napolitano's memorandum memorializing her deferred action for childhood arrivals is brief, it relies explicitly on scarce resources, equitable considerations, and policy choices, which are classic factors influencing decisions not to enforce. And it also seems to be quite in line with the Supreme Court's recent recognition in the Arizona case of the important role that immediate human concerns play in immigration decisions. Not only does the deferred action seem to be well grounded in the general understanding of prosecutorial discretion and statutory discretion, both the Department of Homeland Security and the INS, prior to DHS' creation, have apparently long treated deferred action as a species of prosecutorial discretion with instances of exercising this authority extending back to at least 1975. It is fair to assume that Congress has been aware of this longstanding practice and has at least implicitly acquiesced in it.

Now, I have more about Secretary Napolitano's decision and the Treasury decisions in my written remarks. But even there it is not my intention to delve deeply into these or other any questions of discretionary authority with regard to one or more of these actions. What I want to do is to articulate the appropriate way to understand what it means to execute the law faithfully in the context of statutes that grant discretionary authority, and to emphasize that analysis of the propriety of any exercise of discretionary authority must begin with the statutes and the authorities they grant. If the action can be squared with them, taking into account the full array of discretion that has been granted by law, then the action is faithfully executing the law.

Suppose, however, that the executive branch oversteps, that it takes an action that is outside the boundaries that the statute has laid out. Is the President then guilty of violating his constitutional duty? In my view, not by virtue of that fact alone. The President's duty is to take care that the law is faithfully executed, not that it is flawlessly executed. No President could ever meet the standard of flawless execution.

Because mere legal error is consistent with faithful execution of the laws, I do not believe the avoidance of legal error goes to the heart of the matter of the President's obligation. So what does? The heart of the matter, it seems to me, lies in exercising good faith and conscientious effort to take actions within the discretionary authority granted by law. So long as the President is taking are to ensure that this is being done, he is discharging his constitutional obligation.

I thank the Committee for its time, and I look forward to answering your questions.

[The prepared statement of Mr. Schroeder follows:]

Written Statement

Christopher H. Schroeder

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"Enforcing the President's Constitutional Duty to Faithfully Execute the Laws"

Committee on the Judiciary

United States House of Representatives

2141 Rayburn House Office Building

February 26, 2014

Chairman Goodlatte, Ranking Member Conyers, and members of the Judiciary Committee, I am Chris Schroeder, a professor of law at Duke Law School. From 2010-2012 I served as Assistant Attorney General for the Office of Legal Policy at the United States Department of Justice. Earlier, I served as deputy assistant attorney general and acting Assistant Attorney General for the office of Legal Counsel, from 1994-97, and prior to that I was chief counsel to the Senate Judiciary Committee, 1992-93. Much of my current research and writing concentrates on questions of presidential authority.

I thank you for the invitation to testify here today on the subject of the President's constitutional duty to faithfully execute the laws.

Article II, Section 3 of the United States Constitution imposes on the President the solemn duty to "take care that the Laws be faithfully executed." In recent months, the contours of this duty have received a considerable amount of attention, stimulated by several different actions taken by the administration, including, but not limited to, the Department of Homeland Security's Deferred Action for Childhood Arrivals and decisions by the Department of the Treasury to delay full implementation of certain tax provisions enacted by the Patient Protection and Affordable Care Act.

In our constitutional democracy, taking care that the laws are executed faithfully has a number of facets. The Constitution imposes restrictions on Congress' legislative authority, so that the faithful execution of the laws may present occasions where the President declines to enforce a congressionally enacted law in order to enforce another law, the Constitution. Even when legislation raises no question of constitutionality, the laws that Congress enacts are incredibly diverse and executing them can raise a number of issues of interpretation, application or enforcement that need to be resolved before a law can be executed. Further, the "mass of legislation" that has been lawfully enacted creates problems of coordination that must be addressed in one manner or another.[1] In these remarks, I shall concentrate on the nature of federal laws and some of the most significant issues that arise in enforcing them, in situations where the Executive Branch does not face a question of the constitutionality of the laws themselves. My objective is to develop a picture of law execution that will illuminate important aspects of the President's Take Care responsibility.

The laws that Congress enacts are extremely diverse in their characteristics. For instance, they range from short and simple, such as the provision of the Omnibus Appropriations Act of 1997, PL 104-208, which amended 18 U.S.C. §922(q)(2) to make it unlawful for someone to possess a firearm that has moved in interstate commerce when that person has reason to believe he or she is within a school zone, to the long and complex, such as the Patient Protection and Affordable Care Act, PL 111-148. One characteristic that unites almost all of them, however, is that each delegates one or more discretionary decisions about how to execute them to the executive branch. By "discretion," I simply mean "an authority granted by law to act" one way or another according to one's "own considered judgment and conscience."[2]

When the Executive Branch exercises discretionary authority that has itself been granted by law, it is executing that law, notwithstanding any disagreements one might have with the particular manner in which that discretion has been exercised. There is an important proviso here: the executive's discretionary choice cannot lead to just any judgment. It must be a choice that falls within the authorities granted by the statute.

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[1] "[T]he President is a constitutional officer charged with taking care that a 'mass of legislation' be executed. Flexibility as to mode of execution ... is a matter of practical necessity." Youngstown Steel & Tube Co. v. Sawyer, 343 U.S. 579, 702 (Vinson, C.J., dissenting).

[2] Pound, "Discretion, Dispensation and Migration: The Problem of the Individual Case," 35 N.Y.U.L. Rev. 925, 926 (1960).

Accordingly, executive branch choices are "subject to check by the terms of the legislation that authorized [them]," typically either through "judicial review ...or the power of Congress to modify or revoke the authority entirely." It is its adherence to law in this sense that renders legitimate "executive action under legislatively delegated authority that might [otherwise] resemble 'legislative' action in some respects."[3]

Discretionary choices are unavoidable features in executing almost all laws. Consider a law that the Environmental Protection Agency had to execute after Congress enacted the Clean Air Act Amendments of 1977, which among other things required the Administrator of EPA to set rules for the regulation of air emissions for certain stationary sources. The Act itself did not define "source," and there were reasonable arguments that source could mean either a single smokestack or a single factory or facility, which might include a number of different smokestacks, or it could mean both. Which definition was selected had consequences for both the costs that owners of stationary sources would incur and the amount by which air pollution would be reduced.

EPA had initially chosen a definition that was going to be more costly for producers. Then, when "a new administration took office and initiated a Government-wide reexamination of regulatory burdens and complexities," EPA switched course and promulgated a definition that lowered compliance costs.[4] In other words, the new administration emphasized different policy objectives than the prior administration, and the definition of source finally chosen advanced those objectives, not the objectives of the prior administration nor, necessarily, the objectives of the Congress. The selection was consequential enough that the EPA's choice was litigated up to the Supreme Court. In *Chevron v. N.R.D.C.*, the Court upheld EPA's new definition, finding that "the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference ... Congress intended to accommodate both interests, but did not do so itself on the level of specificity presented by these cases."[5]

For purposes of understanding what it means to faithfully execute the laws, *Chevron* makes two crucial points. First, it was impossible to execute this

[3] I.N.S. v. Chadha, 462 U.S. 919, 954 n. 16 (1983).
[4] Chevron v. N.R.D.C., 467 U.S. 837, 858 (1984).
[5] Id. at 865.

aspect of the Clean Air Act without choosing a definition of source. While the choice itself was discretionary, the exercising of discretion was not – it was an unavoidable component to executing the law. Without actually exercising the authority to make discretionary choices such as these, the overall process of statutory interpretation, application and enforcement that make up the execution of law cannot be done.

Second, the Court's discussion of the conflicting interests and policies that needed to be reconciled in selecting a definition of source leaves little doubt that the Court would have sustained the prior Administration's definition as well. The Court here was simply acknowledging the inevitably of policy objectives influencing choice, and further indicating that so long as that choice was "check[ed] by the terms of the legislation" – in its words, so long as the choice was a "permissible construction" of the statute – it was the Executive's responsibility, as part of its responsibility to execute the law, to make the choice. By necessity, the exercise of choice "requires the formulation of policy and the making of rules to fill any gap left, implicitly and explicitly, by Congress."[6] Congress did not have to leave the question for the agency. By being specific Congress could certainly have made the choice between competing definitions here. In this sense, when the EPA makes the choice, the EPA's determination of the meaning of source does indeed "resemble 'legislative' action." Nonetheless, as the *Chadha* Court said, "executive action under delegated authority" remains law execution, and does not become lawmaking or any other type of legislative action.

The gap filling activities illustrated by *Chevron* that are required to execute today's mass of legislation have grown enormously as the corpus of federal legislation and its delegations of authority have grown. Even so, the understanding that this kind of gap filling activity is essential to executing the law was well established from the earliest days of the Republic (as well as before). To cite just one example, Thomas Jefferson was steadfast in insisting that the Constitution ought to grant no lawmaking powers and no powers in the nature of royal prerogatives to its Executive. For instance, in his *1783 Draft of a Fundamental Constitution for Virginia*, he insisted that the Executive ought to be given "these powers only, which are necessary to execute the laws (and administer the government)."[7] Yet later on he wrote to Governor Cabell that "if means specified by an act are impracticable, the

[6] Morton v. Ruiz, 415 U.S. 199, 231 (1974).
[7] Thomas Jefferson, Notes on the State of Virginia 365 (1787).

constitutional [executive] power remains, and supplies them ... This aptitude of means [that the act does not supply] to the end of a law is essentially necessary for those who are executive; otherwise the objection that our government is an impracticable one would really be verified."[8] Supplying effective means to accomplish a statutory end is clearly within the competence of the Congress in the first instance, and hence when the agency provides those means this action will once again typically "resemble 'legislative' action," but Jefferson clearly saw that this resemblance did not take the action out of the Executive's realm.

Sometimes Congress' delegation of authority concerns the question of how to construe or interpret a particular word, as was the case in *Chevron*. The delegation of discretionary authority can also relate to resolving more recurrent or more generic issues that arise in executing the laws. Two of these more generic delegations relevant to the present discussion are the discretion to set priorities and allocate resources to different work streams and the discretion not to initiate enforcement actions, the latter of which can in a number of ways be thought of as a subcategory of the first.

When it is appropriating funds for executive branch activities, Congress can fund functions within an agency at levels it considers appropriate, given its own priorities and policy choices. It can, for instance, fund the line item for OSHA inspectors at levels sufficient to support the inspection of any single workplace on average once every 131 years[9] or, to pick a different example, by passing the Senate version of an immigration reform bill and appropriating sufficient funds, it can fund 20,000 new border agents. These funding levels produce very different levels of law execution in their respective fields, but in each case the agency will still be faithfully executing the applicable law when it in good faith and conscientiously expends the funds made available for that purpose.

If it receives fewer funds than sufficient to discharge all its responsibilities, however, the agency must set priorities. At current funding levels, OSHA cannot send an inspector to visit every work site within its jurisdiction, so it must set priorities. Priority setting becomes even more important when an agency has been charged with executing multiple pieces of legislation.

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[8] Edward Corwin, the President: Offices and Powers 1787-1984 (Randall W. Bland et al. eds, 5th ed. 1984) (quoting letter from Thomas Jefferson to Governor Cabell (Aug. 7, 1807).

[9] AFL-CIO, 2013 Death on the Job Report, Exec. Summ. p. 2. Available at http://www.aflcio.org/content/download/79331/1935061/2A+Executive+Summary2013final.pdf

Congress is under no obligation to ensure that appropriated funds and the statutory delegations it has made are kept aligned such that all agency functions are funded at levels sufficient to enable each agency to execute fully all the laws over which it has been given responsibility. Such "full execution" funding as a practical matter is not possible. This kind of funding shortfall does not imply that the executive is failing in its charge to execute the laws faithfully. All legislation is passed by Congress with at least the implicit delegation of discretion to the agency to set priorities.[10] The priority setting decisions necessitated by budget constraints necessarily affect *how* the laws are being executed at any point in time, not *whether* they are being executed.

The need to set priorities was an important animating force behind the Supreme Court's ruling that agencies possess almost unreviewable discretion to decide not to enforce a statute. In *Heckler v. Chaney*, then-Associate Justice Rehnquist reasoned that

> "An agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all."[11]

Agency enforcement actions are often resource intensive, such that calibrating enforcement within a resource-limited environment is an important decision in any agency's execution of the laws.

Heckler recognized that agency non-enforcement decisions "share to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict – a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'"[12] *Heckler* also acknowledged, however, that in the agency

[10] Again, this discretion operates within the parameters remaining after Congress has been as explicit as it chooses to be in defining those priorities.
[11] Heckler v. Chaney, 470 U.S. 8321, 831 (1985).
[12] Id. at 832.

context at least, Congress can limit the exercise of non-enforcement discretion to some degree, citing *Dunlop v. Bachowski* as an example.[13] *Heckler* explained that the statute at issue in *Dunlop* "quite clearly withdrew discretion from the agency and provided guidelines for the exercise of its enforcement power."[14]

Statutes as specific as *Dunlop* are uncommon, however. While I have not myself examined all the statutes relevant to recent administration actions on this point, I am not aware of any statutory restrictions on enforcement discretion that bear on those actions. Thus, there is no need for current purposes to decide whether prosecutorial discretion is better understood as a constitutional power granted directly by the Take Care Clause of Article II, Section 3, or as a congressional delegation of authority implied by the combination of the numerous laws to execute and resource constraints. In either case, the decisions involved in exercising prosecutorial discretion are unavoidable links within the chain of decisions that have to be made in order to execute the laws.

At first blush, it may seem paradoxical to say that an agency is executing the laws when it decides not to enforce the law, but the paradox is completely eliminated once one recognizes that executing laws encompasses many activities, not all of which can be performed at any given time. Insofar as making decisions about where and when to enforce frees up resources for other activities constitutive of law execution, non-enforcement decisions are part of the overall process of executing the laws.

Whatever the ultimate provenance of prosecutorial discretion and its counterpart of agency non-enforcement, a number of different factors influence such decisions. As Wayne LaFave noted years ago, two of the most significant factors are limited enforcement resources and the need to take equitable considerations into some account.[15] More recently in the specific context of immigration law, the Supreme Court emphasized the significance of the second of these two, noting that

> "a principal feature of the removal system in the United States is the broad discretion exercised by immigration officials ... Federal officials as an initial matter, must decide whether it makes sense to pursue

[13] Dunlop v. Bachowski, 412 U.S. 560 (1975).
[14] 470 U.S. at 834.
[15] Wayne R. LaFave, "The Protector's Discretion in the United States," 18 Am. J. Comp L. 532, 533-34 (1970).

> removal at all ...Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children in the United States, long ties to the community, or a record of distinguished military service."[16]

When the *Heckler* court describes the need of an agency to decide whether "agency resources are best spent" on an enforcement action, that description provides room for equitable considerations as well as whatever other policy priorities the Executive, in his "considered judgment and conscience" thinks bear on the question of how – not whether – to execute the laws.

* * * *

I can now summarize some of the main lessons from this brief exploration of the nature of the laws that the executive branch must execute. Then by way of illustration I will suggest how these lessons apply to several of recent decisions, and finally will conclude with a consideration of the more general question of the meaning of the Take Care Clause.

When the Executive Branch exercises delegations of discretionary authority granted by law it is executing the law. In deciding how to exercise discretion, the Executive Branch may appropriately consider equitable consideration and policy priorities that are not specifically prescribed by the Congress. Almost all statutes grant some discretionary authority, including the discretion to set priorities and to determine not engage in all possible enforcement actions. These choices are not in tension with executing the laws; they are part and parcel of what it means to execute the laws. Some of these actions may "resemble 'legislative' action," but the test of their legality is not that kind of eye test, rather it is to "check [them against] the terms of the legislation that authorized [them]."

Both the DHS's Deferred Action for Childhood Arrivals and the Department of the Treasury's "transition relief" for several provisions of the Patient Protection and Affordable Care Act have been justified as exercises of discretionary authority. The administration is not claiming any authority to

[16] Arizona v. United States, 132 S. Ct. 2492, 2499 (2012).

suspend any law, or otherwise to refuse to enforce any law. Even assuming that it is possible to see a resemblance between these administration actions and such labels, the proper approach to them must begin by taking the administration at its word, because if they are defensible as exercises of discretion granted by law, any such resemblance is immaterial.

First, consider DHS's Deferred Action for Childhood Arrivals. While Secretary Napolitano's memorandum memorializing her Deferred Action for Childhood Arrivals is brief, it relies explicitly on scarce resources, equitable considerations and policy choices, which are classic factors influencing decisions not to enforce, and it seems to be quite in line with the Supreme Court's recent recognition of the role that "immediate human concerns" play in immigration decisions.[17] The Secretary noted that she is announcing the decision in order to "ensure that our enforcement resources are not expended on these low priority cases but are instead appropriately focused on people who meet our enforcement priorities." As for her reasons for assigning low priority to the cases of undocumented children who were brought into this country as children and know only this country as home, she stated that

> "Our Nation's immigration laws must be enforced in a strong and sensible manner. They are not designed to be blindly enforced without consideration given to the individual circumstances of each case. Nor are they designed to remove productive young people to countries where they may not have lived or even speak the language. Indeed, many of these young people have already contributed to our country in significant ways. Prosecutorial discretion, which is used in so many other areas, is especially justified here."[18]

Not only does the deferred action seem to be well grounded in the general understanding of prosecutorial discretion, both the Department of Homeland Security and the INS prior to DHS's creation have apparently long treated deferred action as a species of prosecutorial discretion authorized by the immigration laws, with instances of exercising this authority documented at

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[17] See Arizona v. United States, note 15, above.

[18] Memorandum from Janet Napolitano, Secretary of Homeland Security, Re: "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children," June 15, 2012. Available at http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf

least back to 1975.[19] It is fair to assume that Congress has been aware of this longstanding practice and has at least implicitly acquiesced in it.

Similarly, the Treasury defends its "transition relief" with respect to several tax-related provisions of the ACA as exercises of discretionary authority that has been granted by law. In a letter to Congressman Upton of July 9, 2013, Assistant Secretary of the Treasury for Tax Policy Mark Mazur references these authorities in explaining the basis for such decisions announced on July 2, 2013.[20] Specifically, the letter states that Section 7805(a) of the Internal Revenue Code grants discretionary authority to Treasury to provide such relief. The letter also references a number of occasions in the past in which the effective date of tax-related provisions have been extended, documenting cases going back at least to 1999, including several during the George W. Bush administration. The letter further states that because of problems in the reporting requirements noted by stakeholders as well as other impediments to the effective implementation of the these and other requirements, it is using its long-standing discretionary authority to delay them for one year.

The exercise of this discretionary authority must be compared to the terms of the Affordable Care Act. Does the presence of an effective date in the statute eliminate the Treasury Department's discretion to provide transitional relief? There are sound reasons for Treasury to have concluded that it does not. To begin with, as evidenced by all the prior uses of this authority, the very nature of the long-standing transitional relief authority under 7805(a) is to provide relief from the effective dates of new tax provisions. There is nothing in the ACA's enactment of its effective dates to distinguish those in the ACA from any of those found in earlier legislation, as to which the Treasury's discretionary authority has been applied.

I am not aware of any case law interpreting the scope of Treasury's claimed authority, but if Treasury's lawyers were looking for analogous judicial interpretations, they might have consulted the case law interpreting challenges to other agencies' failure to meet explicit statutory deadlines for taking actions such as issuing rules and regulation. This case law is quite unsettled, but the guidance that can be gleaned from the decisions of the

[19] See Shoba Sivaprasad Wadhia, "Response: In Defense of DACA, Deferred Actin, and the Dream Act at 65-68, available at http://ssrn.com/abstract-2195735.

[20] Available at: http://www.scribd.com/doc/153011058/Treasury-Letter-To-GOP-Defending-ACA-s-Employer-Mandate-Delay .

D.C. Circuit, which are the most important for the judicial review of many administrative actions, would not have discouraged Treasury's interpretation.

The leading D.C. Circuit decision evaluating when a court can "compel agency action unlawfully withheld or unreasonably delayed,"[21] is *Telecommunications Research & Action Center v. FCC.* [22] It articulates a set of five factors courts should consider to decide whether an action is unreasonably delayed. The case arose in the context of a statute that did not contain an explicit deadline, but the D.C. Circuit continues to apply its five factors when a statutory deadline is present.[23] While the existence of a deadline is taken into account, the court continues to weigh all the factors to reach case-by-case determinations. If Treasury had applied these factors to the question of the reasonableness of delaying the ACA effective dates, it could well have thought it had discretion to proceed.[24]

It is not my intention to resolve this or any other question of discretionary authority with regard to actions that others have thought constitute breaches of the President's duty to take care that the laws be faithfully executed. What I have tried to do is to articulate the appropriate way to understand what it means to execute the laws faithfully in the context of statutes that grant discretionary authority and to emphasize that analysis of the propriety of any exercise of discretionary authority under such statutes must begin with the statutes and the authorities they grant. If the action can be squared with them, taking into account the full array of discretion that has been granted by law, then the action is faithfully executing the laws, even if it is not enforcing the law in some particulars and even if it

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[21] 5 U.S.C. §706(1).

[22] Telecommunications Research and Action Center v. FCC, 750 F.2d 70 (D.C. Cir. 1984).

[23] E.g., In Re Barr Laboratories, Inc., 930 F.2d 72 (D.C. Cir. 1991)

[24] The five factors are:

> (1) the time agencies take to make decisions must be governed by a "rule of reason;" (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed. 750 F.2d at 80.

Factors 3, 4 and 5 suggests reasons why a temporary delay to the ACA tax provisions could be considered reasonable.

resembles legislative action. The question of whether the executive branch is right or wrong in any particular instance or instances is surely an appropriate matter for discussion, but it is a discussion about statutory interpretation or construction. So far as I am aware, in no instance has the President or any of his subordinates asserted a claim to act without statutory authority, let alone to violate, suspend or dispense with a statute.

Suppose, however, that the Executive Branch has taken an action outside the boundaries of the statutes' grants of discretion. Is the President then guilty of violating his constitutional duty? In my view, not by virtue of this fact alone. The President's duty is to take care that the law is faithfully executed, not that it is flawlessly executed. With the courts as final arbiters of what the law is in many situations, and with many questions of discretionary authority being contestable by reasonable people, it would be impossible for any President to discharge such a duty. This conclusion is enforced by the fact that there are thousands of decisions on the books in which a court has vacated agency action because it was outside the authorities granted by statute, yet to my knowledge none of them has suggested that legal errors by the Executive in interpreting the scope of its discretionary statutory authority imply that the Executive has been faithless in executing the laws, or that the President is in violation of his constitutional duty to ensure that his subordinates are faithful to those laws.

Because mere legal error is consistent with faithful execution of the laws, I do not believe the avoidance of legal error goes to the heart of the President's obligation. The heart of the matter, rather, seems to have been anticipated by the earlier quotation from Roscoe Pound, even though Pound was not speaking directly to the President's duty. Exercising "considered judgment and conscience" contemplates a good faith and conscientious effort to take actions within the discretionary authority granted by law. So long as the President is taking care to ensure that this is being done, he is discharging his constitutional obligation.

I thank the members of the Committee for their time, and I look forward to answering any questions you may have.

Mr. GOODLATTE. Thank you, Mr. Schroeder.

Ms. Foley, welcome.

TESTIMONY OF ELIZABETH PRICE FOLEY, PROFESSOR OF LAW, FLORIDA INTERNATIONAL UNIVERSITY, COLLEGE OF LAW

Ms. FOLEY. Thank you. Mr. Chairman, Ranking Member Conyers——

Mr. GOODLATTE. You want to make sure that microphone is on and close to you.

Ms. FOLEY. I believe it is on.

Mr. GOODLATTE. There go you.

Ms. FOLEY. There we go. Okay. Mr. Chairman, Ranking Member Conyers, Members of the Committee, my name is Elizabeth Price Foley. I am a professor of constitutional law at Florida International University College of Law. I am absolutely honored to be here today to talk about this topic.

I have provided the Committee with what I consider to be a road map of how the House can establish standing to sue the President as a means to enforce his constitutional duty to take care that the laws be faithfully executed. I believe Congress would, in fact, have standing to sue the President to enforce his duty of faithful execution, provided a four-part test is satisfied.

First, the institutional injury alleged should be one that can be characterized as a nullification of a legislative act. The Supreme Court in *Raines v. Byrd* made it clear that if Members want to assert an institutional injury, the executive's act must effectively nullify a prior act of Congress. So, for example, if Congress declares X in a law, a nullification would be an executive act that effectively declares not X.

So let us say Congress passes a law that says anyone who enters this country illegally shall be deportable. An executive act that declares a group of illegal immigrants to not be deportable would be a nullification of that law. Say Congress also enacts a law that says it shall, in fact, go into effect in 2014. An executive act that says the law shall not go into effect in 2014, but instead 2015, 2016, or whatever, would also clearly be a nullification.

Second, the lawsuit should be explicitly authorized by a majority of the House. This is because the case law indicates that when Members assert an institutional injury, we have to make sure this is not a sore loser lawsuit that is brought by sort of an ad hoc, disgruntled group of legislators. Explicit authorization for litigation is critically important because what it does is it signals to the Court that the institution as an institution believes it has been injured.

Third, the lawsuit should target the President's, what I call, benevolent suspensions of law, which means that there would be no private plaintiff available to adjudicate the constitutionality of the President's acts. A benevolent suspension of law is when the President grants a privilege or a waiver from the operation of law to a certain group of people that, of course, the President himself defines. So, for example, when the President delays provisions of Obamacare but not other provisions, or he decides not to deport some young people who have entered this country illegally, he be-

nevolently has suspended the law with regard to that group of people.

In these situations, the individuals are not sufficiently harmed to satisfy personal injury requirements of standing. In fact, no individuals are. Think about it. When you delay an employer mandate to provide health insurance, when you decide not to deport certain young illegal aliens, these actions undermine our laws certainly and our constitutional separation of powers. But they do not hurt any individuals enough to allow them to challenge the President's acts. In fact, if the constitutionality of benevolent suspensions of law is ever going to be resolved, it must be resolved through litigation by Congress against the President.

Fourth, the lawsuit should target presidential acts for which legislative self-help is not available. The reason self-help is salient to the courts is because they want to make sure that Congress could not just simply undo the executive's acts by simple majoritarian vote. But think about it again. When a president fails to faithfully execute the law, there is no simple majoritarian remedy available because what Congress wants in this situation is for the existing law to be enforced.

Repealing a law that the Congress simply wants executed is obviously not a remedy here. Congress also could not enact another law in this situation because it has already enacted the law it thinks it wants. Congress again wants the existing law to be enforced.

We should not also have to resort to the drastic act of impeachment. Peaceful court resolution is going to be a lot easier here, and I think that is what the courts would find. What Congress wants here, again, is faithful execution of the law. It may not think that the President should be entirely removed from office. It just wants the President to faithfully execute the law.

Peaceful resolution of disputes between Congress, and the Court, and the president has been accepted by the courts since *Marbury v. Madison*, and faithful execution of the laws disputes should be no different. Separation of powers is clearly a critically important principle, and I think it is something that all Members of Congress, regardless of political persuasion, should want to see preserved. In the case particularly of benevolent suspensions, the only recourse, again, is for Congress to seek a court's declaration of the constitutionality of the President's acts.

These are serious constitutional questions. There are reasonable arguments on both sides. They deserve a full and fair hearing in our courts of law. Thank you.

[The prepared statement of Ms. Foley follows:]

Written Statement

Elizabeth Price Foley
Professor of Law
Florida International University
College of Law

"Enforcing the President's Constitutional Duty to Faithfully Execute the Laws"

Committee on the Judiciary
U.S. House of Representatives

February 26, 2014

Chairman Goodlatte, Ranking Member Conyers, and members of the Judiciary Committee, my name is Elizabeth Price Foley and I am a professor of constitutional law at Florida International University College of Law, a public law school located in Miami, Florida. I am grateful for the opportunity to testify before you today to discuss how Congress can enforce its constitutional lawmaking prerogative against Executive encroachment.

The Committee held a hearing on December 3, 2013, exploring whether the President has failed to execute his constitutional duty to take care that the laws be faithfully executed. The record in that hearing amply documents why President Obama's actions are qualitatively different from those of his predecessors and thus raise serious constitutional questions. I am not here to re-litigate the merits of that substantive question, but will instead focus my remarks exclusively on the issue of "congressional standing" to sue the President to enforce his duty of faithful execution and, as an inherent corollary, to defend Congress's exclusive legislative prerogative.

How can Congress best position itself to have standing to sue a President whom it believes has failed in his duty of faithful execution? To briefly summarize the position I elaborate upon below: I believe Congress would have standing to sue the President for failure of his faithful execution duty, provided such a lawsuit is carefully circumscribed to satisfy a four-part test:

(1) Explicit legislative authorization: The lawsuit should be explicitly authorized by a majority of the House. It cannot be a "sore loser" suit initiated by an *ad hoc*, disgruntled group of legislators.

(2) No private plaintiff available: The lawsuit should target the President's "benevolent suspension" of an unambiguous provision of law, such that there would be no private plaintiff available to adjudicate the propriety of the suspension.

(3) No political "self-help" available: The lawsuit should target presidential action that cannot be remedied by a simple repeal of the law.

(4) "Nullification" of institutional power injury: The institutional injury alleged should be one that reasonably can be characterized as a nullification of legislative power.

The last element—an injury-in-fact that is tantamount to a nullification of institutional power—is a constitutional (Article III) prerequisite to the court's recognition of standing in the special context of a legislator lawsuit alleging "institutional" injury. The other three elements—explicit authorization; no available private plaintiff; no available political self-help—are prudential considerations that courts have intimated are important in assessing whether the dispute is sufficiently cabined to overcome the judiciary's general and understandable hesitancy to interject itself into political branch disputes. These three prudential considerations—along with the constitutional injury-in-fact element—provide a limiting principle, assuring the courts that adjudication will not open the door to limitless legislator lawsuits against the executive branch in the future.

When all four elements exist, a court would likely overcome its hesitancy and find in favor of congressional standing because such a case presents an unusual and unpalatable dilemma: If the court does not allow standing in such a situation, separation of powers concerns (from whence the standing doctrine derives) will prevent the judiciary from preserving separation of powers. In other words, when all four elements are present, the court effectively *must* adjudicate unless it is prepared to accept that it is powerless to preserve the constitutional architecture of separation of powers. If it does not adjudicate, the President will have carte blanche to exceed his constitutional powers because there are neither any private plaintiffs available to check him (element two), nor any reasonable way for Congress to check him (element three).

I will proceed to explore each of these four factors, and how I believe they may be present, should the House wish to initiate litigation.

I. THE CONSTITUTIONAL ELEMENTS OF STANDING

In order to maintain a lawsuit in federal court, the plaintiff must have "standing" to sue. The requirement of standing derives from the language in Article III, section two of the Constitution, which extends the federal judicial power only to certain kinds of "cases" and "controversies." In order to have a "case" or "controversy" within the meaning of Article III, the Supreme Court has identified three standing

elements: (1) an injury-in-fact; (2) fairly traceable (caused by) the defendant's conduct; and (3) redressability by the court.[1]

Assuming that the elements of causation and redressability would not be in issue in a lawsuit disputing the President's faithful execution of law, I will focus on the first element—injury-in-fact—and whether/when such an injury exists.

To have standing, the plaintiff's alleged injury must not be abstract, conjectural, or hypothetical.[2] The plaintiff(s) must have suffered—or be in imminent risk of suffering—direct harm from the defendant's acts.

Lawsuits brought by legislators are subject to the same Article III standing requirements as all other lawsuits. However, the Supreme Court in *Raines v. Byrd* declared that, in applying these requirements in the specific context of a legislator lawsuit, a court should be "especially rigorous."[3] While the Court has never specified what, precisely, it means by "especially rigorous," it has stated that the purpose of such additional rigor lies in prudential considerations—namely, its desire to "keep[] the Judiciary's power within its proper constitutional sphere," and avoid unnecessarily involving itself in disputes among the political branches.[4] This goal dictates that courts "carefully inquire" as to whether plaintiff's injury is sufficiently concrete and particularized.[5]

Raines is best conceptualized as establishing a rebuttable presumption against adjudicating legislator lawsuits. Thus, if there is an institutional injury of sufficient concreteness (discussed in the next section), courts will be amenable to adjudicating legislator lawsuits when prudential factors counsel in favor of adjudication. In other words, *Raines* does not establish a prohibition on legislator standing as a general matter; legislators can indeed have standing to sue the executive under the right circumstances.

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[1] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992); Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982).

[2] *Lujan*, 504 U.S. at 560 ("[T]he plaintiff must have suffered an 'injury in fact'—an invasion of a legally-protected interest which is (a) concrete and particularized and (b) actual or imminent, not 'conjectural' or 'hypothetical.'") (internal citations omitted); Allen v. Wright, 468 U.S. 737, 751(1984) ("The injury alleged must be, for example, 'distinct and palpable,' and not 'abstract' or 'conjectural' or 'hypothetical'.") (internal citations omitted).

[3] Raines v. Byrd, 521 U.S. 811, 819-20 (1997) ("And our standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.").

[4] *Id.* at 820 ("In the light of this overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere, we must put aside the natural urge to proceed directly to the merits of this important dispute and to 'settle' it for the sake of convenience and efficiency. Instead, we must carefully inquire as to whether appellees have met their burden of establishing that their claimed injury is personal, particularized, concrete, and otherwise judicially cognizable.").

[5] *Id.*

II. INSTITUTIONAL INJURY

As a preface to this discussion, it may be worthwhile to engage in the following thought experiment:

> *Imagine a very charismatic Speaker of the House declares himself Commander-in-Chief of the U.S. armed forces. He convinces a majority of his colleagues in the House to pass H. Res. 123, authorizing the Speaker to direct the generals of the U.S. armed forces.*
>
> *The Speaker then commands the generals to cease operations in a foreign country, where the U.S. has had ongoing military operations for several years. The generals comply but there are grumblings about whether H. Res. 123 is constitutional, with some high-ranking military officials insisting that it is, and others insisting that it is not. Constitutional law professors and practitioners are similarly divided on the constitutional question.*
>
> *The President has lost command of the military. The Speaker of the House (with support of his House colleagues) has arguably violated the Constitution's separation of powers, as Article II, section II of the Constitution grants the President power to be Commander-in-Chief of the armed forces.*
>
> *Putting the merits consideration of the constitutionality of the Speaker's actions aside, consider the preliminary procedural hurdle: Can the President sue the Speaker, seeking a court declaration of the unconstitutionality of the Speaker's acts? In other words, would the President have institutional "standing" to sue the Speaker?*
>
> *Assume further that because the Speaker's only action thus far—ordering a cessation of military operations in a foreign country—is a "benevolent" act, no individual has been harmed in a sufficiently personal, concrete way, so as to establish injury sufficient for standing to sue the Speaker.*
>
> *If there is to be any justiciable lawsuit at all, it will be because the President convinces the court that he has suffered "institutional" injury to his Article II powers.*

If you believe the President should have standing to bring a lawsuit against the Speaker (and not have to resort to more aggressive self-help such as attempting to order a few, still loyal military personnel to arrest the Speaker), do you also believe that Congress should have standing to sue the President if the President takes action to infringe Article I powers?

In other words, do you believe lawsuits by Article I against Article II should be just as justiciable as lawsuits by Article II against Article I?

Concededly, when Article I sues Article II, a court faces some challenges not normally present when Article II sues Article I. Specifically, ascertaining "institutional" injury is more challenging for the simple fact that there are many more members of Article I (435 in the House; 100 in the Senate) than Article II (one). Courts faced with an institutional injury claim initiated by members of Article I, therefore, must check to make sure two things exist that are not normally questionable when Article II sues Article I:

(1) Institution check: The court must check to ensure that the Article I members initiating the lawsuit—the plaintiff-legislators—represent the institution *qua* institution, not merely their own personal objections to something the Executive has done; and

(2) Injury check: The court must check to ensure that the "institutional" injury alleged by the plaintiff-legislators is indeed an injury to the institution *qua* institution—namely, that the Executive has committed an act that directly contradicts, or nullifies, an act of Congress.

If Article I plaintiffs survive these two checks, the court should find that they have standing to bring an institutional injury lawsuit against the President, just as the President should have standing to bring an institutional injury lawsuit against Congress.

Now let's proceed to examine the relevant case law that fleshes out how courts have struggled with these two checks.

A. Distinguishing "Private" Injury from "Institutional" Injury

The Supreme Court has articulated a distinction between legislator lawsuits that allege "private" injury versus "institutional" injury. This distinction necessitates a consideration of the nature of the injury alleged: Is the injury one that is felt by the member as an individual, *distinct from* his colleagues? Or is it one that has been suffered by *all* members of the legislature and thus harms the institution as a whole?

Very few lawsuits brought by legislators are private injury lawsuits; most of them have been brought as institutional injury cases. This does not mean that institutional injury suits are commonly justiciable; they often are not, as I will detail in the next section. It simply means that most lawsuits brought by legislators have historically involved allegations of institutional rather than private injury.

One notable example of a private injury lawsuit is *Powell v. McCormack*.[6] In *Powell*, Congressman Adam Clayton Powell and thirteen of his constituents sued the Speaker of the House and other House officials, asserting that a House resolution excluding Powell from the chamber—based upon an investigation revealing improprieties relating to travel and staff expenses—violated various constitutional provisions. The Supreme Court held that Powell's exclusion from the House presented a justiciable case or controversy, and has subsequently made clear that *Powell* is a case involving a private legislator injury.[7]

But again, the vast bulk of legislator lawsuits have not involved *Powell*-like private injuries.[8] Instead, they have involved allegations of institutional injury to the legislature itself. Any House or Senate lawsuit against the President based upon the President's failure to faithfully execute would inherently involve an institutional injury, so I will proceed to analyze the kind of institutional injury that the courts have (and have not) deemed sufficient for standing.

B. Institutional Injury Cases

1. Supreme Court Institutional Injury Cases—Raines (1997) & Coleman (1939)

There have been two Supreme Court cases addressing legislator standing to sue the executive: (1) *Raines v. Byrd*; and (2) *Coleman v. Miller*. The former (*Raines*) denied legislator standing; the latter (*Coleman*) allowed it. The key to understanding the difference in outcome between these two cases is the nature of the "institutional" injury alleged. There were also significant prudential distinctions in the posture of these two cases, which will be discussed in the next section examining the three prudential factors. For now, however, I will focus exclusively on the element of institutional injury-in-fact as it existed in these two cases.

The plaintiffs in *Raines* were six members of Congress (four senators; two House members) who voted against the Line Item Veto Act. After their legislative colleagues enacted the bill and President Clinton signed it into law, these six members filed their lawsuit challenging the constitutionality of the Act. The harm they alleged was that in passing the Act, their voting power as members of Congress had been diminished.[9]

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[6] 395 U.S. 486 (1969).

[7] *See* Raines v. Byrd, 521 U.S. 811, 821 (1997) (Unlike the injury claimed by Congressman Adam Clayton Powell, the injury claimed b the Members of Congress here is not claimed in any private capacity but solely because they are Members of Congress.").

[8] For another, recent legislator lawsuit involving allegations of private injury, see Rangel v. Boehner, ____ F. Supp.2d _____ , 2013 WL 6487502 (D.D.C. Dec. 11, 2013) (denying standing to censured House member for various private injury claims).

[9] The *Raines* Court observed that the plaintiffs "alleged that the Act injured them 'directly and concretely . . . in their official capacities' in three ways:

The Supreme Court held that the *Raines* plaintiffs lacked standing. The institutional injury asserted by the legislators—a diminution of legislative power—rendered the injury-in-fact element less "concrete" than a private injury claim such as that asserted in the *Powell v. McCormack* case.[10] And under the specific circumstances of *Raines* case, this institutional injury was too "abstract and widely dispersed."[11]

So what made the institutional injury in *Raines* too abstract and dispersed? First, the President had not yet actually exercised the line item veto.[12] Indeed, the lack of presidential action triggered a ripeness objection in addition to the standing objection, but the Supreme Court did not rule on the ripeness issue.[13]

Perhaps the reason why the Court did not rule on the ripeness issue is because the plaintiffs' complaint alleged that the Act was facially unconstitutional, and there was little doubt that the President would eventually exercise his newfound cancellation power. But this realization implies that the Court understood that the plaintiffs' objection was to the Act itself—namely, that the Act unconstitutionally expanded the President's power in various ways.[14] The legislators' complaint was thus aimed against *their own colleagues* in Congress, who had passed the Line Item Veto Act over the plaintiffs' objections. The defendant in the case—Franklin Raines, the OMB Director—was named because the lawsuit sought to enjoin him from implementing the Act if/when the President exercised the line item veto.

> The Act . . . (a) alter[s] the legal and practical effect of all votes they may cast on bills containing such separately vetoable items, (b) divest[s] the [appellees] of their constitutional role in the repeal of legislation, and (c) alter[s] the constitutional balance of powers between the Legislative and Executive Branches, both with respect to measures containing separately vetoable items and with respect to other matters coming before Congress.

Raines, 521 U.S. at 816.

[10] *Id.* at 821 ("Their claim is that the Act causes a type of institutional injury (the diminution of legislative power) which necessarily damages all Members of Congress and both Houses of Congress equally. Second, appellees do not claim that they have been deprived of something to which they *personally* are entitled—such as their seats as Members of Congress after their constituents had elected *them*. Rather, appellees' claim of standing is based on a loss of political power, not a loss of any private right, which would make the injury more concrete.") (emphasis in original).

[11] *Id.* at 829.

[12] Indeed, the *Raines* plaintiffs filed their lawsuit the very next day after the President signed the Line Item Veto Act into law. *Id.* at 814.

[13] The district court denied the ripeness objection as well as the standing objection. 956 F. Supp. 25, 32 (D.D.C. 1997) ("The issues in this case are legal, and thus will not be clarified by further factual development. In what context and when the President cancels an appropriation item is immaterial. The Court will be no better equipped to weigh the constitutionality of the Presidents cancellation of an item of spending or a limited tax benefit after the fact; the central issue is plain to see right now.").

[14] *Raines*, 521 U.S. at 816 ("Specifically, they alleged that the Act 'unconstitutionally expands the President's power,' and 'violates the requirements of bicameral passage and presentment . . . .'"). *See also infra* note 9.

When one understands the true nature of the dispute in *Raines*—an "institutional" injury alleged by a group of legislators who were angry at their own colleagues' delegation of legislative power to the President—it becomes clear why institutional injury could not be established. The legislator-plaintiffs in *Raines* complained that they had suffered "dilution" of their voting power. And presumably, this dilution of legislative power was suffered by all of their congressional colleagues, not merely the individual plaintiffs, and was thus an "institutional" rather than "private" injury. But this institutional injury had its genesis in *Congress itself* and its passage of the Line Item Veto Act.

A legislator lawsuit alleging an institutional injury-in-fact suffered as a result of an act approved by the majority of her legislative colleagues is difficult for a court to characterize as an "institutional" injury. If a majority of legislators do not believe they have been injured, why would the judiciary second-guess that conclusion, particularly when the judiciary is hesitant to embroil itself in political disputes? Such an intra-branch political dispute properly counsels particular judicial hesitation. Indeed, the *Raines* majority acknowledged this by pointing out that, unlike *Coleman v. Miller* (which will be discussed next), the legislators had not had their legislative desires thwarted by the executive but by their own colleagues. In other words, "They simply lost that vote."[15]

Second, the institutional injury alleged in *Raines* did not rise to the level of concreteness of *Coleman v. Miller*[16]—the Court's one prior decision recognizing legislator standing for institutional injury. As the *Raines* Court put it, "There 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."[17]

So what was the "level of vote nullification at issue in *Coleman*"? In *Coleman*, twenty-one out of forty Kansas State senators (a majority) sought mandamus against various state executive officers in an attempt to prevent authentication of Kansas's ratification of a proposed federal Child Labor Amendment.[18] The senators asserted that their State's ratification of the amendment was unconstitutional under Article V of the U.S. Constitution because the Kansas senate had rejected the amendment by a 20-20 vote, and the tie was improperly broken by a favorable vote cast by the Lieutenant Governor.

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[15] *Id.* at 824.

[16] 307 U.S. 433 (1939).

[17] *Raines*, 521 U.S. at 826.

[18] The 21 plaintiff-senators included 20 senators who had voted against the Child Labor Amendment. One additional senator (who had supported the amendment) and three members of the Kansas House joined their colleagues in an attempt to vindicate the Senate's prerogative to decide the question without tie-breaking interference from the Lieutenant Governor. *See Coleman*, 307 U.S. at 436.

The U.S. Supreme Court sustained the senators' standing to challenge the validity of their state's ratification, concluding that the senators' votes against the amendment "have been overridden and virtually held for naught" if their assertions on the merit were correct.[19] The *Coleman* Court concluded that the senators had a "plain, direct and adequate interest in maintaining the effectiveness of their votes."[20]

What made the *Coleman* plaintiffs' institutional injury sufficient for standing? The *Raines* Court subsequently characterized *Coleman* as holding that "legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified."[21] The key, in other words, seems to be that the institutional injury alleged must be tantamount to a complete nullification of a legislative act. *If the executive acts in such a way that a legislature's vote (to enact or not enact) on issue X is effectively nullified/undone by executive action, there will be "institutional injury" of sufficient concreteness to satisfy Article III standing.*

In a lawsuit challenging the President's failure to faithfully execute the law, injury asserted would be as follows: By failing to faithfully execute the law (an assertion that is assumed to be true at the preliminary stage of a motion to dismiss),[22] the President has completely nullified that portion of the law with which he is refusing to comply. If Congress passes a law that declares "X" and the President takes action that declares "not X," then X has been nullified.

Imagine, for example, that Congress passes a law that says that "[a]ny alien. . . shall . . . be removed" if the alien was inadmissible at the time of entry into the U.S.[23] Then imagine that the President declares that—as a matter of policy that cannot be plausibly characterized as an exercise of law enforcement discretion—a large category of illegal immigrants may obtain deferral of deportation and obtain employment authorization to remain in the country indefinitely.[24] Imagine further

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[19] *Id.* at 438.

[20] *Id.*

[21] *Raines*, 521 U.S. at 823.

[22] The question whether the President has, in fact, failed to faithfully execute the law is a subsequent question that goes to the merits of the legislator-plaintiffs' claims. At a motion to dismiss stage—including a 12(b)(1) motion to dismiss for want of subject matter jurisdiction (which is the proper motion when there is a lack of standing)—the court must assume the allegations of a failure to faithfully execute are true. *See* Warth v. Seldin, 422 U.S. 490, 501 (1975) ("For purposes of ruling on a motion to dismiss for want of standing . . . courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.").

[23] 8 U.S.C. § 1227(a).

[24] *See* Deferred Action for Childhood Arrivals (DACA), U.S. Dep't of Homeland Security, https://www.dhs.gov/deferred-action-childhood-arrivals.

that this executive suspension of immigration law is virtually identical to legislative reform proposals that had been debated extensively by Congress, but ultimately rejected.[25] Under such circumstances, is there any doubt that: (1) congressional power to define the contours of amnesty has been severely curtailed; (2) existing immigration law—mandating deportation for those who entered the country illegally—has been nullified; and (3) congressional *rejection* of amnesty for such individuals also has been nullified?

Significantly, when a President fails to faithfully execute a law, he nullifies not only the existing law, but also severely diminishes congressional power to legislate in the future. The President's action changes the entire political landscape, diluting the power of every member by making Congress's constitutionally enumerated powers superfluous and redundant. If the President can take actions that conflict with the commands of Congress (without any independent, Article II authority), he can both nullify existing laws and render Congress unnecessary for future action. This isn't the mere nullification of a single vote, as was held to be sufficient for institutional injury-in-fact in *Coleman*. It is the nullification of the legislature as a legislature. An institutional injury of this magnitude far exceeds that of *Coleman*.[26]

Moreover, in the situation where the injury is a nullification of both specific legislative acts as well as legislative power generally, caused by the President's failure to faithfully execute, the injury is an institutional one, not merely a "sore loser" lawsuit as was the case in *Raines*. An *ad hoc* group of plaintiff-legislators who want to litigate their policy disagreement with their own colleagues does not present an Article III "controversy" about an "institutional" injury—it presents an intra-institutional disagreement inappropriate for judicial resolution.

But when there is no doubt that the legislature *qua* legislature is concretely opposed to the action of the executive—the two branches are unequivocally at loggerheads over the distribution of powers between them—an Article III case or controversy exists that courts may adjudicate, particularly if one or more of the three prudential factors are present, as the subpoena cases discussed in the next subsection suggest.

2. Post-Raines Institutional Injury Cases in the D.C. Circuit and District Court

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[25] *See* Naftali Bendavid, *Dream Act Fails in Senate*, WALL ST. JOURNAL, Dec. 19, 2010, *available at* http://online.wsj.com/news/articles/SB10001424052748704368004576027570843930428.

[26] *Accord* Kerr v. Hickenlooper, 880 F. Supp.2d 1112, 1131 (D. Colo. 2012) ("As alleged, this injury is of a greater magnitude than the single instance of vote nullification in *Coleman* . . . . The injury alleged here is a concrete injury involving the removal of a 'core' legislative power of the General Assemhly.. The allegations of the Operative Complaint are of such a magnitude that the term 'dilution of institutional power' appears insufficient to describe the alleged injury [the act] has effected on Plaintiffs' core representative powers.").

The D.C. Circuit and the federal district court in D.C. have offered some useful post-*Raines* guidance regarding the meaning of legislative "nullification" that is sufficient to establish an institutional injury.

In general, these D.C. cases can be lumped into two categories: (1) non-subpoena cases, and (2) subpoena cases. The former have generally not recognized legislator standing, whereas the latter have. There does not appear, however, to be a meaningful, theoretical distinction between the subpoena and non-subpoena outcomes. In other words, while the non-subpoena cases generally have not been successful, it is because the four elements identified in this paper have not been satisfied, not because the D.C. Circuit has expressed an objection to legislator standing in non-subpoena cases. Indeed, as will be discussed below, the subpoena cases indicate that where the four elements do exist, federal courts in D.C. are quite willing to allow institutional injury legislator lawsuits against the executive.

a. Non-subpoena cases

The D.C. federal courts have decided several non-subpoena cases involving an allegation of institutional legislative injury. I will examine two of the most important post-*Raines* cases decided by the D.C. Circuit: (1) *Campbell v. Clinton*; and (2) *Chenoweth v. Clinton*. In both cases, legislative standing to assert institutional injury was denied.

In *Campbell v. Clinton*, the D.C. Circuit denied standing to 31 members of the House who sued President Clinton, claiming the sending of U.S. troops to Kosovo, Yugoslavia violated the War Powers Act and the War Powers Clause of the Constitution.[27] The legislator-plaintiffs in *Campbell* made a *Coleman* "nullification" argument, claiming that their votes against a resolution authorizing Yugoslavian air strikes (which failed in a 213-213 tie) as well as a resolution declaring war (which failed 427-2) had been nullified by the President's action.[28]

The D.C. Circuit rejected the nullification argument, noting that while the President had indeed acted in disagreement with the 31 legislator-plaintiffs' desires, he had not acted against congressional direction. The congressional resolutions seeking a declaration of war and authorization of air strikes had failed, but Congress had also rejected a resolution directing the President to immediately end U.S. participation in the NATO operation in Yugoslavia and had also explicitly voted to fund such involvement.[29] Under such circumstances, it could not be said that the President had "nullified" legislative power or an act of Congress. There was no clear indication, in other words, that the two branches were at loggerheads.

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[27] 203 F.3d 19 (D.C. Cir.), *cert. denied* 531 U.S. 815 (2000).

[28] *Id.* at 22 ("Here the plaintiff congressmen, by specifically defeating the War Powers Resolution authorization by a tie vote and by defeating a declaration of war, sought to fit within the *Coleman* exception to the *Raines* rule.").

[29] *Id.* at 20.

Moreover, because the President claimed independent Article II authority as Commander-in-Chief and Chief Executive to send troops to Kosovo, the D.C. Circuit noted that such a claim distinguished the President's actions from the executive's actions in *Coleman*. When the President claims independent constitutional authority to do X, in other words, doing X cannot be construed as an attempt by the Executive to nullify an act of Congress, but instead to exercise separate and independent presidential powers enumerated under Article II.[30]

Essentially, the D.C. Circuit saw the *Campbell* legislators' claims as a dispute over the constitutionality of the War Powers Resolution itself (a dispute over the distribution of constitutional war powers), not a claim about presidential "nullification" of legislative power (a dispute over executive disregard of a proper legislative act).[31]

A second post-*Raines* institutional injury case from the D.C. Circuit is *Chenoweth v. Clinton*, a lawsuit filed by four members of the House against President Clinton.[32] The plaintiff-legislators sought to enjoin the President's implementation of the American Heritage Rivers Initiative (AHRI), which they claimed exceeded presidential authority.

After President Clinton created the AHRI, the plaintiffs introduced a bill to terminate the initiative but the bill went nowhere.[33] Failing in their legislative efforts to stop the President's initiative, the legislators filed their lawsuit, claiming it violated several constitutional and statutory provisions.[34] Specifically, the plaintiffs asserted that the AHRI "usurp[ed] Congressional authority by implementing a program, for which [the President has no constitutional authority, in a manner contrary to the Constitution."[35]

The *Chenoweth* court concluded that after *Raines*, the plaintiffs' allegations of institutional injury were insufficient for standing.[36] Specifically, the D.C. Circuit

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[30] *Accord* Kucinich v. Obama, 821 F. Supp.2d 110, 120 (D.D.C. 2011) ("The President's actions, being based on authority totally independent of [Congress's vote], cannot be construed as actions that nullify a specific Congressional prohibition.").

[31] *Campbell*, 203 F.3d at 22 ("As the government correctly observes, appellants' statutory argument, although cast in terms of the nullification of a recent vote, essentially is that the President violated the quarter-century old War Powers Resolution. Similar, their constitutional argument is that the President has acted illegally—in excess of his authority—because he waged war in the constitutional sense without a congressional delegation. Neither claim is analogous to a *Coleman* nullification).

[32] 181 F.3d 112 (D.C. Cir. 1999), *cert. denied* 529 U.S. 1012 (2000).

[33] *Id.* at 113.

[34] *Id.*

[35] *Id.* at 116.

[36] *Id.* (Applying *Moore*, this court presumably would have found that injury sufficient to satisfy the standing requirement; after *Raines*, however, we cannot.").

noted that the four plaintiff-legislators "did not allege that the necessary majorities in Congress voted to block the AHRI. Unlike the plaintiffs in . . . *Coleman*, therefore, they cannot claim their votes were effectively nullified by the machinations of the Executive."[37] As with *Campbell*, the plaintiff-legislators in *Chenoweth* failed to convince the D.C. Circuit that Congress and the President were genuinely at loggerheads. There was no concrete evidence, in either case, that their colleagues in Congress agreed with the plaintiff-legislators' position.

Both *Campbell* and *Chenoweth* thus stand for the proposition that when legislators allege institutional injury, the existence of facts indicating that a *majority of their colleagues in Congress do not agree with their position* will result in a finding that the plaintiff-legislators have not established a sufficiently concrete "institutional" injury.

In *Campbell*, for example, a majority of the plaintiff-legislators' colleagues had voted to fund U.S. military involvement in Kosovo and against a resolution directing the President to end such involvement—both of which indicated that the dispute was intra-legislative, as it was in *Raines*.[38] Likewise, in *Chenoweth*, Congress had taken no action to oppose the President's creation of the AHRI for two years, including no action on the plaintiff-legislators' bill to terminate the initiative—suggesting that Congress as an institution did not feel the same way as the plaintiff-legislators.[39] In neither case was there any indication that the majority of congressional colleagues supported the plaintiffs' position. Without such direct evidence of *institutional support* for the plaintiff-legislators' position, it is impossible for such legislators to carry their burden of proving "institutional" injury.

It should be noted, however, that concrete evidence of institutional injury does not require a *formal* legislative authorization for the plaintiff-legislators' lawsuit. The Supreme Court's decision in *Coleman v. Miller* makes this clear. While there was no formal authorization by the Kansas State Senate for the institutional injury lawsuit in *Coleman*, the named plaintiffs in the case included a majority (21 of 40) Kansas State Senators.[40] As will become apparent in the following discussion on the D.C. Circuit's subpoena cases and on the relevant prudential factors, an explicit institutional authorization for an institutional injury lawsuit—while not necessary—is nonetheless a significant "plus factor" toward establishing standing in such a case.

One additional fact of note in both *Campbell* and *Chenoweth* is that neither case involved *any* of the three prudential factors discussed in section III below. Neither

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[37] *Id.* The *Chenoweth* court also placed great emphasis on the availability of legislative self-help, a prudential factor I will discuss in the next section. *Id.* ("It is uncontested that the Congress could terminate the AHRI were a sufficient number in each House so inclined.").

[38] *Campbell*, 203 F.3d at 20.

[39] *Chenoweth*, 181 F.3d at 113.

[40] *Coleman*, 307 U.S. at 436.

case involved (1) an explicit institutional authorization for the lawsuit; (2) a lack of a private plaintiff to challenge the executive's action;[41] or (3) a lack of available political self-help.[42] A lawsuit in which one or more of these factors is present would thus be distinguishable.

b. Subpoena cases

Prior to *Raines*, the D.C. Circuit had ruled, in *United States v. American Telephone and Telegraph Co.* (*AT&T*), that the House of Representatives as a whole had standing to enforce congressional subpoenas against the executive branch.[43] After *Raines* was decided in 1997, however, there was some question as to whether *AT&T* was still good law. In 2008, the federal district court in D.C. rendered an opinion in *Committee on the Judiciary, U.S. House of Representatives v. Miers*,[44] concluding that "*Raines* did not overrule or otherwise undermine *AT&T I* . . . ." A similar conclusion was reached in late 2013 by the D.C. district court in *Committee on Oversight and Government Reform, U.S. House of Representatives v. Holder*.[45]

Before turning to the district court opinions in *Miers* and *Holder*, it is useful to examine *AT&T*. The *AT&T* litigation began with an investigation by the O&I Subcommittee of the House Committee on Interstate and Foreign Commerce into the nature and extent of domestic warrantless wiretaps conducted for national security purposes. As part of its investigation, the Subcommittee issued a subpoena to AT&T, asking it to turn over all warrantless wiretap requests received by the FBI.[46]

After the subpoena was issued, the White House began negotiations with the Subcommittee regarding the extent and format of disclosure of the FBI's requests to

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[41] A private plaintiff would have been available to challenge President Clinton's commitment of U.S. troops to Kosovo without congressional authorization. Affected members of the U.S. military of their families would have standing to sue. *See* Doe v. Bush, 323 F.3d 133 (1st Cir.), *reh'g denied* 322 F.3d 109 (1st Cir. 2003). Similarly, a private property owner injured by the AHRI in some way could have challenged a waterway's designation under the initiative, though a Westlaw search did not uncover any private lawsuits.

[42] Indeed, the D.C. Circuit noted in both *Campbell* and *Chenoweth* that if Congress were unhappy with the President's actions, it had political remedies readily available. *See Campbell*, 203 F.3d at 23-24; *Coleman*, 181 F.3d at 116.

[43] 551 F.2d 384 (D.C. Cir. 1976).

[44] 558 F. Supp.2d 53 (D.D.C. 2008). The D.C. district court's opinion was the last word on the merits of the issues raised by Miers. The D.C. Circuit granted a motion to stay district judge Bates' order pending appeal. Committee on the Judiciary of the U.S. House of Representatives v. Miers, 542 F.3d. 909 (D.C. Cir. 2008). After the elections of 2008, the D.C. Circuit granted Miers' and Bolten's motion to voluntarily dismiss their appeals. 2009 WL 3568649 (D.C. Cir., Oct. 14, 2009).

[45] _____ F. Supp.2d _____, 2013 WL 5428834 (D.D.C. Sept. 30, 2013).

[46] *AT&T*, 551 F.2d at 385.

AT&T. When negotiations between the White House and Subcommittee broke down, President Ford instructed AT&T "as an agent of the United States" to decline compliance with the subpoena.[47] When AT&T indicated that it felt compelled to comply with the subpoena, the U.S. sought and received a temporary restraining order against AT&T.[48] The Subcommittee's Chairman intervened, and the district court "correctly treated the case as a clash of the powers of the legislative and executive branches of the United States, with AT&T in the role of a stakeholder."[49] The trial court then balanced the needs of the Subcommittee and Executive, concluding that national security interests outweighed a need for strict compliance with the subpoena. [50] A permanent injunction was entered, ordering AT&T to ignore the subpoena.[51]

The D.C. Circuit concluded that the Subcommittee Chairman had standing to represent the interests of the House. Specifically, the D.C. Circuit noted that the House had passed a resolution, H. Res. 1420, which authorized the Subcommittee Chairman to intervene in the lawsuit on behalf of the House and provided funds for counsel.[52] Because a formal institutional authorization for the lawsuit existed, the D.C. Circuit concluded, "[W]e need not consider the standing of a single member of Congress to advocate his own interest in the congressional subpoena power. It is clear that the House as a whole has standing to assert its investigatory power, and can designate a member to act on its behalf."[53] The court then remanded the case and requested the Subcommittee and White House to attempt to negotiate a settlement.[54]

AT&T is consistent with *Raines* for one simple reason: When Congress issues a subpoena and the executive refuses to comply with that subpoena, the executive is "nullifying" a legislative act—the subpoena itself. When Congress, pursuant to its legitimate investigatory power, declares to the executive, "Thou shalt produce documents and/or testimony relating to X," an executive decision to ignore the subpoena is an act that declares, "not X." In such a situation, the legislative and executive branches are undeniably at loggerheads because the executive act has the effect of nullifying a legislative act. The nullification of the legislative act provides the "institutional" injury sufficient for a concrete case or controversy. When Congress takes the step of explicitly authorizing an institutional lawsuit to enforce

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[47] *Id.* at 387.

[48] *Id.*

[49] *Id.* at 389.

[50] *Id.* at 388.

[51] *Id.*

[52] *Id.* at 391.

[53] *Id.* (internal citation omitted).

[54] *Id.* at 395.

its subpoena—as it did in *AT&T*—there is little doubt that the institution *qua* institution has been harmed by the executive's act. The explicit authorization of the lawsuit satisfies the "institutional check"; the executive's nullification of the subpoena satisfies the "injury check."

Two post-*AT&T* decisions by the federal district court in D.C. confirm that *AT&T* has continuing viability post-*Raines*: (1) *Committee on the Judiciary, U.S. House of Representatives v. Miers*;[55] and (2) *Committee on Oversight and Government Reform, U.S. House of Representatives v. Holder*.[56]

In *Miers*, the House Judiciary Committee issued subpoenas to a former White House counsel, Harriet Miers, and current White House Chief of Staff, Joshua Bolten, to provide documents and testimony relating to the Committee's investigation into the reasons motivating the forced resignations of nine U.S. attorneys.[57] When Miers and Bolten claimed executive privilege and the Department of Justice made it clear that it would not initiate criminal contempt proceedings, the House then passed H. Res. 980, authorizing then-Chairman Conyers to file a civil action in federal court seeking compliance with the subpoenas.[58]

Judge John Bates' opinion in *Miers* declared that the D.C. Circuit's opinion in *AT&T* survived the Supreme Court's decision in *Raines*[59]and that *Raines* demanded that institutional injury suits be unequivocally "institutional" in nature to satisfy injury-in-fact: "Members [in *Raines*] had suffered no injury that granted them *individual* standing because the actual injury was incurred by the *institution*. Significantly, the Supreme Court noted that it 'attached some importance to the fact that [plaintiffs] have not been authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose their suits."[60]

Judge Bates then distinguished *Miers* and *AT&T* from *Raines* by observing that in the subpoena cases, the Chairmen of the respective committees were "authorized to act on behalf of the House to vindicate the House's institutional right that had been challenged by the executive branch. The chairman, then, represented the *institution* and sought to remedy a potential *institutional* injury. That was not the case in *Raines*. There *individual* Members sought to ameliorate Congress's *institutional* injury without the consent of the institution itself—and the approach was rejected by the Supreme Court. But the Supreme Court has never held that an institution

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[55] 558 F. Supp.2d 53 (D.D.C. 2008).

[56] ____ F. Supp.2d _____, 2013 WL 5428834 (D.D.C. Sept. 30, 2013).

[57] *Miers*, 558 F. Supp.2d at 55.

[58] *Id.* at 63.

[59] *Id.* at 69 ("*Raines* did not overrule or otherwise undermine *AT&T I* . . . .").

[60] *Id.* (quoting *Raines*) (emphasis in original).

such as the House of Representatives cannot file suit to address an institutional harm.[61]

To Judge Bates, in other words, the institutional injury asserted in *Raines* was too abstract because there was no evidence that the institution thought it had been injured by the Line Item Veto Act. Moreover, because noncompliance with a subpoena was a direct nullification of Congress's legitimate investigatory request, the *Miers* injury was not an abstract, future injury like it was in *Raines*.[62] The executive's noncompliance with a congressional subpoena nullified both Congress's power to investigate and its power to enforce its power to investigate.[63]

Judge Bates then concluded, "[T]he fact that the House has issued a subpoena and explicitly authorized this suit does more than simply remove any doubt that [the House] considers itself aggrieved. It is the key factor that moves this case from the impermissible category of an individual plaintiff asserting an institutional injury to the permissible category of an institutional plaintiff asserting an institutional injury."[64]

The *Holder* decision by district court Judge Amy Berman Jackson is essentially the same as that of Judge Bates in *Miers*. In *Holder*, the House Committee on Oversight and Government Reform issued a subpoena to Attorney General Eric Holder, seeking information relating to its investigation into the so-called "Fast and Furious" gun-walking operation by the Bureau of Alcohol, Tobacco and Firearms.[65] Holder refused fully to comply with the subpoena, citing executive privilege.[66]

The House of Representatives then passed H. Res. 706, explicitly authorizing the Chairman of the Oversight and Government Operations Committee to initiate a civil lawsuit to enforce the Holder subpoena.[67] Judge Jackson noted that since *Marbury v. Madison*, the courts have undertaken the duty to adjudicate disputes about the proper boundaries of power between the political branches.[68] She rejected the

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[61] *Id.* at 70 (emphasis in original).

[62] *Id.* (In *Raines* . . . the harm was not tied to a specific instance of diffused voting power; rather, the injury was conceived of only in abstract, future terms.").

[63] *Id.* at 71 ("The injury incurred by the Committee, for Article III purposes, is both the loss of information to which it is entitled and the institutional diminution of its subpoena power.").

[64] *Id.* at 71 (internal citations and quotation marks omitted).

[65] *Holder*, ____ F. Supp.2d _____, 2013 WL 5428834, at *1 (D.D.C. Sept. 30, 2013).

[66] *Id.* at *4.

[67] Plaintiff's Complaint, ¶53, *available at* 2012 WL 3264300 (D.D.C. Aug. 13, 2012) (trial pleading).

[68] *Holder*, 2013 WL 5428834 at *8 (noting that in *United States v. Nixon*, "the Court reviewed the history of its own jurisprudence, beginning with *Marbury v. Madison*, and it pointed out that it had repeatedly been called upon to decide whether the executive branch or the legislature had exercised its power in conflict with the Constitution. . . . And it repeated what it had set forth in *Baker v. Carr*: '[D]eciding whether a matter has in any measure been committed b the Constitution to another

Executive's position that judicial determination of the proper division of powers between the political branches would violate separation of powers,[69] concluding, "To give the [executive] the final word would elevate and fortify the executive branch at the expense of the other institutions that are supposed to be its equal, and do more damage to the balance envisioned by the Framers than a judicial ruling on the narrow privilege question posed by the complaint."[70]

Turning her attention to *Raines v. Byrd*, Judge Jackson concluded that the *Raines* Court had no intention of blocking legislative lawsuits against the executive, but the legislators simply had not proven either a concrete personal harm or a concrete institutional harm.[71] In short, "*Raines* was dismissed for lack of jurisdiction because of the 'amorphous' nature of the claim, not because it was an inter-branch dispute."[72]

All three of these subpoena cases decided by the federal courts in D.C. are remarkably similar. They all involve:

(1) the issuance by a House committee of an investigatory subpoena against a member of the executive branch;

(2) the non-compliance with the subpoena by the executive branch, citing some form of executive privilege (a state secrets/national security privilege in *AT&T*; the executive communications privilege in *Miers* and *Holder*); and

(3) the passage of a House Resolution explicitly authorizing a lawsuit to be brought on behalf of the House to enforce the subpoena.

Under these circumstances, there is little doubt that both the institutional check and the injury check have been satisfied. The explicit institutional authorization, combined with an executive act nullifying an act of Congress, establishes that there

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branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court has ultimate interpreter of the Constitution.") (internal citations omitted).

[69] *Id.* at *9 ("Throughout is pleadings and during oral argument, the Department has advanced this constricted view of the role of the courts and maintained that it would violate the separation of powers enshrined in the Constitution if this Court were to undertake to resolve a dispute between the other two branches. . . . But while this position was adamantly advanced, there was a notable absence of support for it set forth in the defendant's pleadings, and oral argument revealed that the executive's contention rests almost entirely on one case: *Raines v. Byrd*.").

[70] *Id.* at *8.

[71] *Id.* at *10 ("A reading of the entire opinion [*Raines*] reveals that the problem that prompted the dismissal was not the fact that legislators were suing the executive; it was that the plaintiffs had suffered no concrete, personal harm, and they were simply complaining that the Act would result in some 'abstract dilution' of the power of Congress as a whole.").

[72] *Id.*

is an active "controversy" between the branches that may be resolved by the judiciary under Article III, section two.

I will now proceed to examine three important prudential factors that courts will consider in deciding whether it *should* exercise its constitutional power to adjudicate the controversy. If one or more of these prudential factors is lacking, the court *may decline* (but constitutionally does not have to decline) to adjudicate a political branch dispute it would otherwise have constitutional authority to resolve.

III. PRUDENTIAL FACTORS IMPORTANT IN INSTITUTIONAL INJURY LAWSUITS

The foregoing discussion indicates that legislative standing for institutional injuries is, in fact, possible under the right circumstances. So long as the courts are convinced that the legislator-plaintiffs are speaking on behalf of the institution (the "institutional check") and the Executive's act is tantamount to a "nullification" of legislative action (the "injury check"), the controversy will be sufficiently direct and concrete to satisfy Article III injury-in-fact requirements.

Now, we will focus on non-Article III *prudential* standing considerations that both the Supreme Court and lower federal courts have intimated are salient to the decision to adjudicate a controversy involving institutional injury to the legislature.

A. Explicit Authorization for Litigation

As stated above, explicit institutional authorization for the lawsuit is not required, as evidenced by the justiciability of the Kansas State Senators' lawsuit in *Coleman v. Miller.* In that case, a majority (21 out of 40) of state senators had joined as plaintiffs in the lawsuit challenging the constitutionality of a Lt. Governor's tie-breaking vote in favor of the federal Child Labor Amendment.[73] In *Coleman*, however, the fact that a majority of the Kansas Senate was bringing the lawsuit ensured the Court that the institution *qua* institution had an active controversy against the executive branch—in other words, the institutional check was satisfied.

But if a majority of one of the legislative houses does not formally join a lawsuit, how can the court be satisfied that the controversy with the executive does, indeed, constitute a dispute with the legislature *qua* legislature? The case law—particularly the subpoena cases of the federal courts in the D.C. Circuit—suggests that, in the absence of formal joinder of a majority of legislators as plaintiffs, a formal institutional authorization for the lawsuit will suffice to provide this institutional check.

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[73] *Coleman*, 307 U.S. at 436 ("The original proceeding in mandamus was then brought in the Supreme Court of Kansas by twenty-one members of the Senate, including the twenty senators who had voted against the resolution, and three members of the house of representatives . . . . ").

Formal institutional authorization for an institutional injury lawsuit ensures that the judiciary is not being asked to adjudicate a "sore loser" lawsuit wherein a few disgruntled lawmakers attempt to reach a result through litigation that they could not reach with their own colleagues in the political branch. In the words of the Supreme Court in *Raines*, "We attach some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose their suit."[74]

Indeed, in all three of the D.C. subpoena cases—*AT&T*, *Miers* and *Holder*—institutional authorization for the lawsuit existed, and the courts sustained institutional standing to sue. Conversely, in the D.C. Circuit cases disallowing congressional standing—*Campbell* and *Chenoweth*—such institutional authorization was lacking.

Another D.C. federal district court opinion is useful here as well, *Kucinich v. Bush*.[75] In *Kucinich*, an ad hoc group of thirty-two House members sought a declaration that President Bush's unilateral withdrawal from the Anti-Ballistic Missile (ABM) Treaty was unconstitutional. Judge Bates (the same judge as in *Miers*) denied these legislators' standing to assert institutional injury, concluding that they had not convinced him that their colleagues in Congress agreed with their position, and were functionally indistinguishable from the "sore loser" legislator-plaintiffs in *Raines*.[76]

Judge Bates' conclusion that the plaintiffs could not satisfy injury-in-fact was reinforced by the fact that the lawsuit had not been authorized by the House: "Equally important, the thirty-two congressmen here have not been authorized, implicitly or explicitly, to bring this lawsuit on behalf of the House, a committee of the House, or Congress as a whole."[77] He then observed,

> It is entirely logical, from an institutional standpoint, that a group of congressmen bringing suit in court, purportedly to protect Congress's interests, must first have the authority to represent the interests of Congress, the House of Representatives, or the Senate. Permitting individual congressmen to run to federal court any time they are on the losing end of some vote or issue would circumvent and undermine the legislative process, and risk substituting judicial considerations and assessments for legislative ones.[78]

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[74] *Raines*, 521 U.S. at 829.

[75] 236 F. Supp.2d 1 (D.D.C. 2002).

[76] *Id.* at 6-7.

[77] *Id.* at 11.

[78] *Id.* at 11.

A similar emphasis on institutional authorization was made by D.C. federal district judge Reggie Walton in *Kucinich v. Obama* ("*Kucinich II*").[79] In *Kucinich II*, an ad hoc group of ten House members challenged the constitutionality of President Obama's commitment of U.S. troops to Libya, in violation of the War Powers Clause and the War Powers Act (the same legal claims raised in *Campbell v. Clinton*,[80] discussed above in the subsection on non-subpoena D.C. Circuit cases).

Judge Walton ruled that the congressmen lacked standing to assert their institutional injury, emphasizing the importance of a lack of institutional authorization to bring such claims: "Furthermore, the Supreme Court's decision in *Raines* was premised in part on the fact that the legislators in that case did not initiate their lawsuit on behalf of their respective legislator bodies. . . . Here, there has been no indication from the plaintiffs that they have initiated this litigation at the behest of the House of Representatives as a whole—to the contrary, they speak for themselves, not the House of Congress in which they serve."[81] In short, just like in other *ad hoc* legislator lawsuits that lack institutional authorization, Judge Walton viewed *Kucinich II* as a "sore loser" lawsuit, not a genuinely institutional one.

The bottom line appears to be that, in the absence of formal joinder by a majority of legislators of a particular chamber (as was the case in *Coleman*), courts will insist on a formal institutional authorization for the lawsuit. When such formal institutional authorization exists, the genuineness of the institutional injury is not in doubt, and the case presents an undeniable "controversy" between the legislative and executive branches, provided the executive has taken some act that "nullifies" an act of Congress (injury-in-fact).

B. No Private Plaintiff is Available

Another important consideration lurking in the legislator standing cases is whether there are any private, non-legislator plaintiffs available who can sue the Executive to enforce the constitutional limits on his power. In *Raines*, for example the Supreme Court was well aware that other private individuals, who had been personally injured by the exercise of a line item veto, would be available to sue the President. Indeed, in a case decided the year after *Raines*, *Clinton v. City of New York*, standing to sue the President was established by several businesses, individuals, and a city that had lost tax benefits due to the line item veto, and the Court then declared the line item veto unconstitutional on the merits.[82]

This prudential factor is important because if there is a private plaintiff available to sue the Executive, the courts can avoid adjudicating a dispute among the political

[79] 821 F. Supp.2d 110 (D.D.C. 2011).

[80] 203 F.3d 19 (2000).

[81] *Kucinich II*, 821 F. Supp.2d at 118.

[82] 524 U.S. 417 (1998).

branches, and instead simply resolve the underlying issue in a more traditional, private citizen vs. government lawsuit. Such lawsuits inherently have a less aggressive appearance, so courts are more comfortable adjudicating them.

Indeed, this understanding is the key to deciphering the *Raines* Court's reference to "historical practice," in which the Court referenced "several episodes in our history that in analogous confrontations between one or both Houses of Congress and the Executive Branch, no suit was brought on the basis of claimed injury to official authority or power."[83] Specifically, the *Raines* Court mentioned four historical situations involving a dispute over the proper constitutional boundary between the legislative and executive branches: (1) the Tenure of Office Act of 1867, which required the President to obtain Senate concurrence before firing any cabinet officers; (2) the one-house legislative veto provision contained in the Immigration and Nationality Act; (3) the appointment provisions of the Federal Election Campaign Act, which allowed the President, House and Senate to appoint FEC members with majority confirmation of both Houses of Congress; and (4) the validity of President Coolidge's pocket veto of a law giving certain Native American tribes a right to sue the U.S. for damages for the loss of their tribal lands.
The common denominator in all four of these legislative-executive power disputes is this: The disputes could be litigated (and in fact, were litigated) by a private plaintiff, without needing to resort to a legislator, institutional injury lawsuit.

The power of President Andrew Johnson to ignore the Tenure of Office Act by firing his Secretary of War, Edwin Stanton, without Senate concurrence could easily have been litigated by the affected individual (Stanton) or any other executive officer so fired. The *Raines* Court took pains to note that if President Johnson were allowed to "challenge the Tenure of Office Act before he ever thought about firing a cabinet member, simply on the grounds that [the law] altered the calculus by which he would nominate someone to his cabinet . . . [such a lawsuit] would have [ ] improperly and unnecessarily plunged [the court] into the bitter political battle being waged between the President and Congress."

This statement from *Raines* does not mean that legislator lawsuits are inappropriate under Article III; quite the contrary. It simply means that adjudicating a "President Johnson v. Congress" lawsuit would inappropriately have interjected the courts into a raw political dispute that was best resolved by a private plaintiff. The *Raines* Court made this clear in its subsequent analysis, which noted that, in 1926, a private plaintiff-postmaster, aggrieved by a mini-Tenure in Office Act that covered the U.S. Post Office, sued the Executive after he was fired without the required Senate approval.[84] That lawsuit, *Myers v. United States*,[85] ruled in favor of the fired postmaster and "expressed the view that the original Tenure of Office Act was

[83] *Raines*, 521 U.S. at 826.

[84] *Id.* at 827.

[85] 272 U.S. 52 (1926).

unconstitutional."[86] The *Raines* Court then quoted from *Myers*, "This Court has, since the Tenure of Office Act, manifested an earnest desire to avoid a final settlement of the question until it should be inevitably presented, as it is here."[87] This statement indicates that when a private plaintiff is available, legislator lawsuits should not be entertained, and the court should simply wait until the private plaintiff lawsuit is filed to resolve the constitutional question.

The same theme is evident in the three other cases cited by the *Raines* Court. Specifically, the Court said that a lawsuit filed by the Executive to challenge the constitutionality of the one-House veto of the Immigration and Nationality Act would have been inappropriate. It then cited *INS v. Chadha*,[88] in which a foreign exchange student named Chadha had been ordered deported after the House of Representatives vetoed the INS decision to allow Chadha to remain. Clearly, any exercise by the House of its unicameral power to veto an INS non-deportation decision would concretely injure the individual affected, and private plaintiffs such as Chadha were readily available.

Similarly, the *Raines* Court stated that a lawsuit by President Ford challenging the constitutionality of the FEC appointment provisions of the Federal Election Campaign Act would have been inappropriate, citing *Buckley v. Valeo*.[89] In *Buckley*, several federal candidates and contributors directly affected by the FECA challenged the constitutionality of several of the acts provisions, including the manner in which FEC members were appointed. It would have been overly aggressive for the federal judiciary to allow President Ford to challenge these provisions of the FECA, when it was apparent that there would be many concretely injured private plaintiffs suitable to bring such a constitutional challenge.

The final example cited by the *Raines* Court involved the constitutionality of President Coolidge's pocket veto of a law granting certain Native American tribes the right to sue the U.S. for damages sustained by loss of their tribal lands. When President Coolidge failed to sign the law before Congress adjourned for the summer, the law was deemed vetoed pursuant to the pocket veto language of Article I, section seven.[90] Under these circumstances, it was apparent that the Native American tribes were concretely injured by the pocket veto, and would have standing to sue.

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[86] *Raines*, 521 U.S. at 827.

[87] *Id.* at 828 (quoting *Myers*, 272 U.S. at 173).

[88] 462 U.S. 919 (1983).

[89] 424 U.S. 1 (1976) (per curiam).

[90] "If any Bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a Law, in like manner as if he had signed it, unless the Congress by their Adjournment prevent its return, in which case it shall not be a Law." U.S. CONST. art. I, § 7.

Native American tribes initiated such a lawsuit, *The Pocket Veto Case*,[91] and the Supreme Court determined that Coolidge's pocket veto was constitutional.

By citing these four constitutional crises, the *Raines* Court made it clear that legislator or executive standing should not be allowed whenever a private plaintiff would be available to adjudicate the constitutional issues.

But what if there *are no other* private plaintiffs with standing to challenge the President? This would be the case, for example, in the cases seeking enforcement of a congressional subpoena issued against the Executive. It would also be the case in situations that David Rivkin and I have called "benevolent suspensions" of law by the President.[92]

In the benevolent suspension scenario, the President exempts certain classes of individuals from the operation of law, effectively granting an executive "privilege" to the exempted individuals. For example, when the President instructed the Department of Homeland Security to stop deporting certain classes of young, illegal immigrants—the so-called Deferred Action for Childhood Arrivals (DACA)[93]—whom did the President "harm" in any concrete, particularized way? No one. Similarly, when the President unilaterally delayed provisions of the Affordable Care Act—such as the employer mandate[94]—he nullifies those provisions of the law declaring an effective date of January 1, 2014.[95] But whom did he harm, in an individualized way? Again, no one.

Such benevolent suspensions of law, by their very nature, are particularly pernicious from a constitutional, separation of powers perspective because by *benevolently granting privileges that "help" a class of persons, exempting them from the operation of law*, the *President's acts cannot give rise to a private plaintiff lawsuit.*[96]

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[91] 279 U.S. 655 (1929).

[92] David Rivkin and Elizabeth Price Foley, *Can Obama's Legal End-Run Around Congress Be Stopped?*, POLITICO, Jan. 15, 2014, *available at http://www.politico.com/magazine/story/2014/01/barack-obama-constitution-legal-end-run-around-congress-102231.html*.

[93] *See* Deferred Action for Childhood Arrivals, U.S. Dep't of Homeland Security, https://www.dhs.gov/deferred-action-childhood-arrivals (listing criteria for indefinite suspension of deportation and obtaining of a work permit).

[94] *See* Fact Sheet, U.S. Dep't of the Treasury, *Final Regulations Implementing Employer Shared Responsibility Under the Affordable Care Act (ACA) for 2015, available at http://www.treasury.gov/press-center/press-releases/Documents/Fact%20Sheet%20021014.pdf*.

[95] Patient Protection and Affordable Care Act § 1513(d) ("(d) Effective Date- The amendments made by this section shall apply to months beginning after December 31, 2013.").

[96] Contrast those situations in which the President has arguably ignored the plain language of the Affordable Care Act which tax credits to purchase health insurance available to individuals living in States that operate a state-run health insurance exchange. 26 U.S.C. § 36B(b)(2)(A) (extending tax credits to taxpayers "which were enrolled in through an Exchange established by the State under

If the constitutionality of a President's benevolent suspension is going to be adjudicated on the merits, the lawsuit must be initiated by Congress. Such a lawsuit, moreover, will by definition involve an allegation of institutional injury. Provided the legislator-plaintiffs in such a case can convince the court that the institution has suffered an injury-in-fact—i.e., that the benevolent suspension is tantamount to a "nullification" of a law they have written (e.g., the portion of the Immigration and Nationality Act that proclaims that individuals who have entered the country illegally "shall" be deportable,[97] or the provision of the Affordable Care Act that proclaims they "shall" be effective beginning in 2014[98])—the lack of a private plaintiff should strongly counsel the court to allow standing.

If no private plaintiff is available, adjudicating the case would not be a situation in which the judiciary is unnecessarily embroiling itself in a political dispute. It is, instead, inherently a situation wherein if the court does not adjudicate, the issue will go unadjudicated entirely.

It would be rather ironic if, in the name of "separation of powers," courts declined to hear institutional injury lawsuits brought by the legislature when there is no other private plaintiff available to adjudicate serious separation of powers issues. If separation of powers is to be maintained long-term, it must allow the courts to adjudicate institutional injury lawsuits as a last resort.

C. No Legislative "Self-Help" is Available

A final factor of salience to the prudential standing calculus is the availability of political "self-help" remedies. This is concededly the most amorphous of the three prudential factors, as it is unclear from existing case law to what extent political self-help must be available in order to counsel against adjudication. For example, is the mere possibility of impeachment by the legislature sufficient to thwart legislator standing? Presumably not, as the legislator-plaintiffs in *Coleman v. Miller* could have impeached the Lieutenant Governor or Governor under the Kansas Constitution,[99]

1311."). In this situation, the Executive's decision to extend the tax credits to individuals living States without state-run exchanges, 76 Fed. Reg. 50,931 (Aug. 17, 2011), has caused concrete harm to employers in those states, who are required to pay penalties whenever their employees receive such credits. As such, this is not a "benevolent suspension" scenario at all, but one in which private plaintiffs are readily available to challenge the constitutionality of the President's action. As such, there is no need to resort to legislator-lawsuits. Such private plaintiff lawsuits have, indeed, been filed and are pending in the federal courts. *See, e.g.,* Halbig v. Sebelius, ____ F. Supp.2d _____, 2014 WL 129023 (D.D.C. Jan. 15, 2014).

[97] 8 U.S.C. §1227(a).

[98] Patient Protection and Affordable Care Act § 1513(d) ("(d) Effective Date- The amendments made by this section shall apply to months beginning after December 31, 2013.").

[99] KANSAS CONST. art. II, § 28 (allowing for impeachment of the Governor "and all other officers under this Constitution"). This provision of the Kansas Constitution is part of the so-called Wyandotte

yet impeachment certainly would not "undo" the state's ratification of the Child Labor Amendment, but merely punish the allegedly offending executive branch actors with a loss of office.

The availability of political self-help was not actually discussed by the Supreme Court in *Coleman* itself, but instead appeared initially in *Raines v. Byrd*. There, the Supreme Court denied legislator standing and, toward the end of the opinion, briefly opined, "We also note that our conclusion neither deprives Members of Congress of an adequate remedy (since they may repeal the Act or exempt appropriations bills from its reach) . . . ."[100] The Court then acknowledged that whether the case would have come out any differently had such self-help *not* been available, they did not need to decide.[101]

Given the paucity of Supreme Court guidance on the importance or meaning of "self-help," I will proceed to examine the D.C. federal court cases mentioned thus far, to see if they provide additional clues about this prudential factor.

In *Campbell*, a majority of the D.C. Circuit panel believed that the 31 congressmen challenging the President's sending of troops to Kosovo could have sought political self-help such as cutting off funding for the troops or impeachment of the President[102] and thus believed *Raines* foreclosed standing to them.[103] They seem to have adopted a mandatory view of this prudential factor, thus giving it conclusive force, even though *Raines* itself did not do so.[104]

Specifically, the *Campbell* majority believed that *any* legislative remedy—even impeachment—would foreclose legislator standing. This is an odd conclusion, since again, the Kansas legislator-plaintiffs in *Coleman* could have theoretically impeached the offending Lieutenant Governor. Yet the *Campbell* majority described *Coleman* as

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Constitution, which was ratified in 1859, https://www.kshs.org/kansapedia/kansas-constitutions/16532, and in existence when *Coleman v. Miller* was decided.

[100] *Raines*, 521 U.S. at 829.

[101] *Id.* at 829-30 ("Whether the case would he different if any of these circumstances were different we need not now decide.").

[102] *Campbell*, 203 F.3d at 23 ("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.").

[103] *Id.* ("Congress has a hroad range of legislative authority it can use to stop a President's war-making and therefore under *Raines* congressmen may not challenge the President's war-making powers in federal court.") (citing John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996)). It should he noted that Judge Randolph took another, narrower view of the availability of self-help. *Id.* at 32 (Randolph, J., concurring in the judgment).

[104] *Raines*, 521 U.S. at 829-30 ("Whether this case would be different if any of these circumstances were different we need not now decide.").

"an unusual situation" because it was "not at all clear whether once the amendment was 'deemed ratified,' the Kansas Senate could have done anything to reverse that position."[105] The majority further asserted, "The *Coleman* senators . . . may well have been powerless to rescind a ratification of a constitutional amendment that they claimed had been defeated. In other words, they had no legislative remedy."[106]

The *Campbell* majority never mentions the possibility of impeachment of the offending Lieutenant Governor in *Coleman*, even though such impeachment was, in fact, available. Yet they assert—in the next breath—that the legislator-plaintiffs in *Campbell* could have remedied their dispute with the President over the use of U.S. military troops in Kosovo by impeaching the President.[107]

Judge Raymond Randolph concurred in *Campbell* but wrote separately to voice his disagreement with the majority's understanding of the salience of legislative self-help. Specifically, Judge Randolph believed the majority had misunderstood the role self-help played in *Raines*, improperly transforming the availability of self-help into a component of "nullification" (institutional injury-in-fact). Randolph believed the availability of self-help was merely a prudential factor to be considered only *after* the court had decided that the legislator-plaintiffs suffered a "nullification" injury—as was the approach taken by the Supreme Court in *Raines* itself. The availability of self-help was *not* relevant, in Randolph's view, to the *ab initio* determination of whether a nullification injury existed. In Judge Randolph's words:

> The majority has, I believe, confused the right to vote in the future with the nullification of a vote in the past, a distinction *Raines* clearly made. To say that your vote was not nullified because you can vote for other legislation in the future is like saying you did not lose yesterday's battle because you can fight again tomorrow. The Supreme Court did not engage in such illogic. When the Court in *Raines* mentioned the possibility of future legislation, it was addressing the argument that 'the [Line Item Veto] Act will nullify the [Congressmen's] vote in the future. . . . ' This part of the Court's opinion, which the majority adopts here, is quite beside the point to our case. No one is claiming that their votes on future legislation will be impaired or nullified or rendered ineffective.[108]

Judge Randolph appears to have the correct position on the "importance" of self-help. It is not supposed to be—and was not, in fact—a prerequisite to finding a constitutional injury-in-fact (nullification) in *Raines.* Indeed, the *Raines* Court's brief mention of self-help occurred only at the very end of its opinion, after it had already concluded that the legislator-plaintiffs challenging the Line Item Veto had failed to

[105] *Campbell*, 203 F.3d at 22-23.

[106] *Id.* at 23.

[107] *Id.*

[108] *Id.* at 32 (Randolph, J., concurring in the judgment).

establish an institutional injury-in-fact (nullification). After finding no injury-in-fact, the *Raines* Court, in a separate section (section IV), then briefly mentioned several prudential factors that it believed bolstered its decision not to adjudicate the lawsuit. The prudential factors briefly mentioned in *Raines* are the same three prudential factors I have discussed in this statement: (1) a lack of institutional authorization for the lawsuit; (2) a lack of an available private plaintiff; and (3) the availability of political self-help.[109]

The D.C. Circuit's decision in *Chenoweth* seems better reasoned, placing its emphasis on institutional injury-in-fact (nullification) rather than the availability of political self-help. In *Chenoweth*, you may recall, four House members sued President Clinton, alleging that his unilateral creation of the American Heritage Rivers Initiative exceeded his Article II authority.[110] The D.C. Circuit denied the legislators standing to pursue their institutional injury claim, finding their alleged injuries—loss of open debate and a vote on the issue[111]—was too abstract to constitute nullification.[112] More specifically, the *Chenoweth* court concluded that because the "Representatives [did] not allege that the necessary majorities in the Congress voted to block the AHRI . . . they cannot claim their votes were effectively nullified by the machinations of the Executive."[113]

The *Chenoweth* court only very briefly mentioned self-help, stating, "It is uncontested that the Congress could terminate the AHRI were a sufficient number in each House so inclined. Because the parties' dispute is therefore fully susceptible to political resolution, we would . . . dismiss the complaint to avoid meddling in the internal affairs of the legislative branch."[114]

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[109] The entirety of the *Raines* Court discussion of these prudential factors was as follows:

> We attach some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose their suit. We also note that our conclusion neither deprives Members of Congress of an adequate remedy (since they may repeal the Act or exempt appropriations bills from its reach), nor forecloses the Act from constitutional challenge by someone who suffers judicially cognizable injury as a result of the Act. Whether the case would be different if any of these circumstances were different we need not now decide.

Raines, 521 U.S. at 829-30 (internal citations omitted).

[110] 81 F.2d 112 (D.C. Cir. 1999).

[111] *Id.* at 113 ("Their legislative efforts having failed, the appellants brought this lawsuit, claiming . . . the President's issuance of the AHRI by executive order, without statutory authority therefor, 'deprived [the plaintiffs] of their constitutionally guaranteed responsibility of open debate and vote on issues and legislation' involving interstate commerce, federal lands, the expenditure of federal monies, and the implementation of the NEPA.").

[112] *Id.* at 117 (the legislators' claims of injury "is indistinguishable from the claim to standing the Supreme Court rejected in *Raines*. . . . [they cannot] claim that their vote was nullified by the President's action.").

[113] *Id.*

[114] *Id.* at 116.

The *Chenoweth* court's discussion of self-help via congressional termination of the AHRI is a much narrower and more appropriate inquiry than that of *Campbell*. Indeed, if one examines *Chenoweth's* treatment of self-help, one will see that the court considered it only in the context of injury-in-fact (nullification), not as a separate prudential factor in the manner of the Supreme Court in *Raines*.

Notably, the *Chenoweth* court did not mention the possibility of withholding appropriations or presidential impeachment, though certainly both avenues were theoretically available to Congress. Instead, by focusing on legislative termination of the AHRI, the *Chenoweth* court was asking itself a deceptively simple question: Could Congress "undo" the President's allegedly unconstitutional act by simply passing an ordinary statute? If the answer is yes, then it would be hard to characterize the President's act as "nullifying" a *non-existent act of Congress*. If Congress has *not* declared "X," in other words, a presidential directive declaring "not X" cannot be a "nullification" of X, since Congress has not addressed X and could simply declare X any time it wants. This was, essentially, the point raised by Judge Randolph's concurrence in *Campbell* the following year, discussed at length above.

The D.C. federal courts' subpoena cases—*AT&T*, *Miers* and *Holder*—do not explicitly consider the self-help factor in their standing analysis. This is most likely because the lack of available self-help in these cases was somewhat obvious. In *AT&T*, for example, the Executive had instructed AT&T not to comply with a subpoena issued by the O&I Subcommittee of the House Commerce Committee. Under such circumstances, it was patent that the Executive was not going to bring criminal contempt charges against AT&T for noncompliance with the subpoena since the President had ordered AT&T not to comply. If the House was going to be able to enforce its subpoena against AT&T, it would need to have standing to initiate civil contempt proceedings in court.

Similarly, in both *Miers*[115] and *Holder*,[116] the House sought civil enforcement of its subpoenas issued against high-ranking Executive officials, but only after the Department of Justice made it clear that it would not initiate criminal contempt proceedings. Under these circumstances—as with *AT&T*—the House's ability to

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[115] *Miers*, 558 F. Supp.2d at 63-64 ("[T]he Attorney General responded that because Ms. Miers and Mr. Bolten were acting pursuant to the direct orders of the President, 'the Department has determined that noncompliance . . . with the Judiciary Committee subpoenas did not constitution a crime and therefore the Department would not hring the congressional contempt statute before a grand jury or take any other action to prosecute Mr. Bolten or Ms. Miers.").

[116] *Holder*, 2013 WL 5428834 at *4 ("Deputy Attorney General Cole notified the Speaker that the Department would not bring the congressional contempt citation before a grand jury or take any other action to prosecute the Attorney General. . . . Deputy Attorney General Cole advised Senator Grassley that the U.S. Attorney had asked him to 'convey his concurrence with the position' of the Department that no criminal prosecution against the Attorney General would be pursued. The U.S. Attorney confirmed this position in a letter to the General Counsel of the House.").

enforce its subpoenas was limited solely to the initiation of civil contempt proceedings in federal court.

To summarize, the availability of legislative self-help appears to be relevant in two distinct ways: First, it may be relevant to the issue of injury-in-fact (nullification), in the *Chenoweth* sense that if Congress has not yet made any declaration on "X," a presidential action that declares "not X" cannot be a "nullification" of congressional legislative power because Congress is always free to simply legislate and declare "X," thus trumping the Executive and defending its legislative prerogative.

Second, the availability of self-help is relevant as a prudential factor, *after* the court has decided that injury-in-fact (nullification) exists. This was the role that self-help appeared to play in the Supreme Court's *Raines v. Byrd* decision, in which the Court had already found a lack of injury-in-fact, then briefly mentioned several prudential factors—including self-help—that it thought bolstered its conclusion of no standing.[117] Specifically, the *Raines* Court noted that its conclusion denying standing did not "deprive Members of Congress of an adequate remedy (since they may repeal the Act, or exempt appropriations from its reach) . . . ."[118]

It is worth noting that in briefly assessing this prudential self-help factor, the *Raines* Court mentioned both legislative repeal of the Line Item Veto Act, as well as appropriations, presumably for the White House itself. And indeed, it would presumably have been possible for Congress to do either of these things if it had the political willpower to do so. When such self-help is freely available but not exercised, courts may hesitate to adjudicate a legislator institutional injury lawsuit, reasoning that courts should be loathe to help a Congress that is not willing to help itself.

But could the same be said of Congress in the face of a President's benevolent suspension of a law passed by Congress? In *Raines*, Congress had passed a law—the Line Item Veto Act—and the President had signed it. Similarly, with a law such as the Immigration and Nationality Act or the Affordable Care Act, Congress has passed a law, and the President has signed them. But this is where the similarity ceases between *Raines* and a potential lawsuit challenging the President's benevolent suspension of federal immigration law or the ACA.

As already discussed, a President who benevolently suspends a law harms Congress as an institution by nullifying the law as passed. In such benevolent suspension situations, Congress has declared "X," and the President's benevolent suspension declares "not X." This is the essence of nullification.

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[117] *Raines*, 521 U.S. at 829.

[118] *Id.*

More importantly for present purposes, a President's benevolent suspension of law is not reasonably subject to legislative self-help. First, it would be unreasonable for a court to refuse to adjudicate a President's failure to faithfully execute on the rationale that Congress could "undo" the President's act by repealing the law. In the benevolent suspension situation, Congress *simply wants the President to faithfully execute the law as written*. In these situations, repeal of the law would not constitute self-help at all; it would undo the very law that Congress is seeking to enforce. One might argue that Congress could pass another law that expressed its displeasure with the President's benevolent suspension, but this would be an odd requirement, as the law would presumably need to declare something along the lines of, "Congress is re-declaring X, and this time we really, really mean it." Asking Congress to re-enact a law it has already enacted—hoping the President will faithfully execute it the second time around—is both inefficient and tilts the balance of powers unfairly toward the Executive, allowing the Executive to ignore Congress unless Congress can muster the political will to re-enact its original law.

Second, insisting that Congress take action other than repeal—such as denial of appropriations or even impeachment of the President—is similarly unreasonable under the circumstances. When congressional action is nullified by a President's benevolent suspension, asking Congress to defund a law it simply wants to have faithfully executed is like asking Congress to cut off its nose to spite its face—a self-defeating overreaction that would make faithful execution of the law *harder*, not easier.

Similarly, denying Congress standing to challenge a President's benevolent suspension on the basis that Congress could just impeach the President would be a perverse rule of law that would effectively say, "We (courts) cannot adjudicate the constitutionality of the President's suspension of law because if Congress is angry about its loss of legislative power, it should impeach the President." While it is true that Congress is always free to impeach the President and has, in fact, done so on grounds of a failure to faithfully execute,[119] impeachment is a drastic political remedy that should be a *very last resort*, not *encouraged* by courts as an preferable alternative to a peaceful judicial determination of constitutional parameters.

Moreover, in the context of a President's benevolent suspension of law, Congress and the country might otherwise be perfectly happy wit the President's

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[119] *See* Elizabeth Price Foley, *Why Not Even Congress Can Sue the Administration Over Unconstitutional Executive Actions*, DAILY CALLER, Feb. 7, 2014, *available at* http://dailycaller.com/2014/02/07/why-not-even-congress-can-sue-the-administration-over-unconstitutional-executive-actions (examining various impeachment efforts based on failure to faithfully execute). I would like to note for the record that while I authored this op-ed, I did not author its title, which (misleadingly) implies that the article concludes that congressional standing to sue the President is not possible. I did not reach that conclusion at all; instead, the article explores the possibility that *if* courts refuse to adjudicate benevolent suspensions and *if* Congress refuses to impeach, the checks and balances presupposed by the Framers to check a runaway President are nonexistent.

performance in office. Suggesting that Congress "try impeachment first" rather than asking the courts to police separation of powers seems deeply inappropriate.

Even more fundamentally, impeachment would not remedy the President's benevolent suspension at all; it would simply remove the President from office and replace him with a new one, who may or may not continue the policy of the impeached President. In the situation in *Coleman v. Miller*, for example, the Kansas legislature could have impeached the Governor and/or Lieutenant Governor as a consequence of its anger over the Lieutenant Governor breaking the Senate's tie vote on the Child Labor Amendment. If the availability of impeachment counseled courts to deny standing, *Raines* should have come out the other way and the Kansas State senators should have been denied standing. It would have been ridiculous for the Supreme Court to tell the Kansas State senators, "I'm sorry, we cannot adjudicate your constitutional claim about the validity of your State's ratification of the Child Labor Amendment because if you were angry at the Lieutenant Governor for breaking your tie vote, you should impeach him rather than seeking judicial relief." Impeaching the Lieutenant Governor of Kansas—like impeaching a President who benevolent suspends the law—simply would not remedy the injury-in-fact (nullification) committed by the Executive.

IV. CONCLUSION

Congressional standing is possible under the right circumstances. A federal trial court must accept the allegations of the plaintiff's complaint as true at the motion to dismiss stage. Thus, in a lawsuit alleging a failure to faithfully execute, the court will ask itself: Assuming the President has failed to execute the law, would such an act constitute an "injury in fact" sufficient to establish standing under Article III?

In order to answer this question, the court will apply *Raines v. Byrd*, which demands that legislators asserting an institutional injury must: (1) unequivocally speak for the institution *qua* institution; (2) complain of an injury suffered equally by all members of the institution; and (3) establish that the injury is tantamount to a "nullification" of a legislative act.

With regard to nullification, the courts have suggested that an institutional controversy requires evidence that Congress has effectively declared "X" while the executive's act has effectively declared "not X." In such a situation, there will be little doubt that the legislative and executive branches are at loggerheads, and the case is sufficiently concrete for judicial review under Article III.

In the specific context of a lawsuit asserting a failure of faithful execution, the D.C. federal courts' subpoena cases are instructive. In much the same way that an executive's defiance of a congressional subpoena is accepted as nullifying both Congress's subpoena itself and its greater power to investigate certain matters, an

act by the President that contravenes a law written by Congress nullifies not only Congress's law itself, but also its greater, exclusive power to legislate.

Assuming an injury-in-fact tantamount to nullification can be established, the court will then turn its attention to the three prudential factors that all counsel in favor of adjudicating a legislator lawsuit alleging institutional injury: (1) explicit institutional authorization for the lawsuit; (2) the absence of available private plaintiffs to challenge the executive; and (3) the lack of reasonably available political self-help.

If the House passed a resolution explicitly authorizing a lawsuit to challenge a President's benevolent suspension (thus satisfying prudential factor one), the lack of an available private plaintiff would be inherent because the benevolent suspension would not, by definition, harm any individual in a concrete manner (thus satisfying factor two). Finally, when one properly understands the meaning and role of the self-help factor, one sees that in a benevolent suspension situation, Congress cannot, in fact, remedy the benevolent suspension by itself. It cannot simply repeal the law, since it wants the President to faithfully execute that law. It should not be asked to re-enact the law and declare that it really means it this time. And it should not be asked to cut off funds for a law it wants executed or impeach a President whom it otherwise does not wish to impeach. Indeed, in the benevolent suspension scenario, the least drastic remedy—and indeed the only remedy—is for the courts to grant congressional standing to adjudicate the constitutional question.

Mr. GOODLATTE. Thank you, Ms. Foley. We will now begin questioning under the 5-minute rule, and I will begin by recognizing myself.

Professor Turley, many of the unilateral actions the Obama Administration has taken addressed controversial political issues effectively cutting the people's elected representatives in Congress out of the political process for a whole host of important issues. What is the effect on the political process of having the executive branch alone make these tough decisions? Is unilateral decision making good for our republican system of government?

Mr. TURLEY. Well, thank you, Mr. Chairman. The greatest danger that we have really cannot be overstated when you have the concentration of power in one branch. That is precisely the danger that the framers were seeking to avoid. People like James Madison viewed the branches as sort of like bodies in orbit. They were locked in an orbit of shared powers.

Once you have a concentration of authority in any one branch, it creates instability. But what people often miss is that separation of powers is really not about protecting Congress, about the institutional powers. Separation of powers was designed as a protection of liberty. It was to prevent the concentration of power by any of the branches that would threaten individual citizens.

Mr. GOODLATTE. Professor Foley, can you elaborate on what long-term institutional consequences would likely be if the current practice of benevolent suspensions of the law is not stopped?

Ms. FOLEY. That is a really good question because I think, you know, if Congress cannot stop the President from these benevolent suspensions, I think the first thing that occurs to me is that people are going to become very cynical about government. They already are, but it is going to get worse, and particularly I think people are going to get very cynical about the Constitution. They are going to start thinking that law is politics.

I already have students in my classes who think that, and it gets worse and worse every year because of situations like this. Situations like this, these benevolent suspensions, as they get more and more frequent and more aggressive, they are eroding our citizens' respect for the rule of law. We are a country of law and not men.

You know, the other problem I would see from your perspective if I were sitting on the other side is that, you know, it is going to render Congress superfluous, right? You have a delicate situation here I understand, but think about whether or not you would ever want to tackle any super controversial issues if this continues. Think about, for example, comprehensive immigration reform. Why would you go to the trouble of reaching a very delicate political compromise on an issue like that if you actually think the President is just going to, you know, simply benevolent suspend those portions of the law he does not like after you reach that compromise?

So if you want to stay relevant as an institution, I would suggest that you not stand idly by and let the President take your power away.

Mr. GOODLATTE. As Mr. Schroeder has noted, the President certainly has some discretion to set enforcement priorities in order to best allocate limited resources and to make a case-by-case enforce-

ment decision. But does that discretion encompass the complete non-enforcement of multiple statutes without any argument that they were unconstitutional, Ms. Foley?

Ms. FOLEY. You are talking about just discretion to not enforce something? Could you repeat the question because it got a little long there around the margins.

Mr. GOODLATTE. Sure. I apologize. But we acknowledge, as Professor Schroeder noted, that the President has some discretion on case-by-case enforcement decisions. But the question is, does that discretion encompass complete non-enforcement of multiple statutes without any argument that they are unconstitutional?

Ms. FOLEY. Of course it does not. You know, there is a difference between enforcement discretion and non-enforcement of law with regard to an entire category of people. Enforcement discretion, for example, is when a prosecutor with limited resources says, you know what, I have got all these cases lined up, and I think I have got the best evidence to spend my limited resources prosecuting this one first, this 1 second, this one third.

Prosecutorial discretion is not saying, well, I know I have this law and I know it says it shall do this and it shall do that. But I am just going to say it does not do that with regard to an entire category of people. That is an apple and an orange. This is not a simple matter of enforcement discretion. This is suspension of the law with regard to an entire category of people.

Mr. GOODLATTE. Professor Turley, it would appear that the largest impediment to Congress seeking judicial review of the President's failures to faithfully execute the laws is the doctrine of standing, which according to the Court is a doctrine required by the separation of powers. At what point must the separation of powers principles that standing is intended to preserve give way to the separation of powers concerns a congressional lawsuit would be intended to enforce?

Mr. TURLEY. Well, it is an excellent question, Mr. Chairman. I have to say that I believe the Supreme Court has made an unholy mess out of the area of standing. And many of our problems are attributed to the fact that they have left the two branches to fight out in sort of raw power as opposed to resolving what are not political questions, but structural ones.

And I have long believed, and I have represented Members of this Committee and other Committees challenging presidential action, that Member standing would go a long way to resolve some of these conflicts. They would not fester. Whatever the framers may have meant in the first three articles of the Constitution, it cannot possibly be this. It cannot possibly be a standing principle where literally no one seems to have standing to bring an issue before the Court. And it cannot possibly mean that a President can go to Congress and ask for something, be rejected, and then his unilateral authority to achieve the same result. Those things to me seem quite beyond the pale of anyone that looks at the Constitutional Convention.

Mr. GOODLATTE. Thank you. My time has expired.

The gentleman from Michigan, the Ranking Member, is recognized for 5 minutes.

Mr. CONYERS. Thank you, Mr. Chairman. I first wanted to begin by asking the gentlelady or good witness about a statement that she posted on February 7 in which the title was that not even Congress can sue the President for failing to enforce the part of the Constitution, that sometimes, as has been argued here today, that he can successfully establish the standing. And it was titled "Why Not Even Congress Can Sue the Administration Over Unconstitutional Executive Actions." Do you remember that was posted February 7 of this year?

Ms. FOLEY. Absolutely. Yes. Yes, in fact, very recently——

Mr. CONYERS. Do you still hold to that position?

Ms. FOLEY. No, let me clarify, if I may. If you look on footnote 119 of my written testimony, which is on page 31, I specifically note that I did not pick that title. When you write an op-ed for a large blog, like the Daily Caller, you write the substance, but you do not write the title.

As I express in that footnote 119, what the article is about, if you read the substance of the article, is that I am saying that if the courts will not enforce the faithful execution duty, and if Congress will not impeach the President, then we have a problem. That does not mean that I do not think Congress would not have standing to sue the President if they tried to do so. That is a separate question.

Mr. CONYERS. You did say in there, though, that Congress probably does not have standing.

Ms. FOLEY. I said most people think Congress probably would not. I am not one of them.

Mr. CONYERS. But you are not one of them.

Ms. FOLEY. That is correct.

Mr. CONYERS. But you wrote that in the article.

Ms. FOLEY. That most people think that? Absolutely.

Mr. CONYERS. Okay. I am going to offer that into the record just for all of us to be able to examine it.

Mr. GOODLATTE. Without objection, it will be made a part of the record.

[The information referred to follows:]

- The Daily Caller - http://dailycaller.com -

Why not even Congress can sue the administration over unconstitutional executive actions

Posted By Elizabeth Price Foley On 10:52 AM 02/07/2014 In | No Comments

What happens if a president refuses to "take care that the laws be faithfully executed" as required by Article II of the Constitution? The Framers assumed that neither Congress nor the courts would tolerate such usurpation. In *Federalist No. 48*, James Madison said power was "so divided and balanced among several bodies ... that no one could transcend their legal limits, without being effectually checked and restrained by the others." Madison's confidence assumes a wayward president could be reversed by the courts, reigned in by Congress or — as a last resort — impeached. But what if none of these checks and balances works? Americans may soon find out.

First, courts have limited ability to check a president's failure to execute. The primary obstacle is "standing," a doctrine that requires a plaintiff to have a concrete, personal injury in order to sue. Citizens can't file generic lawsuits to enforce the Constitution; they must prove that the government has harmed them in a personal, palpable way.

When a president delays or exempts people from a law — so-called benevolent suspensions — who has standing to sue him? Generally, no one. Benevolent suspensions of law don't, by definition, create a sufficiently concrete injury for standing. That's why, when President Obama delayed various provisions of Obamacare — the employer mandate, the annual out-of-pocket caps, the prohibition on the sale of "substandard" policies — his actions cannot be challenged in court.

Similarly, when the president decided not to deport certain young people, not to prosecute most marijuana users, and rewrote the work requirement of welfare reform, courts cannot rule on these acts' constitutionality because no individual has suffered the personal harm required for standing. Sure, the Constitution and its separation of powers are tremendously harmed. But the Supreme Court has made clear such generalized societal harms won't suffice.

Congress probably can't sue the president, either. The Supreme Court has severely restricted so-called "congressional standing," creating a presumption against allowing members of Congress to sue the president merely because he fails to faithfully execute its laws.

If courts can't be counted on to check the president, couldn't Congress just enact another law reversing him, or even impeach him? In today's hyper-partisan climate, the answer appears to be no.

Even if the House passed a bill undoing presidential action — for example, a bill that declared, "We don't want individuals brought into this country illegally to be exempt from deportation, and we really, really mean it this time" — the Democrat-controlled Senate wouldn't likely allow a vote on the measure. House Republicans passed a spending measure this fall to keep the government operating. But because the bill included a one-year delay in Obamacare — something the president threatened to veto — Senate Majority Leader Harry Reid refused to even bring the bill to the floor.

Indeed, why should Congress even bother to legislate in the current environment? If it somehow miraculously passed something the president opposed, it would be promptly vetoed, and getting two-thirds of both Houses of Congress to overrule his veto — particularly in the Senate — is as likely as a snowstorm in Miami.

Even when a congressional majority *agrees* with the president and passes a law the president signs, there's little confidence he will faithfully execute the law as written. Why pass comprehensive immigration reform, for example, if it includes tight border security or deportation measures with which the president disagrees and may ignore? As Congressman Paul Ryan put it, "Here's the issue that all Republicans agree on: We don't trust the president to enforce the law." The president's failure to faithfully execute has made Congress grind to a halt and with it, democracy itself.

If the president's actions are so bad, why not just impeach him? Presidential impeachment has occurred only three times. Reconstruction President Andrew Johnson narrowly escaped conviction after the House impeached him for firing the Secretary of War in contravention of the Tenure of Office Act. Richard Nixon resigned after being impeached for obstructing an investigation into the Watergate break-in, and using the IRS and other executive agencies to target political opponents. Bill Clinton

was impeached for abusing the judicial process and executive power to cover up his extramarital relationships. The Democrat-controlled Senate acquitted him.

The one thing all three attempts at presidential impeachment share is this: An assertion that the president was failing to faithfully execute the laws. Each situation involved — to a greater or lesser degree — a president intent on ignoring or manipulating the law for his own political or personal advantage.

Has President Obama committed similarly serious acts? Some Americans believe his unilateral changes to various laws and use of the IRS to target tea party and conservative groups are just as serious as Clinton's, Nixon's, or Johnson's transgressions. But even assuming this is true and the House passed articles of impeachment, would two-thirds of Harry Reid's Senate convict the first African-American president? The question seems to answer itself.

Sadly, in the Washington of 2014, partisanship trumps constitutional principles. While President Obama's pattern of failing to execute laws is serious, the ability of courts and Congress to stop him is shockingly limited. The Framers relied on the other branches of government to jealously guard Congress's prerogative to make laws and the president's duty to faithfully execute those laws. Unfortunately, the Framers may have been wrong.

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Ms. FOLEY. Thank you.

Mr. CONYERS. Now, Professor Schroeder, can one house of the Congress, in your view, successfully establish standing to sue the President to enforce the take care clause?

Mr. SCHROEDER. Not under existing Supreme Court interpretation of congressional or legislative standing.

Mr. CONYERS. Individuals can if they can get standing.

Mr. SCHROEDER. Individual citizens who have suffered what the Court calls a cognizable injury, in fact, can certainly sue to challenge whether the President's action has strayed outside of discretionary authority, and, therefore, is unlawful and should be rescinded or whatever. But Members of Congress have never been granted standing by this Supreme Court, and I do not see any inclination for a shift in their standing doctrine simply to challenge whether a President's action under a statute is one side or another of the boundaries that that statute says.

Mr. CONYERS. Now, Professor Schroeder, the clause itself, "take care that the laws be faithfully executed," does that clause itself not support and require the exercise of discretion by the President?

Mr. SCHROEDER. Is that a question for me?

Mr. CONYERS. Yes, sir.

Mr. SCHROEDER. Yes, it does.

Mr. CONYERS. And so——

Mr. SCHROEDER. It is inevitable that the President has to interpret what the statute means. He has to figure out whether it applies in individual cases. He has to make decisions about executing them. Even the simplest statutes are going to require those kinds of discretionary choices and judgments.

Mr. CONYERS. And we have numerous examples where Presidents have exercised that authority under the Constitution, so numerous that it is surprising that we are holding, I think this is the second hearing, on this same subject as if this President has gone overboard with this or something. As a matter of fact, I think there are numerous examples of other presidents actually exercising this discretion far more than the current occupant of the White House.

Mr. SCHROEDER. You could not begin to number them.

Mr. CONYERS. No. And so, I want to kind of lower the room temperature, taking into consideration the two witnesses on either side of you that this is a very dicey proposition that the Committee on Judiciary is going into for the second time, as if this is getting out of hand.

And so, I tend to agree with the proposition of the witness here, Ms. Foley, that probably not even Congress can sue the Administration over unconstitutional executive actions. As we all know, there are many other ways to get at a president who they think has really strayed far over the lines.

And with that, Mr. Chairman, I yield back the balance of my time.

Mr. GOODLATTE. The Chair thanks the gentleman, and recognizes the gentleman from North Carolina, Mr. Coble, for 5 minutes.

Mr. COBLE. Thank you, Mr. Chairman. Good to have the panel with us this morning. It is my belief, folks, that President Obama's credibility rating presently is fragile at best, expired at worst. And I appreciate you all being with us today.

Professor Turley, some defenders of the President's unilateral actions have asserted that his actions were merely an exercise of prosecutorial discretion. Are these assertions correct, or is there a fundamental difference between prosecutorial discretion and many of the President's unilateral acts?

Mr. TURLEY. Thank you, Congressman. As a practicing criminal defense attorney, I must say this is not like any prosecutorial discretion I have ever dealt with. Prosecutorial discretion is normally based on individual cases or relatively nuanced classes of cases. They do not involve categorical exclusions, like the ones we are dealing with here.

They also do not involve actions that are taken after submitting to Congress requests for changes, being rejected on those changes, and then implementing them in the name of prosecutorial discretion. If that is allowed, then obviously it would turn our entire system into a pretense of democratic process. It would make a mockery out of the separations.

What is fascinating about these areas is they happen to be areas in which we are deeply divided as a Nation. And that really makes this more serious, in my view, that there is a reason why compromise was not reached on these issues. The country is deeply divided. The framers never guaranteed that you could get compromise. What they guaranteed, or they thought they did, was that you have to try, that you cannot go it alone. You cannot freelance.

So I do not view this as prosecutorial discretion. You can call it that if you want, but from my view, it is the clear circumvention of Congress, and for Congress not to act, in my view, borders on self-loathing. I do not understand why Congress would allow a president to come to this body and ask for reforms, some of which I happen to agree with, and then simply take unilateral action once this body refuses to implement those reforms.

Mr. COBLE. Thank you, Professor. Professor Foley, let me get your opinion on a hypothetical. Sometimes hypotheticals can be treacherous. I do not intend for it to be, however. During his presidency, George H.W. Bush proposed that Congress lower the tax rate on capital gains. Congress did not enact his proposal. Under President Obama's assertion of executive power, could President Bush simply have instructed the IRS not to enforce the tax code on capital gains greater than 10 percent?

Ms. FOLEY. Well, I do not see why not. I mean, it seems to be an apt analogy to me. That was a benevolent suspension of law does, right? So you're hypothesizing that a conservative President essentially takes the Internal Revenue Code. He does not get the tax relief he requested for Congress, and so he unilaterally decides to change the rates that are explicitly mentioned in the Internal Revenue Code itself.

And, of course, when he would do that, that would be a benevolent suspension of law because it is benevolent in the sense that it is not hurting anybody. People are paying fewer taxes. To the extent that, you know, the residual rest of the country, the taxpayers, are hurt by that, the Supreme Court had made abundantly clear that there is no generalized taxpayer lawsuits allowed. They do not have standing.

So you would have to find some individual that had suffered a concrete, particularized personal harm from the President's lowering of the tax rates, and I do not see it. So you would have a classic benevolent suspension scenario, and I do not think that that is any more farfetched than what President Obama has been doing.

Mr. COBLE. I thank you. Professor Schroeder, let me try to get another question in before that red light illuminates. In your opinion, sir, at what point does a President cross the line from exercising his enforcement discretion to violating the duty of care that laws be faithfully executed?

Mr. SCHROEDER. When he is no longer making a conscientious and good faith effort to interpret the statutory authorities that you have granted him and using that effort to stay within them. I think that is the boundary, because making any particular mistake by itself does not warrant the conclusion that he is no longer faithfully executing the laws.

Mr. COBLE. I thank you again for being with us today. Mr. Chairman, I yield back.

Mr. GOODLATTE. The Chair thanks the gentleman, and recognizes the gentlewoman from California, Ms. Lofgren, for 5 minutes.

Ms. LOFGREN. Thank you, Mr. Chairman. Before asking my questions, I would ask unanimous consent to place in the record a statement from the American Immigration Lawyers Association and a statement from the National Immigration Forum.

Mr. GOODLATTE. Without objection, they will be a part of the record.

[The information referred to follows:]

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Statement of the American Immigration Lawyers Association

Submitted to the Committee on the Judiciary of the U.S. House of Representatives Hearing on "Enforcing the President's Constitutional Duty to Faithfully Execute the Laws"

February 26, 2014

The American Immigration Lawyers Association (AILA) submits this statement to the Committee on the Judiciary. AILA is the national association of immigration lawyers established to promote justice and advocate for fair and reasonable immigration law and policy. AILA has over 13,000 attorney and law professor members.

This hearing examines the president's duty to execute the law. With respect to immigration law, AILA's assessment is that President Obama as well as his predecessor, President Bush, have gone beyond faithfully enforcing immigration law to dramatically increasing it over the past decade. The rapid expansion of immigration enforcement has not necessarily resulted in more effective enforcement, but has resulted in a decline in the accountability and consistency of enforcement practices. Of great concern to AILA is that, in the rush to expedite the deportations of large numbers of people from the country, the Department of Homeland Security has compromised fundamental constitutional values such as due process that are the core of America's identity. Reforms should be implemented to bring these enforcement practices back on track.

In the 2013 fiscal year, overall immigration enforcement continued at unprecedented levels:

- By early 2014, DHS will have removed 2 million people during the course of the Obama administration, at a time when net migration to the U.S. is at or near zero and border crossings are at a 40-year low.
- Removals are happening quickly often at the expense of due process. DHS increasingly relies on summary procedures that allow enforcement agents to bypass immigration courts. The two most common summary procedures, "expedited removal" and "reinstatement of removal," tripled in fiscal year 2012, rising to 312,700 and constituting 75% of all DHS removals that year.
- Federal criminal prosecutions of immigration-related offenses are at the highest point in history—up 468 percent from FY2003.
- Immigration detention rates continue to rise and now total about 430,000 individuals each year, at a cost of $2 billion annually to American taxpayers.

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Prosecutorial Discretion

Critics have argued that DHS has used its current prosecutorial discretion policy to circumvent the law and decrease enforcement of immigration law. The authority of all law enforcement agencies to exercise discretion, however, is well-accepted in both the civil and the criminal arena. For decades legacy Immigration and Naturalization Service (INS) and DHS, under both Republican and Democratic administrations, have issued policies on and required the use of prosecutorial discretion. Prosecutorial discretion is such an important principle that, in 1999, twenty-eight Republican and Democratic members of Congress wrote to the Attorney General emphasizing the importance of prosecutorial discretion in the immigration field. The appropriate exercise of discretion leads to better targeting and smarter enforcement.

While prosecutorial discretion is a fully appropriate framework for immigration enforcement, implementation of the policy has been inconsistent. Customs and Border Protection (CBP), which engages in substantial removal activities, has never published a prosecutorial discretion policy. With respect to Immigration and Customs Enforcement (ICE), a recent review showed that only about 7 percent of all cases were designated for prosecutorial discretion—which is a lower rate than many statutory forms of relief that an immigration judge would grant after a full hearing. Some ICE field offices resist considering discretion at all. As a consequence, ICE continues to remove hundreds of thousands of people who have family in the U.S., contribute to our communities, have lived in the U.S. for years, and would qualify for legal status under reform legislation currently pending in Congress.

Rapid Expansion of Enforcement Has Come at the Price of Due Process

The steady increase in DHS's immigration enforcement practices has undermined basic due process and the protection of civil rights. DHS relies on summary removal procedures that bypass immigration courts and offer extremely limited judicial review.

DHS continues to hold many noncitizens, including lawful permanent residents and asylum seekers, in detention without ever providing a custody determination hearing before a judge—a fundamental deprivation of due process. Each day, thousands of noncitizens are held in DHS detention who pose no flight risk or threat to public safety and therefore should not have been detained in the first place, including asylum seekers and other vulnerable persons. Poor conditions in detention are still a problem, and every year people awaiting their court hearings die in immigration detention facilities, including one death reported on February 22 in a Houston facility. ICE has underutilized much less costly and extremely effective alternatives to detention, such as release on recognizance, bond, electronic GPS technologies, and other monitoring and

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supervision methods. These alternatives are standard practice in criminal justice systems across the country. Compared to billions spent annually on detention, alternatives represent a smarter, less costly, and more humane way to ensure compliance with immigration laws.

DHS has also entangled local criminal processes and federal immigration enforcement in constitutionally suspect ways. For example, the number of civil immigration detainers issued by ICE increased dramatically, from just 15,000 in FY2007 to over 250,000 in FY2012. These detainers request that police detain individuals for possible immigration violations without a warrant or probable cause, without a hearing, often without notice, and often for a prolonged period of time.

CBP itself has grown so rapidly in recent years that concerns arise as to their adequate training, oversight, and accountability. Since 2006, Congress has funded a near-doubling of Border Patrol agents, from 12,185 to a peak of 21,444 in 2011. But accompanying this ramp-up are well-documented reports of rights violations and abusive practices, most notably the many examples of improper use of force, including lethal force by Border Patrol. Several cases of lethal force were in response to rock throwing. Last week, another individual was shot by a Border Patrol after hitting the agent with a rock. The agent sustained minor injuries. The protection and safety of law enforcement officers is paramount, but not at the cost of overlooking excessive and improper use of force. Abusive CBP detention practices—including keeping facilities at dangerously cold temperatures, verbal and physical intimidation, and lack of basic health and hygiene provisions—are routinely reported by men, women, and children held at ports of entry or in Border Patrol detention facilities. Widespread reports of racially motivated arrests, coercive interrogation tactics, and denial of the right to counsel, and misinformation or coercive tactics by CBP officers and agents leading to individuals signing voluntary departure forms – resulting in deportation of many who may have had an avenue for relief – are also of concern. These problems, which undermine the rights of both citizens and noncitizens, are made worse by the lack of any uniform or effective complaint mechanism to address misconduct by CBP officers.

Finally, in carrying out the controversial "expedited removal" procedure, Border Patrol agents often fail to ask whether an individual has a fear of returning to his or her home country before ordering them removed, and even deny individuals who do express such a fear the ability to start the asylum application process.

Biometric Entry/Exit Has Not Been Feasible

There have been concerns that the Administration has failed to implement a nationwide biometric exit system. For more than a decade, Congress has required the executive branch to the

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implement the nationwide use of a biometric entry-exit data tracking system operational at land, air, and sea ports of entry. While the entry portion has been implemented, the exit process has not been implemented due primarily to high cost and operational and infrastructure hurdles. A biometric exist system has been piloted several times, but each pilot has encountered problems with the availability of technologies, the cost and feasibility of expanded infrastructure, and the potential negative impact to business and travel. In 2013, in testimony before Congress, DHS reiterated its commitment to moving to a biometric air exit system. In the meantime, DHS has worked to develop an advanced biographic exit system in the ports that serve as a functional yet cost-effective solution.

Border Region Enforcement Showing Rapid Growth

CBP enforcement authority and activities have expanded and swept deeper into the interior of the country. In 2004, DHS extended CBP's authority to use the summary deportation practice of expedited removal to encompass individuals found without documents (or with false documents) within 100 miles of any international border. That broad authority covers the whole of the state of Florida and large swaths of the rest of the country. After this policy change in 2004, the number of expedited removals dramatically increased, nearly doubling from even the highest levels seen during the previous George W. Bush administration, to a record 163,000 in FY2012. Moreover, ICE has defined "border" removals very broadly, to include individuals who were not encountered at the border at all but were apprehended after residing in the U.S. for quite a while. For example, ICE has defined "border removals" in some places to include illegal entrants apprehended at any time within 3 years of entry – a very long time. Thus, the distinction that critics have drawn between "interior" immigration enforcement (by ICE) and "border" enforcement (by CBP) is much less meaningful than it appears at first blush. Consequently, ICE's FY 2013 data does not permit any straightforward separation of interior and border removal activities. The reality is that immigration enforcement continues at aggressive levels.

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Statement for the Record

House Judiciary Committee

"Enforcing the President's Constitutional Duty to Faithfully Execute the Laws"

February 26, 2014

The National Immigration Forum works to uphold America's tradition as a nation of immigrants. The Forum advocates for the value of immigrants and immigration to the nation, building support for public policies that reunite families, recognize the importance of immigration to our economy and our communities, protect refugees, encourage newcomers to become new Americans and promote equal protection under the law.

Introduction

The National Immigration Forum looks forward to a spirited and balanced discussion of executive power in this hearing to evaluate the President's duty to faithfully execute the laws of the United States. To the extent members of the Committee may distrust the President or otherwise disagree with various executive actions taken by the Administration, specifically as they relate to immigration, we urge those members not to let this distrust become a barrier against fair consideration of broad immigration reform that includes a path to eventual citizenship.

We believe the current conversation around immigration reform is different. In the past two years, an alliance of conservative faith, law enforcement and business leadership has come together to forge a new consensus on immigrants and America. These relationships formed through outreach in the evangelical community, the development of state compacts, and regional summits across the country.

Due to these relationships the National Immigration Forum launched the Bibles, Badges and Business for Immigration Reform Network (BBB) to achieve the goal of broad immigration reform. Targeting key states through a combination of field events, media coverage and direct advocacy BBB and its partners have had more than 700 meetings with Members of Congress and their staffs and held 303 events in key congressional districts across 40 states in the past year.

As the Committee looks at the President's duty to enforce our nation's laws, it is important to understand how far we have come when it comes to border and interior enforcement and the robust enforcement occurring. Heads of border agencies under both Republican and Democratic Administrations agree that the best way to improve border security is to fix the immigration system by providing legal avenues for workers and families to enter the United States. This will allow law enforcement and border officials to focus on protecting our communities by apprehending criminals and tracking terrorist threats rather than expending excessive resources on economic migrants. However, as with any program, there is room for improvement.

The Forum has written extensively on the need for smart enforcement at our nation's borders and the interior of the country, including the following recent Forum's papers: "What Does Smart and Effective Enforcement Look Like?", "The 'Border Bubble': A Look at Spending On U.S. Borders", "The Math of Immigration Detention" and "Cut Here: Reduce Wasteful Spending on Immigration Enforcement." This Committee can take immediate steps in this area by examining ways to update our legal immigration system and implement workable solutions.

Enforcement Priorities

Over the past few years, Immigration and Customs Enforcement (ICE) has rapidly stepped up interior enforcement, increasing the number of people it detains and deports. One symptom of our broken immigration system is the exorbitant spending on detaining hundreds of thousands of immigrants annually. Simply by limiting physical detention only to those immigrants whose release would pose a danger to the community, Congress can save billions in tax dollars, while avoiding inflicting a costly and severe punishment on a population that poses little danger to the general public. Instead, the government should move away from the current overreliance on detention, employing less expensive alternative methods of monitoring the majority of immigrants in detention. Such an approach is more humane, more cost-effective.

In 2011, ICE began prioritizing enforcement against repeat immigration violators and those with criminal records, rather than targeting its limited resources on immigrants with no criminal records, who pose no danger to the community. ICE's use of discretion has been limited, however, and some undocumented individuals who pose no risk are still being detained and deported. Smart, targeted application of discretion focusing on repeat and criminal violators is an opportunity to focus on the true threats. Yet, more

can be done to target enforcement in a smart way that saves money and increases public safety.

In June 2012 the President took an additional step forward in prioritization of immigration enforcement by announcing Deferred Action for Childhood Arrivals (DACA). DACA allows individuals who came to the United States before the age of 15 and are younger than 31 to apply for deferred action which allows them to remain in the country and work legally. It does not allow individuals to obtain a green card or citizenship and is valid in renewable two year intervals. This program was an exercise of the President's authority to deprioritize those young individuals who were brought to the United States as children and pose no threat to society.

Despite a more focused approach by DHS to immigration enforcement, the White House continues to request billions of dollars for ICE to detain immigrants posing no threat. For fiscal year 2014 (beginning October 1, 2013), DHS and the White House requested $1.84 billion for DHS Custody Operations. This funding level would amount to over $5 million per day spent on immigration detention.

Over the past five years this administration has deported nearly 2 million people (368,000 last year), approximately as many as the previous administration deported in eight years. In fiscal year 2012 (the most recent year on record), ICE also set a record detaining 478,000 people while maintaining the congressionally mandated 34,000 detention beds.

Enforcement Today

In addition, an incredible amount of progress has been made in improving enforcement at the border in recent years. Data shows that our border today is more secure than it has ever been. Millions of dollars have been spent in the last decade to improve enforcement and border security; all indications are that this investment has paid dividends. Moving forward, this Committee should work with DHS to develop useful and achievable metrics and benchmarks.

Currently, the entire Southwest border is either "controlled," "managed," or "monitored" to some degree. A record 21,370 Border Patrol agents continue to be stationed at the border, a number that does not include the thousands of agents from other federal agencies, including the Drug Enforcement Agency (DEA), the Bureau of Alcohol,

Tobacco, Firearms and Explosives (ATF), Federal Bureau of Investigations (FBI), and other agencies, supplemented by National Guard troops.

As of February 2012, 651 miles of border fencing have been built out of the 652 miles that the Border Patrol feels is operationally necessary. The fence now covers almost the entire length of the border from California to Texas. There is double fencing in many areas. U.S. Customs and Border Protection (CBP) rely heavily on technology in order to secure the United States' borders and ports of entry.

CBP now has more than 250 Remote Video Surveillance Systems with day and night cameras deployed on the Southwest Border. In addition, the agency relies on 39 Mobile Surveillance Systems, which are truck-mounted infrared cameras and radar. CBP has also sent Mobile Surveillance Systems, Remote Video Surveillance Systems, thermal imaging systems, radiation portal monitors, and license plate readers to the Southwest Border. CBP also currently operates three Predator B unmanned aerial drones from an Arizona base and two more from a Texas base, providing surveillance coverage of the Southwest border across Arizona, New Mexico, and Texas.

Prior to August 2006, many persons who were apprehended at the border were released pending their immigration hearing. That practice ended in August 2006, and now nearly all persons crossing the border illegally are detained or immediately removed. ICE is now funded to hold 34,000 individuals in detention at any given time. Over the course of the government's fiscal year 2012, ICE reported that it detained more than 477,000 individuals, an all-time high, and 166,000 more than the 311,000 individuals who were detained in 2007. For fiscal year 2013, ICE reported that it had removed nearly 368,000 persons, bring the Obama Administration's total to over 1.9 million individuals deported in five years, nearly the same as President George W Bush deported in eight years. To read more on how the 2007 enforcement benchmarks have been met, please read the Forum's paper "Immigration Enforcement Today: 2007 Reform Goals Largely Accomplished."

Conclusion

As evidenced by the record number of removals, as well as the progress made on border enforcement referenced above, the current administration is making immigration enforcement a priority and exceeding the level of enforcement carried out by previous administrations. However, future advancements in immigration enforcement will depend on broader reforms to our broken immigration laws. The system must change so

that enforcement resources can target real threats. The American people want – and deserve – better immigration policy. Dozens of national polls over the last year show overwhelming support for solutions that include, in addition to smart enforcement, functioning legal channels for future immigrant workers and families. The polls also show broad support for tough but fair rules allowing undocumented immigrants to remain in the U.S. to live and work and – provided they get right with the law – eventually have an opportunity to apply for earned U.S. citizenship. We cannot simply spend or enforce our way to a solution on illegal immigration. Border security, while important, is only part of the picture. Immigration reforms that promote legal immigration and smartly enforce immigration laws can improve the security at the border, drying up the customers for criminal enterprises that prey on migrants, and allowing our border agencies to focus on more dangerous threats — terrorists, and those trafficking in drugs, weapons and counterfeit currency, as well as human traffickers.

Our immigration problem is a national problem deserving of a national, comprehensive solution. The Forum looks forward to continuing this positive discussion on how best to move forward with passing and enacting broad immigration reform into law. The time is now for immigration reform.

Ms. LOFGREN. Now, I recognize the Chairman's discretion to allow Members who testify not to answer questions, and so I did not raise an issue on that. But I also do not want people to feel that I am taking an unfair opportunity to point out that our colleague, Congresswoman Black, was the one—I have just got to say this because it is very easy for us in Congress to attack career civil servants. They are not able to defend themselves. And I think sometimes it is important that other Members of Congress provide their defense.

She talked about a lawyer who works for ICE, Mr. Andrew Lorezen-Strait, who is a career civil servant. He has been a lawyer in the agency since long before President Obama was elected. He was appointed to serve as the liaison for immigration detention policies with interested parties, community groups, associations of lawyers, and bar associations. This is not very different than, you know, what local police agencies do where you have somebody who can interface with community who are interested in policies. To call him an illegal alien lobbyist, I think, is quite a slur and very unfair.

And Congresswoman Black, of course, as all of us do, has the opportunity to provide legislation. She did. She is a relatively new Member and apparently did not know that if you just prohibit funding for a title, it complies with the law to eliminate funding for that title, but essentially to maintain functions. So I guess she is doing a re-do, but I think to blame the agency for inept drafting is really, again, rather unfair to the agency and also to the career individuals. And I just felt it was important for some of us at least—I mean, ICE is not my favorite agency, but fair is fair.

I wanted to talk, if I could, a little bit, Mr. Schroeder, about the take care clause as it relates to immigration. You know, I went over and listened to the arguments during the *Arizona v. United States* case, and it was a fascinating hearing before the Supreme Court. But in the decision itself, this is what they said, "A principal feature of the removal system is the broad discretion exercised by immigration officials who, as an initial matter, must decide whether it makes sense to pursue removal at all." That is what the Court said about what the executive's authority is today and always has been. Deferred action has been part of immigration law for decades. This is nothing new.

And so, I guess the question for me is, if there is agreement that the Department has to make some decisions in terms of resources on what to do, given that the Supreme Court has said there is broad discretion to make decisions about what priority to make. Do you think somehow it is a violation if there is order put into those decisions by the heads of the agency for policy, or does this have to be left to officers without any kind of guidance to make that decision on their own?

Mr. SCHROEDER. Not at all, Congresswoman, and I thank you for the question. As a matter of fact, if you think about it, if one of the rationales for granting deferred action are the equitable considerations that relate to the circumstances of the people affected by that decision, one of the things that is most inequitable to those people is the uncertainty of their situation, not knowing whether

somebody is going to come and take an action against them, being completely at sea as to what their status is.

Now, that is the normal situation, but if you were going to take deferred action on the basis of a consideration of the equities of childhood arrivals, one of the things you would want to do is put their mind at ease. It would be part of the equity of the situation to do that.

Ms. LOFGREN. Can I ask one further question because it is something, you know, I have often thought about. If you have this discretion, and you do according to the Court, is there not an equal protection issue here where if you have an officer in, you know, one part of the country saying we are going to exercise discretion for childhood arrivals, but an office in another part of the country saying we are not? Does that not call out for a policy decision on the part of the agency itself on what to do? Is there not an equal protection motivation there?

Mr. SCHROEDER. One of the most fundamental principles of our jurisprudence equitable application of the law is that like cases be treated alike. And if you think the dominant explanation of your treatment of a group of people is shared by all of them, then you need to treat everybody alike. And a case-by-case approach to the problem, in fact, will not lead to that.

Ms. LOFGREN. I see my time is up, Mr. Chairman. I yield back.

Mr. GOODLATTE. The Chair recognizes the gentleman from Texas, Mr. Smith, for 5 minutes.

Mr. SMITH OF TEXAS. Thank you, Mr. Chairman. Rather than ask questions, I have a brief statement to make, after which I yield you the balance of my time.

"Mr. Chairman, the Obama Administration has ignored laws, failed to enforce laws, undermined laws, and changed laws by executive orders and administrative actions. These include laws covering healthcare, immigration, marriage, drugs, and welfare requirements. Other presidents have issued more executive orders, but no president has issued so many broad and expansive executive orders that stretch the Constitution to its breaking point.

As for not enforcing laws, in 2011, the President instructed the Attorney General not to defend the Defense of Marriage Act in court. This Monday, the Attorney General declared that State attorneys general are not obligated to defend laws they believe are discriminatory. At other times, the President has decided not enforce immigration laws as they applied to entire categories of individuals. And the President has decreed a dozen changes to the Affordable Care Act, known as Obamacare. But neither the President nor the Attorney General have the constitutional right to make or change laws themselves. That is what happens in a dictatorship or a totalitarian government.

The President and the Attorney General do have a constitutional obligation to enforce existing laws. If they think a law is unconstitutional, they should wait for the courts to rule, but their opinion is no substitute for due process and judicial review. It is their job to enforce existing laws, whether they personally like them or not.

Ours is a Nation of laws, not a Nation of random enforcement. To put personal preferences above democratically-approved laws reeks of arrogance and conceit, especially when citizens could be

penalized or jailed for not following those same laws. Officials violate the Constitution they have sworn to uphold if they ignore laws or counsel others to do so.

Mr. Chairman, all true reform starts with the voice of the people. If American voters rise up and speak loudly enough, they will be heard in the corridors of the White House and in the halls of Congress."

Thank you, Mr. Chairman, and I will yield back.

Mr. GOODLATTE. I thank the gentleman for yielding to me. And, Ms. Foley, in following up on the discussion that the gentlewoman from California just had with Mr. Schroeder, the argument is made that deferred action on a whole category of people, somewhere between half a million and a million people, is acceptable. Now, the principle on which that is founded is prosecutorial discretion.

Has prosecutorial discretion such elasticity that an entire category of people could be recipients of deferred action simply based upon their being in the category when the Congress has on the books for many, many years laws signed into law by presidents of the United States, made it illegal for those people to be present in the United States? Are we not talking about here the exception swallowing the rule when you essentially carve out the vast majority of people in the category to have deferred action?

Ms. FOLEY. Yes. I mean, this is sort of a dangerous and scary moment. That is not discretion. I mean, that is raw, lawmaking power is what that sounds like to me. Think about what discretion is. Discretion inherently by the executive is a case-by-case decision, just like a, you know, U.S. attorney makes discretions as to whom to prosecute first.

And I believe Mr. Schroeder a second ago mentioned equity. We are trying to do equity here. Equity itself is inherently individualized. When courts exercise equity powers, the whole point of equity is to do an individualized case-by-case assessment as to what is right. That is not what President Obama is doing. He is not doing case-by-case assessment. He is doing entire categories with a giant magisterial brush. He is wiping out an entire category of people to whom the law applies. In my book, that cannot possibly be characterized as prosecutorial discretion.

Mr. GOODLATTE. And there is a great debate going on here in the Congress right now about what the appropriate action is to be taken with regard to children brought here illegally by their parents. Is not the whole point of that if the Congress does not act and the President is impatient with that, does he somehow have the power to reinterpret the law and stretch the meaning of deferred proceeding to say, well, I am going to effectively create a new law by allowing 500,000 to a million people to remain here in a deferred action legal status that the law was never intended to provide for?

Ms. FOLEY. Well, let us hope not, right? And I am sure if you ask the American people they would say that is not their understanding of what the President is supposed to do when he is charged under Article 2 with the faithful execution of law.

And as Professor Turley pointed out a second ago, when the President does something like that where he proposes a legislative reform to a law to Congress and Congress discusses and debates

it extensively and rejects his proposal, and then he turns around and through, again, executive order as his own unilateral act decides to simply implement those reform proposals by himself without congressional authorization, that is the worst possible fact pattern. I cannot imagine that a court looking at that fact pattern would say, oh, that is just prosecutorial discretion.

Mr. GOODLATTE. I thank the gentleman for yielding, and his time has expired. The gentlewoman from Texas, Ms. Jackson Lee, is recognized for 5 minutes.

Ms. JACKSON LEE. Let me thank the witnesses who have taken their time to be here this morning. There is no doubt that each of you, scholars that you are, believe in your position and certainly are students of the Constitution. And I respect and appreciate that.

I want to recount a comment made by some former senators who were at a program yesterday morning. And one said that she has no doubt that all Members who come here come here with a belief and an opportunity—excuse me—come here with a belief and an opportunity to do what is right. And I want to place that on the record. However I may disagree with Members' approach, whether it be House or Senate, I cannot doubt their integrity and their belief.

On the other hand, listening to the leader of this House, after making a commitment to comprehensive immigration reform, and we all were inspired by the collaborative nature of that discussion representing his conference, came back 5 days later and indicated that he could not go forward because of the lack of trust in the President of the United States.

Now, I did not approve and felt there was a constitutional question on the Iraq War, and certainly as we proceeded and went beyond our seeming authorization, maybe the Afghan War. But I wanted to recollect as to whether or not during that timeframe we spent time introducing legislation that I hold in my hand. So let me quickly read one paragraph: "Whereas, because of President Obama's continuing failure to faithfully execute the laws, his Administration's actions cannot be addressed by the enactment of new laws because Congress cannot assume that the President will execute the new laws any more faithfully than the laws he already ignored, leaving Congress with no legislative remedy to prevent the establishment of what is, in effect, an imperial presidency." If that is not over the top in a legislative document with no basis in form whatsoever.

So I disagree with Professor Foley because in actuality, deferred adjudication, Mr. Schroeder, if you would, does give discretion. What it does is it puts in place a procedure for the dreamers to have a process of application. And the authorities, meaning the Administration, the executive branch, then makes an assessment of whether you are eligible. There is discretion. There is a framework. There is equal protection of the law. It is not a vast wave, a tsunami.

And I am going to be posing a question, because I took down the words of Professor Foley that indicted dangerous and raw. Maybe Ukraine, maybe places that we have confronted in South Sudan or Sudan. But to suggest that we have a chief executive officer that is dangerous and raw, if I am correctly saying it.

So let me just pose this question to you. First of all, why are Republicans so insistent on deporting dreamers, so much so that they would distort the executive position the President and what ICE is doing faithfully, and, I believe, appropriately? And then why would legislation be introduced after a Member has indicated that a particular member of the public service is an illegal alien lobbyist, and finds no insult to that? I respect all of you here, and I respect my colleagues. But I raise a question of frivolity, legislative milk toast.

Mr. Schroeder, would you comment on this question of raw and abuse of power, and as well the question of equal protection, and whether or not this is a broad sweep that should be subjected to a question of whether the President can be trusted, and whether or not, as I put in the record very quickly these numbers that I had on a sheet of paper. And I am going to let you start, Mr. Schroeder. Go right ahead until I find them, and I will just shout out in a moment. Thank you.

Mr. SCHROEDER. Thank you, Congresswoman. Well, two basic points. One is I think trying to incorporate or encompass all the actions that have been discussed over the months in this general conversation about whether the President is discharging his duty or not ignores the fundamental point. You have to make individualized decisions that hold up the President's action against existing statutory authority and discretionary function, and decide on a case-by-case basis whether or not the action is over the line or not. I believe that most of these actions are legally defensible as matters of the exercise of that discretion, but that is the analysis you have to go through.

Let me just clarify the relationship of the immigration decision and the President's authorities with respect to the Congress' failure to pass the Dream Act, because a lot has been made of that. The Congress also did not pass the Anti-Dream Act. The Congress did not act in this area, so that left in place existing immigration laws. If the President's legal authority after you debated and did not pass the Dream Act justifies the deferred action that was taken, it is only because it would have justified it if he taken it a year before, because he has never claimed anything more than to act on the basis of existing discretionary authorities in the immigration laws.

Ms. JACKSON LEE. But is it raw? Is it power that is raw and dangerous?

Mr. SCHROEDER. No, ma'am.

Ms. JACKSON LEE. Is it, in essence, a violation of the equal protection law or anything other than other presidents have done to clarify policy?

Mr. GOODLATTE. Regular order.

Mr. SCHROEDER. Absolutely not.

Ms. JACKSON LEE. Mr. Chairman, let me ask unanimous consent to introduce into the record very quickly as it relates to executive orders, President Clinton introduced 364, President Bush introduced 291, and President Obama 168 as of January 20, 2014. And I think that clarifies the record.

Mr. GOODLATTE. If that is a document, without objection, it will be made a part of the record.

[The information referred to follows:]

Executive Orders

The American Presidency Project

John Woolley and Gerhard Peters

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Executive Orders: *Washington - Obama*

President	Term	Total Orders[1]	EO Number Range
George Washington	**Total**	**8**	*unnumbered*
John Adams	**Total**	**1**	*unnumbered*
Thomas Jefferson	**Total**	**4**	*unnumbered*
James Madison	**Total**	**1**	*unnumbered*
James Monroe	**Total**	**1**	*unnumbered*
John Quincy Adams	**Total**	**3**	*unnumbered*
Andrew Jackson	**Total**	**12**	*unnumbered*
Martin van Buren	**Total**	**10**	*unnumbered*
William Henry Harrison	**Total**	**0**	*unnumbered*
John Tyler	**Total**	**17**	*unnumbered*
James K. Polk	**Total**	**18**	*unnumbered*
Zachary Taylor	**Total**	**5**	*unnumbered*
Millard Fillmore	**Total**	**12**	*unnumbered*
Franklin Pierce	**Total**	**35**	*unnumbered*
James Buchanan	**Total**	**16**	*unnumbered*
Abraham Lincoln	**Total**	**48**	*unnumbered*
Andrew Johnson	**Total**	**79**	*unnumbered*
Ulysses S. Grant	**Total**	**217**	*unnumbered*
Rutherford B. Hayes	**Total**	**92**	*unnumbered*
James Garfield	**Total**	**6**	*unnumbered*
Chester Arthur	**Total**	**96**	*unnumbered*
Grover Cleveland - I	**Total**	**113**	*unnumbered*
Benjamin Harrison	**Total**	**143**	*unnumbered*
Grover Cleveland - II	**Total**	**140**	*unnumbered*
William McKinley	**Total**	**185**	*unnumbered*
Theodore Roosevelt	**Total**	**1,081**	
William Howard Taft	**Total**	**724**	
Woodrow Wilson	**Total**	**1,803**	
Warren G. Harding	**Total**	**522**	
Calvin Coolidge	**Total**	**1,203**	
Herbert Hoover	**Total**	**968**	**5075 - 6070**
Franklin D. Roosevelt	**Total**	**3,522**	**6071 - 9537**
Harry S. Truman	**Total**	**907**	**9538 - 10431**
	I	504	9538 - 10029
	II	403	10030 - 10431
Dwight D. Eisenhower	**Total**	**484**	**10432 - 10913**
	I	266	10432 - 10695-A
	II	218	10696 - 10913
John F. Kennedy	**Total**	**214**	**10914 - 11127**
Lyndon B. Johnson	**Total**	**325**	**11128 - 11451**
Richard Nixon	**Total**	**346**	**11452 - 11797**
	I	247	11452 - 11698
	II	99	11699 - 11797
Gerald R. Ford	**Total**	**169**	**11798 - 11966**
Jimmy Carter	**Total**	**320**	**11967 - 12286**
Ronald Reagan	**Total**	**381**	**12287 - 12667**
	I	213	12287 - 12499
	II	168	12500 - 12667
George Bush	**Total**	**166**	**12668 - 12833**
William J. Clinton	**Total**	**364**	**12834 - 13197**
	I	200	12834 - 13033
	II	164	13034 - 13197
George W. Bush	**Total**	**291**	**13198 - 13488**
	I	173	13198 - 13370
	II	118	13371 - 13488
Barack Obama	**Total**	**168**	**13489 - 13656...**
	I	147	13489 - 13635
	II	21	13636 - 13656...

Last Update: Data Through January 20, 2014. *(through 5 years of the Obama Administration)*

http://www.presidency.ucsb.edu/data/orders.php[2/28/2014 3:23:36 PM]

Executive Orders

Citation: Gerhard Peters. "Executive Orders." The American Presidency Project. Ed. John T. Woolley and Gerhard Peters. Santa Barbara, CA. 1999-2014. Available from the World Wide Web: http://www.presidency.ucsb.edu/data/orders.php.

Notes:
1789 to 1945 (Roosevelt) data includes "numbered" and "unnumbered" executive orders. 1945 (Truman) data includes only numbered executive orders including those with letter designations (ex. Executive Order 9577-A).

Data Sources:
• 1789 - 1945 (Roosevelt) data obtained from Lyn Ragsdale, "Vital Statisitcs on the Presidency: Washington to Clinton," rev. ed. (Washington, D.C.: CQ Press, 1998).
• 1945 (Truman) - present data compiled by Gerhard Peters, The American Presidency Project, from documents contained in the *Federal Register*.

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Mr. GOODLATTE. And the Chair recognizes the gentleman from Alabama, Mr. Bachus.

Ms. JACKSON LEE. I thank the gentleman, and I yield back.

Mr. BACHUS. Thank you. First let me ask you this, just following up on the gentlelady from Texas. It is my understanding that President Bush—George W.—and President Obama have used these executive orders quite frequently. Was that also true of President Clinton? From what she said, he actually issued more. I was thinking he had issued much fewer.

Mr. SCHROEDER. Congressman, I do not have the numbers in hand. This is an authority that presidents have used across Administrations for decades, but I am not familiar with the numbers.

Ms. FOLEY. And, you know, again I have stated publicly and in articles that we need to be clear that quantity has nothing to do with it. Presidents issue executive orders all the time, and you can look them up online. And if you look them up, it is routine things like creating this little group, this little commission to do this, you know, things that have to do with his independent Article 2 authority. So plenty of executive orders are perfectly constitutional, so it is not a numbers game. It is about the quality of what the President is doing. And that is the question: is this President doing things of a qualitatively different nature than his predecessors?

Mr. BACHUS. All right. You are the Democratic witness, Mr. Schroeder. It is pretty true that what Professor Foley is saying. Is it not just the last two presidents that have sort of pretty much by executive order either refused to do what a statute said or not follow that statute?

Mr. SCHROEDER. Well, I agree with the point that Professor Foley made. It is not the numbers, it is the quality. It is a longstanding practice. I think in the current executive order numbering system, we are in the 13,000's. President Eisenhower issued an executive order establishing affirmative action and non-discrimination requirements of Federal contractors in the 1950's. President Kennedy followed that up. So those were already in the 11,000's.

Mr. BACHUS. But in quality, is it getting worse?

Mr. SCHROEDER. Well, there again, I cannot hazard a global assessment. I believe that if we are talking about the last three last presidents, with whom I have had some familiarity, and their executive order practice, I believe that the activity is fairly comparable across all three of those president.

Mr. BACHUS. How about Mr. Turley? Do you agree with that?

Mr. TURLEY. I agree, Congressman, with my colleagues that you cannot look at the raw numbers any more than you can look at raw numbers of bills passed to determine how effective a Congress is. You have to look at what is being done. And I do think that situation has gotten far worse in the last two presidencies. George W. Bush, I thought, was rightfully criticized for his signing statements where he adopted interpretations that seemed to be wholly at odds with what Congress had said.

But this has accelerated under President Obama to a point that I think is alarming, that we can disagree with the policies with regard to the Dream Act. But Members of this body thought that they had a consistent rule. They rejected an Anti-Dream Act because they believed that the law itself should remain the same.

Now, we can agree or disagree with that, but the fact is what the President achieved unilaterally was precisely what he had been refused by Congress. And that has to raise separation issues of great import.

Mr. BACHUS. Professor Schroeder, you have testified on this. You at least, I think, have represented yourself as somewhat of an expert on this. What is the most egregious example, in your mind, of an abuse by the President of an executive order?

Mr. SCHROEDER. I thought that President Bush's decision to authorize the NSA to engage in warrantless wire taps when there was pretty clear law on the books that the only two means that you in Congress had intended wire taps to be utilized was either through the normal criminal process or pursuant to a FISA warrant was a pretty egregious misuse——

Mr. BACHUS. Of course, you know the War Powers Act and national security are sort of carved out. The final question, if Congress were to bring action, how long would it take? I mean, the courts, they are sometimes so slow to respond, it is into the next Administration before you get an answer.

Mr. SCHROEDER. Well, regrettably, Congressman, because I do not have anything against the effort by Congress to enforce what it believes are principles of right law, I think it would not take long because I believe the Court would throw it out quite quickly. I just do not think there is congressional standing in this area to entertain the kind of litigation that is being contemplated.

The President would immediately reply, if he replied on the merits at all, by saying I am within my discretionary statutory authority. Then the court would be faced with answering a garden variety legal question about the application of law to certain facts that is just the kind of thing that it has said that this body, or the other body, or the two of you together does not have standing to litigate.

So I just do not think these lawsuits will bear much fruit, regrettably, from the point of view of enabling you or others who advocate for the legislation to pursue that kind of litigation that Professor Foley advocates. It would take a dramatic change in the existing Supreme Court jurisprudence, which I do not see on the cars.

Mr. BACHUS. Professor?

Ms. FOLEY. It would not take a dramatic departure from existing precedent. Look, the Supreme Court has only decided two legislature standing cases other than *Powell v. McCormack*, which was not an institutional injury suit, it was a personal injury suit, when he was excluded from the chamber.

So we have two cases. We have *Coleman v. Miller*, and we have *Raines v. Byrd*. *Coleman v. Miller*, there was standing for the legislators to bring an institutional injury suit. *Byrd v. Raines*, there was not. The reason is patent because in *Coleman v. Raines*, what you had was a group of Kansas State legislators. In fact, you had 21 out of 40, a majority, of Kansas State legislators basically saying that the lieutenant government acted unconstitutionally when he broke a tie regarding that State's ratification of a child labor amendment.

The Supreme Court said under those circumstances we are convinced that both the institution, i.e., the Kansas Senate, has alleged an injury, an institutional injury, of sufficient magnitude that

it satisfies the injury requirements of standing. And second, we actually believe that this group of legislators is appropriately authorized. It does represent the institution as an institution because it is a majority of them.

Now, compare and contrast that to what was going on in *Raines*. In *Raines* you had a group of six congressmen and senators who were challenging the constitutionality of the Line Item Veto Act. Basically you can see just by the way I have set up the fact pattern that this is a disgruntled group, a small group, of disgruntled legislators who believed that the law that their own colleagues just passed should not have been passed and was unconstitutional. There is no way the Supreme Court is going to uphold standing under those facts.

If you follow the four-part test that I have laid out, you have a very good shot at standing.

Mr. BACHUS. All right, thank you.

Mr. GOODLATTE. The time of the gentleman has expired. The Chair recognizes the gentleman from Illinois, Mr. Gutierrez, for 5 minutes.

Mr. GUTIERREZ. Yes, thank you, Mr. Chairman, and welcome to all of you for testifying here. Unfortunately, everything you said will never translate into any legislative action as none of the people that spoke before you or any of the things that you said. This is political theater. That is why we are here. We are not here to really hear about your interpretations of the Constitution, as wise and as well founded as they are. Let us skip over the obvious. The obvious is we had some principles on immigration reform. We do not want to deal with them, so why do we not blame the President? So what we have here is another do-nothing hearing in a do-nothing Congress which will arrive at do-nothing legislation.

Mr. ISSA [presiding]. Would the gentleman yield?

Mr. GUTIERREZ. No, I have 5 minutes, and I know how serious you are about limiting people to their 5 minutes.

Mr. ISSA. I was going to be kind.

Mr. GUTIERREZ. Okay, then fine. [Laughter.]

Mr. ISSA. I, for one, would like to testify that I am interested in a lot of other executive orders. I thank the gentleman.

Mr. GUTIERREZ. Thank you. I hope I will get the extra 15 seconds back at the end. [Laughter.]

And so, the gentleman says that that is what he has raised already. But, you know, Ms. Foley talked a lot about the Dream kids, and most of the conversation here has been about immigration. Let us not kid ourselves, right? And Obamacare, which they do not like obviously to begin with, so I am not sure why they are so angry about his delaying the implementation of a law they all voted against and detest. But here is another thing. They have a very clear policy on immigration, and they brought forward some principles.

So why are we here? We are here because it is really a do-nothing Congress. And here is what they say to the President. They say, you know, the leaders of the do-nothing Congress, you know, they are really going to come after you, Mr. President, if you do something about immigration, if you dare be a do-something President because we want a do-nothing President to go along with the

do-nothing Congress, because that is what they said to us. They said, well, we have some principles, and they articulated those principles, and they brought those principles forward.

And you know what they did? They elevated the debate. What happened as a result of that? I am going to tell you what happened as a result of that. I, the President, Nancy Pelosi, and everybody on this side of the aisle said, great, let us have that conversation and let us have that dialogue so we do not have a do-nothing Congress.

Instead they want to talk about the dreamers, half a million young kids, right? Well, let me just tell you, Ms. Foley, you are wrong. There is prosecutorial discretion. Every last one of them has to pay nearly $500 in a petition before the government to get prosecutorial discretion. And while hundreds of thousands of them have received it, thousands upon thousands of them have been denied. It is on a case-by-case basis that it is done, just as it should be. It is not as though somebody waved the wand and said everybody who arrived here before they were 16. That is wrong.

And let me just say something else. It is not that the Congress did not necessarily say let us not hurt the Dream kids. No, they affirmatively said in the House of Representatives that they should have a pathway to legalization, and they should have a pathway. That law was passed in the House of Representatives. And 55 senators said that the same thing should happen in the Senate.

So let us make it clear, except, of course, they brought something up, cloture. I think that is in the Constitution. Yes, Thomas Jefferson, and George Washington, and Madison, they all brought up the rule of cloture. That is the way they stopped it in the Senate otherwise.

And the thing is I do not know why they are complaining so much. While their principles were very good and very welcoming, and I was very happy to see them, do you know what they said about the Dreamers? They should get legal permanent residence. Do you know what that means? A green card. No fines. I read their principles very clearly, and they should have an immediate pathway to citizenship. So why are we not celebrating what the President did in that case?

And then said they said the Hastert rule, the Hastert rule, the Hastert rule. Really? The Hastert Rule never really existed. Who says that? Dennis Hastert, the former Speaker of the House. That is what he says about the Hastert Rule. And moreover, the former Speaker of the House—I know we can be silly about this and laugh about this and make everything a joke, but it really is not because since you proposed those principles, this do-nothing President who does not enforce the law has deported 29,000 people. He detains more people than any President, over 400,000 a year.

So let us not kid ourselves. There are hundreds of thousands, millions of American citizen children who every day are in fear of losing their mom and their dad. This is not a laughing matter where we can simply just laugh about it. There are Americans, American citizens, yes, born here in this very country. And I think we should take that seriously. But this meeting is not about that. It is about attributing some fault to the President of the United States.

You know, I can show you time and time again prosecutorial discretion. This is a letter, November 8, 1999, signed by Henry Hyde and Lamar Smith, along with dozens of other Republicans Members saying to then President Clinton, you are not using prosecutorial discretion, on what, on immigration. I would like to introduce it for the record, please, because I think that that is very, very important.

Mr. ISSA. Without objection, it will be placed in the record.

[The information referred to follows:]

Appendix I

Congress of the United States
Washington, DC 20515

Embargoed for release Monday
November 8, 1999

Contact: Allen Kay
Rep. Lamar Smith
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November 4, 1999

The Honorable Janet Reno
Attorney General
Department of Justice
10th St. & Constitution Ave. NW
Washington, DC 20530

The Honorable Doris M. Meissner
Commissioner
Immigration and Naturalization Service
425 Eye Street, NW
Washington, DC 20536

Re: Guidelines for Use of Prosecutorial Discretion in Removal Proceedings

Dear Attorney General Reno and Commissioner Meissner:

Congress and the Administration have devoted substantial attention and resources to the difficult yet essential task of removing criminal aliens from the United States. Legislative reforms enacted in 1996, accompanied by increased funding, enabled the Immigration and Naturalization Service to remove increasing numbers of criminal aliens, greatly benefiting public safety in the United States.

However, cases of apparent extreme hardship have caused concern. Some cases may involve removal proceedings against legal permanent residents who came to the United States when they were very young, and many years ago committed a single crime at the lower end of the "aggravated felony" spectrum, but have been law-abiding ever since, obtained and held jobs and remained self-sufficient, and started families in the United States. Although they did not become United States citizens, immediate family members are citizens.

There has been widespread agreement that some deportations were unfair and resulted in unjustifiable hardship. If the facts substantiate the presentations that have been made to us, we must ask why the INS pursued removal in such cases when so many other more serious cases existed.

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Appendix I, continued

Attorney General Reno and Commissioner Meissner
November 4, 1999
Page 2

We write to you because many people believe that you have the discretion to alleviate some of the hardships, and we wish to solicit your views as to why you have been unwilling to exercise such authority in some of the cases that have occurred. In addition, we ask whether your view is that the 1996 amendments somehow eliminated that discretion. The principle of prosecutorial discretion is well established. Indeed, INS General and Regional Counsel have taken the position, apparently well-grounded in case law, that INS has prosecutorial discretion in the initiation or termination of removal proceedings (see attached memorandum). Furthermore, a number of press reports indicate that the INS has already employed this discretion in some cases.

True hardship cases call for the exercise of such discretion, and over the past year many Members of Congress have urged the INS to develop guidelines for the use of its prosecutorial discretion. Optimally, removal proceedings should be initiated or terminated only upon specific instructions from authorized INS officials, issued in accordance with agency guidelines. However, the INS apparently has not yet promulgated such guidelines.

The undersigned Members of Congress believe that just as the Justice Department's United States Attorneys rely on detailed guidelines governing the exercise of their prosecutorial discretion, INS District Directors also require written guidelines, both to legitimate in their eyes the exercise of discretion and to ensure that their decisions to initiate or terminate removal proceedings are not made in an inconsistent manner. We look forward to working with you to resolve this matter and hope that you will develop and implement guidelines for INS prosecutorial discretion in an expeditious and fair manner.

Sincerely,

Rep. Henry J. Hyde

Rep. Barney Frank

Rep. Lamar Smith

Rep. Sheila Jackson Lee

Rep. Bill McCollum

Rep. Martin Frost

Rep. Bill Barrett

Rep. Howard L. Berman

Appendix I, continued

Rep. Brian P. Bilbray

Rep. Corrine Brown

Rep. Charles T. Canady

Rep. Barbara Cubin

Rep. Nathan Deal

Rep. Lincoln Díaz-Balart

Rep. David Dreier

Rep. Bob Filner

Rep. Eddie Bernice Johnson

Rep. Sam Johnson

Rep. Patrick J. Kennedy

Rep. Matthew G. Martinez

Rep. James P. McGovern

Rep. Martin T. Meehan

Rep. F. James Sensenbrenner, Jr.

Rep. Christopher Shays

Rep. Henry A. Waxman

Rep. Kay Granger

Rep. Gene Green

Rep. Ciro D. Rodriguez

Mr. GUTIERREZ. So what are we doing here? We are doing nothing. We have a problem in America, 11 million people. They need help. And you know what? You know what really, really hurt me the most was that we raised the expectation. We said to those people there is hope that, yes, the gentleman from California and the gentleman from Illinois, who many times do not get along on ideological issues, but maybe can find common ground on immigration issues. And, you know, when they said this is hard, when the Speaker said this is hard, I said, so what else is new. That is what we were sent here to do, hard things. If it were easy, they should have another group of people come here.

And you know how they felt? They felt dashed. They felt destroyed. They felt disillusioned. And that is why I have to just say, listen, if you are not going to do anything, then do not tell the President not to do anything. Let him help——

Mr. ISSA. The gentleman's time has expired by 1 minute and a half.

Mr. GUTIERREZ [continuing]. So those dreamers do not have to have their moms and dads deported from this country. Let somebody do something on behalf of the American people and for the immigrants of this Nation. Thank you very much, Mr. Chairman.

Mr. ISSA. I want to thank the gentleman. I now recognize myself in order. And I join with the congressman's thoughts in one sense: Congress does need to act. But, Mr. Turley, I would like to leave that particular executive function aside and go to a couple of other questions, some of which I think have not been covered.

Is it not true that every action of every confirmed individual—secretary of fill in the blank, EPA administrator, and so on. Every one of those individuals offered up and confirmed by the Senate for a Cabinet-level position, every time they say do something, even in an email, is it not effectively an executive order, not a presidential executive order, but an executive order of the executive branch duly distributed throughout authorized Cabinet positions.

Mr. TURLEY. Well, I think it could be executive action. It certainly could be a policy. You are allowed to challenge under the Declaratory Judgment Act policies that are implemented sometimes outside of strict executive order.

Mr. ISSA. Right. But the term "presidential executive order," which the gentleman from Illinois was relatively animated about, these are a relatively few actions of the executive branch compared to the tens of thousands of actions that occur through the regulatory process, through guidance, and as much as possible through—and I will give you an example. And this is Article 3. I am sorry, it is still Article 2. The U.S. Attorney in the Southern District of California some years ago basically made a decision not to go after Coyotes, simply not to prosecute them, that it was not worth it. That is an order by an executive delegated down, is that not correct?

Mr. TURLEY. It is, and one of the things I would point you to is that the Declaratory Judgment Act allows people to challenge acts and policies of the executive branch. The vast majority of those things are not technically executive orders, but they are executive action. They are policies.

Mr. ISSA. Right. So following up on, if you will, all of these actions which affect somebody somewhere or, quite frankly, the will of Congress as often signed by a President. You know, Mr. Conyers and I go back a lot of Congresses, so we may have passed something signed by a previous Congress. We may have signed something over the objection, the veto, of a president. But ultimately, laws have been passed, and they become the basis under which all executive action occurs. Is that correct? And I just ask is that true to both the other witnesses, that that is really the entire universe of what we are talking about, even though this hearing is pulled up to the level of the chief executive. But you all would agree that this is all executive action.

Mr. SCHROEDER. Yes, I would agree with that.

Ms. FOLEY. [Nonverbal response.]

Mr. ISSA. Okay. Then let me ask the salient question that has nothing to do with immigration, but has to do with all of these executive orders, executive actions, rules, regulations, and the like. At current, the United States Congress has not formally given itself standing to intervene on a regular basis, going to Article 3, when they believe that an entity of the executive branch has failed to properly execute or even interpret existing law. Is that correct that standing does not basically exist? The courts have generally found that we have not given ourselves standing on behalf of the American people. Is that agreed by all three?

Mr. TURLEY. Well, I would——

Mr. ISSA. I heard your answer, Ms. Foley, at one point. But, Mr. Turley, in general, if I were to object to the President's executive order, or to Gina McCarthy's at EPA action, I would not in the ordinary course have standing as an individual Member. Is that correct?

Mr. TURLEY. As an individual Member.

Mr. ISSA. And this Committee, if it were to find that the President's actions were inconsistent with the Constitution or with existing law, they would not have predictable standing.

Mr. TURLEY. That is where I would quibble a bit because I have long taken the view that Members do have inherent standing. And also we have had, particularly in subpoena cases where standing of Committees have been recognized.

Mr. ISSA. No, and I have one out in Fast and Furious. Mr. Conyers had one in Harriet Miers. So we are two people who believe in Article 1 power. So let me ask the follow-up final question. It is only one question of this entire line. If we either or do not have standing, in your opinion, does the Congress have the ability through statute to give itself explicit standing to go to Article 3 to resolve such disputes as we shall determine in statute? In other words, by statute do we have the ability to give ourselves standing on behalf of the American people?

And let us presume for a moment that the standing was based on a house, a house of Congress, as Mr. Conyers and I did each during our time, where only one house made a determination and was granted standing in the district court to have it decided. His was decided and mine is in the process of being decided.

From a statutory standpoint, which is really the constitutional question, do you believe we have the ability to pass a statute which

would then explicitly give ourselves standing? And let us just use executive orders, even though I would anticipate that the regulatory process that often leads to regulations or rules which are inconsistent with our belief of what the law says. Do you believe we can give ourselves standing through statute explicitly?

Mr. TURLEY. If the question is to me, I do believe that. Whether the courts would accept it—there is obviously hostility toward it. I would simply hasten to add that when you look at standing, you have to look at two different barriers that are presented by the courts. One is Article 3 cases, and one is called prudential principle cases. On prudential principles, this body can do a lot in advancing a claim of standing. In terms of the interpretation under Article 3, you cannot statutorily change the meaning of Article 3 as set by the Supreme Court. Only the Court can do that absent a constitutional amendment.

Mr. ISSA. Okay. Well, I want each of you to be able to answer briefly. But you are both familiar, I presume, with the Harriet Miers, the Bates case, and now with Amy Berman Jackson, her decision to grant standing and to find that the executive branch cannot assert that the court, Article 3, lacks the ability to decide differences of opinion between our bodies. Would you then say that at least we have the ability to pass a statute, and that they would have to give it similar consideration?

Mr. SCHROEDER. Well, purely as a predictive matter, no. I think you have drawn an apt distinction between the ability of this body to enforce its own internal legal processes against the executive. I would distinguish those situations versus a disagreement with the President over how the laws that apply to the citizens of the United States are being interpreted. But that is just my predictive reading of the cases. It is worth what you are paying for it. I mean, ultimately it is going to be decided by a court, and whether the three of us agree or disagree, is not going to——

Mr. ISSA. But you would agree, and, Mr. Gohmert, I will go quickly to you. I apologize. You would agree that it is only a question of standing because ultimately it is a question of whether you are an injured party and have standing, and whether or not each of us representing 700,000 people and collectively representing 318 million people, have standing on behalf of one or more of those people that may be affected. That is the only question before the Court.

Mr. SCHROEDER. Right. Ultimately a question of standing, there are two problems. One is the peculiar jurisprudence with respect to the legislature suing. I read those cases to say essentially the lawsuits are allowed when it is a question of process. Is there some ambiguity in the process by which a law is being followed through the tracks to get to enactment or not that is ambiguous to justify a lawsuit? So can the lieutenant government in Kansas be involved in a constitutional amendment decision, or does the Constitution prohibit that, and it made a difference as to whether the resolution was adopted or not?

Mr. ISSA. Thank you. Mr. Gohmert, thank you. You are recognized.

Mr. GOHMERT. Thank you, Mr. Chairman. And, Mr. Chairman, I am going to follow up on your questions. I am just going to read

from Article 3, Section 1, so we all know what we are talking about. "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish." Congress has the power to create district courts. If we want to create more district courts, we could do so. Does everybody agree with that?

Mr. SCHROEDER. Yes.

Ms. FOLEY. Absolutely.

Mr. GOHMERT. And we have the power to create more Federal circuit courts, Federal appellate courts, if we wish, correct?

Ms. FOLEY. Yes.

Mr. GOHMERT. We have the right to eliminate district and appellate courts, correct?

[Nonverbal response.]

Mr. GOHMERT. You all are nodding your heads. I take that as an affirmative answer.

Ms. FOLEY. Yes.

Mr. SCHROEDER. Right. There is a little problem at the margins about totally denying a remedy of a citizen for due process or other constitutional problems. But absent that, yes.

Ms. FOLEY. And assuming concurrent jurisdiction by state courts, you would not have a due process problem. So, yes.

Mr. GOHMERT. Well, but actually there is only one court we cannot eliminate, and that because it is created in the Constitution, and that is the Supreme Court, correct?

Ms. FOLEY. Correct.

Mr. SCHROEDER. Right.

Mr. TURLEY. Although you do have the power to add members to that Court.

Mr. GOHMERT. Yes, we do have the power to add members to that Court if we wish. I agree with you, and that has been tried, and I am glad it was not successful.

But I come back to this: if we have the power to create courts, whether we call them district courts, or immigration courts, or tribunals, or whatever inferior courts that we choose to create, then following up on Chairman Issa's question, why would we not also have the power to say what standing would be allowed in the court that we create? Any of you.

Ms. FOLEY. Well, actually I think it is because the relevant language of the Constitution is not Article 3, Section 1, but Article 3, Section 2, which extends the judicial power to certain cases and controversies, including cases that arise under the Constitution, treaties and laws of the United States, and cases between citizens of diverse States. So in interpreting——

Mr. GOHMERT. But if we eliminate every court but the Supreme Court, which we can do, and let them hear the Section 2 issues, then we should be able to create courts and say these courts will give standing to these litigants. We do that with immigration courts. We have done that with Uniform Code of Military Justice creating military courts or courts martial. So I know very intelligent people get to argue, well, you have the language of *Coleman*, and then the *Raines* position and all.

But I am saying if you stand on the Constitution alone, I do not understand how Congress would not have power to say we are cre-

ating these district courts, and you will give standing to Members of Congress, whether it is one who voted for or voted again a bill, or whatever. Whatever we chose to say, these have standing, understanding that we cannot change the powers of the Supreme Court to hear the things in Section 2.

Just because the Supreme Court has the power to hear the things in Section 2 does not mean that every court we create has to hear all of those things in Section 2. Is that not correct? Otherwise, we could not create immigration courts, or courts martial, or district courts, correct?

Ms. FOLEY. With respect, I think you are actually incorrect about this, and let me just briefly explain. The courts that you are referring to are non-Article 3 courts. You are right in the sense that certainly constitutionally only the U.S. Supreme Court has to exist. What would happen if Congress exercised its power to——

Mr. GOHMERT. What power do we have to create courts other than Article 3?

Ms. FOLEY. Correct.

Mr. GOHMERT. I know we have power over immigration and things like that under Article 1.

Ms. FOLEY. Article 1.

Mr. GOHMERT. But under Article 3 is where we derive our courts power, correct?

Ms. FOLEY. Right. So let us say Congress used its power and eliminated all district courts and U.S. courts of appeal, as you are hypothesizing. What would happen? What would that world look like? Would the U.S. Supreme Court be able to hear direct, immediate trial, essentially, of congressional standing? And the answer, I think, has to be no.

I hope everyone on the panel will agree with me here because under Article 3, Section 2, the Supreme Court has original and appellate jurisdiction. It only has original jurisdiction under Article 3, Section 2 for a very narrow category of cases.

Mr. GOHMERT. That is correct.

Ms. FOLEY. And what you are hypothesizing would not be an exercise of appellate jurisdiction, but original jurisdiction. And this standing lawsuit that you are hypothesizing would not be an exercise of appellate jurisdiction, but original jurisdiction. For example, Article 3, Section 2 says the Supreme Court has original jurisdiction over cases involving ambassadors, public ministers, and consuls, I believe, and that is it, right? Is there anything else there that I am missing? That is it.

Mr. GOHMERT. Well, I could read it to you, but my time has expired, and I am still looking for an answer to my question.

Ms. FOLEY. So, no. So the answer would be, no, you could not eliminate the courts and allow the Supreme Court to hear——

Mr. GOHMERT. I am not wanting to eliminate any courts. I am saying that by implication, if we can create a court, we can also create that court's jurisdiction, understanding the limits of Section 2 for the Supreme Court.

Ms. FOLEY. And I am respectfully disagreeing because under the Constitution, the Supreme Court can only hear original jurisdiction cases as a trial court in very narrowly-defined categories. It otherwise can only exercise——

Mr. GOHMERT. You are still talking about if we eliminated all of the courts, and I am not talking about that. I do not want to eliminate the courts. I am talking about the power of Congress, if we have the power to create a court, then we have the power to say which courts will hear which disputes.

Ms. FOLEY. And I am telling you that I do not think that is correct.

Mr. GOHMERT. We could divide up the district courts and say these can hear these disputes, these can hear these disputes, correct?

Ms. FOLEY. No, only for non-Article 3 courts.

Mr. GOHMERT. We do not have power to say what the jurisdiction is of a district court——

Ms. FOLEY. No, you have——

Mr. GOHMERT [continuing]. And that they will have jurisdiction to hear appeals from bankruptcy court? We do not have the power to say that?

Ms. FOLEY. If you are asking the basic question could you give standing to an Article 3 court, a lower Article 3 court now that you are not hypothesizing——

Mr. GOHMERT. Well, you said no when I said——

Mr. ISSA. The gentleman's time has expired.

Ms. FOLEY. The answer I gave was no.

Mr. GOHMERT. Well, she said that I was wrong about an issue, and I want to establish that when she said I was wrong about us being able to split up the district courts and give some district courts some authority, other district courts other authority, we have the power to do that. And when you said I was wrong, you were inaccurate. You were going back to your assessment over standing, correct?

Ms. FOLEY. I am sorry. I must have misunderstood your question. However, if you are asking can the Congress give jurisdiction to the court to establish standing, the answer is clearly no.

Mr. GOHMERT. I asked does Congress have the power to divide district courts——

Mr. ISSA. Would the gentleman yield the time he does not have for just a moment?

Mr. GOHMERT. Sure.

Mr. ISSA. Under Justice Breyer, the Fed Circuit was created to hear appellate of patent and trademark. And Justice Breyer has very publicly said that perhaps he should have created special courts, Article 3 courts, to consider them. So would it be reasonable to say, on behalf of Mr. Gohmert, that that type of decision of what kinds of cases go to what kinds of courts and what appellate process is at least proven in the case of the Fed Circuit to be in law and well recognized?

Ms. FOLEY. That is correct, but I understood that the congressman was asking could you give the court standing. And the answer would be no.

Mr. GOHMERT. Well, I have moved onto other questions.

Mr. ISSA. And we will now move onto the gentleman——

Mr. GOHMERT. And I appreciate the Chairman's indulgence for giving me almost as much time as he took.

Mr. ISSA. No problem at all. Mr. Poe will forgive you in time. The gentleman from Texas is recognized.

Mr. POE. Thank you for being here. I enjoy and think it is quite worthwhile for us to engage in conversation about the Constitution. We ought to do more about that.

I want to cut to the chase. The Congress has given under the Clean Water Act, if I understand it correctly, a cause of action to, let us say, environmental groups under the Clean Water Act so they can go to court. What if we use that same analogy—I am not talking about standing—cause of action. Congress receives under legislation a cause of action to sue under the concept of a violation of the law regarding this issue of executive orders. I did not frame the question very well, Professor Turley, but you could frame it better and then answer it for me.

Mr. TURLEY. No, it is framed perfectly well. And the problem is that unfortunately all these roads end up back at Rome. You know, you can create those causes of action. You can create what are called private attorneys general in statutes like the Clean Water Act. But the Court has placed an overlay on that question that said even if you satisfy the standards of the statute, you must still establish for us that we have Article 3 standing.

Now, I think that the Court has really made a mess of this in that it is almost incomprehensible as you look at all these cases of what they are meaning, including the recent Windsor decision, which was splintered all over the place on standing. And I am still not quite sure what Justice Kennedy ultimately found standing on. But I will note that standing was found by Members of Congress in the Blagg organization, and that was from one house.

So the answer is the Supreme Court has said no matter what Congress does, we have to be satisfied that there is a case or controversy under Article 3. Now, to make things even tougher, because of *Marbury v. Madison*, the Court has always said we alone are the final interpreter of Article 3. So the end result is what they say Article 3 is is what Article 3 is until we can get them to change their minds.

But what Congress can do is to maximize the ability to get standing under an alternative basis, which is called prudential principles. Now, that will not negate the Article 3 limitations, but the Court has recognized that it can grant under prudential principles standing. And notably in the Windsor decision, the Court did say that they felt that really they had to grant those because of the abandonment of the defense of the statute—in this case, DOMA—by the Administration. And they needed to guarantee an adversarial process.

Mr. POE. I have two more questions, so I had better make them quick. I do think, however, on the cause of action that may get us to the courthouse front steps as opposed to not even getting there. Same situation is going on. I mean, Congress has become, I think, because of the executive orders, you know, the whim of this Administration. It could be the whim of any Administration of whether they are going to ignore the law or write its own law.

Let us switch to the judiciary branch, which is supposed to be the weakest branch of government if I remember my constitutional law history that you all taught us. What if the judicial branch in

a lawsuit, hypothetical lawsuit—you all love hypotheticals—the judicial branch, the Supreme Court rules that the Administration cannot do this, and the Administration ignores the judicial ruling of the Supreme Court. Oh, I am going to use my pen and phone and just ignore the judicial ruling of the Supreme Court. What is their remedy? If we do not have a remedy, what is the Supreme Court's remedy?

Mr. TURLEY. Well, of course, that is the question that I believe President Jackson asked when he asked where is your army to the chief justice of the United States.

Mr. POE. You made your ruling, now you enforce it.

Mr. TURLEY. That is right. And so fortunately, this country has been committed to the rule of law, and presidents have rarely taken that position. In terms of the enforcement, it would be left to Congress that has the most direct ability to combat the other branch.

And, you know, Madison assumed that in these fights, the branches would jealously protect their own authority, but they would be equally worried about authority being taken from another branch by a third branch because they want to prevent the concentration of authority.

Mr. POE. Last question briefly. You mentioned impeachment in your written testimony, Professor Turley. Quick comment about what you think that might be as an alternative.

Mr. TURLEY. You know, I testified at the Clinton impeachment and I was the lead counsel in the last judicial impeachment, so I am very leery of even mentioning that word.

Mr. POE. But you did. [Laughter.]

Mr. TURLEY. Well, the reason I did is because courts routinely, almost as a mantra, refer to the power of the purse, legislative oversight, and impeachment when they say checks and balances on the President. I don't believe impeachment is a solution here because courts have really enabled the President in this sense by creating ambiguous standards where he can claim that he believes he is acting within the law.

But more importantly, we will be in seriously bad shape if impeachment is the only remaining check and balance. It is like running a nuclear plant with an on/off switch. We cannot do it, and it will not bring stability to our system.

Mr. POE. Thank you very much. I yield back.

Mr. GOODLATTE [presiding]. The Chair recognizes the gentleman from Pennsylvania, Mr. Marino, for 5 minutes.

Mr. MARINO. Thank you, Chairman. Welcome, everyone. It is good to get involved and engage in this debate.

First of all, let me preface my statements and my questions by saying I am displeased with executive orders that past presidents have executed, Republicans and Democrat, but I was not in Congress at the time. I am in the Congress now, and I am very displeased with what is taking place in the executive branch.

Professor Schroeder, you are one of three authors in Keeping Faith with the Constitution. And I have not read the entire book, but I have looked through passages of it, and I was impressed by what the three of you agreed to. And I am just going to cite some things here.

It says, "The authors have described what they call constitutional fidelity, a principle that serves not only to preserve the Constitution, meaning over time—but here is the line I think is critical—"but also to maintain its authority and legitimacy." And there is no doubt in my mind that from the heart and soul that you mean that.

I do have concerns about at what point do you draw the line at discretionary implementation of the law? I was a prosecutor, a Federal prosecutor, and a district attorney for 18 years, and I know the authority that I had. But that authority was based on that precise case given the fact that there were specific instances or lack thereof that would determine whether I would prosecute or not prosecute. Are you saying that the President has the authority to elevate that in a broad stroke? For example, do not pick up illegals or detain them coming from the President to the Attorney General. Do not implement parts of the healthcare program. The Attorney General, which I am sure was through the direction of the President, telling States' attorneys general not to enforce certain laws if they do not like them.

So, sir, I ask you, where do you draw the line, and that is a broad group, not a specific case. I took an oath as a prosecutor, but it was all based on specific facts, the facts of that particular case. So could you please address that, where you see the distinction?

Mr. SCHROEDER. Well, Congressman, thank you. I certainly agree with you entirely that when you are sitting as a prosecutor and a case file comes before you or you have got to make a judgment in consultation with an FBI agent or other law enforcement agent as to whether is sufficient evidence to proceed, you may make a judgment on an individual basis, well, I think there is sufficient evidence to proceed, but I would rather put the office's priorities someplace else. That happens inevitably on a case-by-case basis.

But presidents and attorneys general make these kinds of decisions all the time. Look what happened after September 11th. The entire FBI pivoted to combat terrorism. They converted thousands and thousands of agents into counterterrorism agents. The JTTFs and the U.S. attorneys' offices in all of the hot spots that people were worried about——

Mr. MARINO. I was part of——

Mr. SCHROEDER [continuing]. Focused like a laser beam. At the same time that was happening, other crimes, and people have criticized the Department for this. White collar crime prosecutions went way down. All kinds of prosecutions that before the FBI was investing resources in investigations that would lead to prosecutions were neglected. Those kinds of reallocation decisions are made all the time.

Mr. MARINO. Yes, but that is where I disagree with you. They were not neglected. Priorities were established.

Mr. SCHROEDER. Priorities were established, exactly.

Mr. MARINO. But they did not say I am not going to prosecute these white-collar crimes because I do not believe they should be prosecuted. So are you going to allow the Attorney General or the President or states' attorneys to say, okay, I am not going to prosecute sex crimes when it involves a 16-year-old and an 18-year-old because I think the 16-year-old is capable of making that decision?

That is not the intent behind that. And the President and the attorneys general are just as responsible for criminal laws and civil laws, not painting it with a broad brush.

There was a statement that you made in your opening statement, or at least when I read through this, you said, "While I have not examined all the statutes relevant to the recent Administration's actions on this point, I am not aware of any statutory restrictions on enforcement discretion that bear on those actions." My question to you is then how can you come to the conclusion that you have without exhausting all the relevant recent Administration actions. That would be like you saying to a law student who you ask a question, and they gave you an answer. And you asked them, well, did you forget about this particular research? Well, yes, I did. Well then, I do not want to hear your answer.

Mr. SCHROEDER. Congressman, I agree with you entirely. I did not intend to, and I hope I have disclaimed appropriately, I do not mean to here offer you a final definitive legal conclusion on any of these actions. Some of them may be without the boundary. I was trying to indicate in my testimony that they have plausible justifications rooted in traditional exercise of prosecutorial discretion and understandings of the appropriate statutes. We would have to dig into them to see if those justifications are warranted.

Mr. MARINO. Okay, and I accept that, and I thank you. I like that response, and I do appreciate that response. So Has my time run out? I am color blind. I cannot tell what is going on over there. All right. I guess my time is up. Thank you so much. I yield back.

Mr. GOODLATTE. That is the best excuse I have heard so far. [Laughter.]

VOICE. I am going to use that.

Mr. GOODLATTE. So for any other Members of the Committee that are suffering from this same affliction, the red light is the one on the left. [Laughter.]

But the Chair now recognizes the gentleman from South Carolina, Mr. Gowdy, for 5 minutes.

Mr. MARINO. I have a little dyslexia, too.

Mr. GOWDY. Thank you, Mr. Chairman. I want to take a quick survey of executive power for those that are watching from home and hope that my old con law professor is watching from whatever nudist colony he retired to. [Laughter.]

A president can veto legislation for any reason or no reason. A President can, through his or her attorney general, fail to defend the constitutionality of a law or portion thereof, even if that same president signed the very law into existence. A president can invite suit against a law and then fail to defend its constitutionality. A president, under some curious definition of prosecutorial discretion, can fail to enforce certain laws, even though money has been appropriated and there has been no challenge to its constitutionality.

And Professor Schroeder used a new test called good faith, which I have not heard previous to today. That, in essence, Mr. Chairman, is a second veto, but it is more insidious than the first veto because now you can pick certain portions of a law and enforce it and ignore other portions even if the bill was only passed because of a compromise between competing positions. The president can pardon offenders even before they are indicted or prosecuted. And

individual Members of Congress have no standing under *Raines*. We may or may not have standing under *Coleman* based on vote nullification and institutional standing.

So, Mr. Schroeder, it seems to me that if you like part of a law, enforce it. If you do not, do not enforce the rest. You used the phrase "good faith." I want to ask you this: what is the mandatory minimum for possession of 5 grams of cocaine base?

Mr. SCHROEDER. I do not know, Congressman.

Mr. GOWDY. It is 5 years, and it is set by statute. So the judicial branch has to follow that. The judicial ranch would never entertain the thought of saying even though there is a mandatory minimum, we are going to ignore it. So tell me how the Attorney General can.

Mr. SCHROEDER. Well, Congressman, I think a lot of the discussion about non-enforcement of the law is focusing too much on the donut hole and not enough on the donut.

Mr. GOWDY. With all due respect, Professor, you talked about immigration, and you talked about healthcare. I am talking about mandatory minimums. They could not be more clear. The legislative branch has the power to set the minimum and the maximum. And rather than this Attorney General doing what he should have done, which is say, you know what, I disagree with the law, I am not going to enforce any narcotics laws because all 50 States have concurrent jurisdiction in narcotics, he wants the best of all worlds. He is going to continue prosecute narcotics cases, just not tell the court what the drug amount is, thereby getting around the law. How does he do that?

Mr. SCHROEDER. Congressman, I am sorry. I am not familiar with that decision that the Attorney General made that you are describing. I would be happy to take a look at it.

Mr. GOWDY. Trust me. Even though I am a lawyer, trust me. He has said he is not going to inform the courts anymore about the drug amount because he disagrees with mandatory minimums. How is that the proper exercise of prosecutorial discretion? That is rewriting the law, Professor.

Mr. SCHROEDER. Congressman, I would very much like to be able to answer your question. I am not going to be able to answer it until I look at the specifics of the situation. I just apologize for not being that thoroughly versed on this particular issue.

Mr. GOWDY. All right. Well, let me ask Professor Turley. If he can do that with drug laws, why can he not do it with election laws?

Mr. TURLEY. Well, I think that it really does hit the nail on the head. I mean, the problem with the Administration's argument is that it just simply proves too much. It would effectively make all of the separation of powers principles discretionary. And I do not see how you could possibly ascribe that purpose to a group of men who were remarkably pragmatic and practical. These are people that spent a lot of time trying to create balances and checks between the branches.

This is the last group of people that would say, you know, we have this massive apparatus in Article 1 and Article 2 and Article 3. But in the end, it really will come down to the President making this decision. These are the last people that would say that.

And I also believe they would feel the same way about the idea that we have plenty of cases now where the Court seems to say virtually no one has standing to bring up a constitutional violation. That is the reason I think a lot of the solution is right here in front of this table. Members of Congress are a relatively small group of people that, in my view, have all the elements of people that should have standing. We usually limit standing to parties that can present the best case, the ones that have the greatest interest. When it comes to separation of powers, these Members have the greatest interest. They have skin the game.

Mr. GOWDY. I think the Court signaled that in *Raines*. The Court said this in dicta. We attach some importance to the fact that the House has not authorized this group to represent them, which I read to mean that perhaps if the House does authorize a group to represent them, and that is in *Raines*, not in *Coleman*.

I know I am almost out of time, Mr. Chairman. Can I ask Professor Foley one question? It is quick, I promise.

Mr. GOODLATTE. Without objection, the gentleman is recognized for 1 additional minute.

Mr. GOWDY. What happens if there is a technical violation of Miranda? Even though you got the right person, you know they committed the crime, but the police just failed to say, you know what, you can stop answering questions any time you want? What is the remedy for that for those watching at home?

Ms. FOLEY. The exclusionary rule.

Mr. GOWDY. Right, even though we have got the right person. In other words, to Professor Turley's point, I like the policy, but the process you used is wrong. And it is the same with 4th Amendment, and it is the same with the 5th Amendment. We are going to kick out evidence, and we are even going to let people we know are guilty go because we value process, and the end does not justify the means.

So to your point, Professor Turley, that you agree with the policy, but you dispute the method by which this Administration is achieving it, I salute you, and I wish more of my colleagues cared enough to do the same. And with that, I would yield back.

Mr. GOODLATTE. The Chair thanks the gentleman, and recognizes the gentleman from Idaho, Mr. Labrador, for 5 minutes.

Mr. LABRADOR. Thank you, Mr. Chairman. And actually to follow up on this last comment from Mr. Gowdy, Mr. Turley, I appreciate you being here, and I appreciate the courageous stance that you have taken. In fact, I found it interesting after your last testimony the last hearing that we had how much you got attacked in the media. And I want you to explain what you went through because there was even a moment where actually a reporter who is here today just went off about the impeachment part of our hearing when there was only maybe one sentence uttered about impeachment in an entire 4- or 5-hour hearing. Could you go through a little bit?

Mr. TURLEY. Well, there was certainly a lot of anger, and I am just talking about within my family. [Laughter.]

I come from Chicago, a really staunchly Democratic and liberal family, so it has been months since I returned to the house. The fact is I realize that this is an area fraught with passions and poli-

tics and people feel very deeply about it. Many people feel that I have, you know, sort of betrayed folks that I usually work with.

And in all truth, even though I have written and taught about separation of powers for many years, I have to admit that on some occasions when President Obama has done things that I liked—and I will list one, you know, the greenhouse gas regulations—I privately was glad he acted, and then I had to sort of catch myself because I did know that Congress had rejected some of those measures. And what is being implemented is a massive new regulatory scheme.

And the fact is, even though I agree with the President in that area, this is a prototypical example of something that Congress needs to weigh in. And all of the passions that we have seen here is precisely why this is the institution that has to make the decisions. It is not enough to say I agree with what he has done, and it is certainly not enough to say this would not have happened if you had just done what the President told you to do.

Mr. LABRADOR. Which is what I am hearing here. I have heard Mr. Schroeder say it. I have heard several of my colleagues say that if you would have done what the President told you to do, he would not have needed to act in the manner he acted. That, to me, sounds so dangerous. Why do you think, Mr. Turley, that that is dangerous for the future of this country?

Mr. TURLEY. Well, what I would say to those that I often work in the environmental field and other areas where I happen to agree with the President, I believe that in time people will loathe the day that they remained silent during this shift of power. There will be a future president you do not agree with. And just as some laws are being negated or delayed or nullified today, the next round of laws may be something you care more deeply about, and that is what the framers warned us about when they said we are giving you not solutions. We are giving you a process, and this is the all-terrain vehicle of constitutional systems. It has been through everything.

It is not a particularly beautifully written Constitution. Anybody who has said that has never read it. It was written by a wonk. You want a beautiful Constitution? Read some of the French constitutions. There are lots of them because they failed repeatedly. Our Constitution was written by practical people, and it has served us well. I do not think it is asking a lot of this institution to pass along that Constitution in the same shape that you inherited it.

Mr. LABRADOR. Ms. Foley, you spoke one moment about the dangerousness of the magisterial power, and I do not think people understand what that means when you talk about a magistrate. What is the difference? Why is it dangerous to actually have magisterial power?

Ms. FOLEY. Well, I mean, it is basically, you know, why we revolted against Great Britain, you know. We were concerned that we had a monarch who basically could suspend our laws and do what he wanted to do. When you get to the point where the only limitation on the President's, or the only definition of the President's, duty to faithfully execute the laws is what Mr. Schroeder suggested, which is sort of an overarching idea that the President has to act in good faith, I do not know what that would mean. I have

no idea how anyone would enforce that. And what that is is, you know, effectively having a monarch.

Mr. LABRADOR. Which is the danger of this. And, in fact, I believe—I have been a Member of the Tea Party. I think the Tea Party arose because there was a frustration with not having spoken up during the Bush years. And many people who were upset, like myself, that we did not say enough because Bush over exerted his constitutional authority. And we actually stood silent because it was our President who was doing it. And I think it was not necessarily an attack on the new President. It was a frustration that many of us had that we did not say enough, and I think that is why many of us are saying now.

One last question for Ms. Foley and Mr. Turley. Can you please explain, because I have heard again and again prosecutorial discretion? And apparently there seems to be a misunderstanding of what prosecutorial discretion is. The people on the other side seem to think that if the Administration just decides there are three or four things that they have to comply with, then that is prosecutorial discretion. That is not the way I understand it.

Ms. FOLEY. It is not the way I understand it either because think about what the President has done in the Dream Act situation, right? He has created a whole new category of people who are not deportable. And basically what this is, it operates as a blanket waiver for these particular people. And I believe it was Congressman Gutierrez when he was here earlier, he was the one who made the point that, you know, this is a case-by-case adjudication. Well, it is only case-by-case if what you mean is that the President's people are checking to make sure that the President's boxes are checked. That is not what most people think of when they talk about prosecutorial discretion.

Mr. LABRADOR. Mr. Turley?

Mr. TURLEY. I have to agree with that. And my problem with the argument of prosecutorial discretion is that when I listen to the arguments, my question is, if that is prosecutorial discretion, what is not prosecutorial discretion? It would seem like everything would be prosecutorial discretion.

Now, we can call a raven a writing desk. We can use whatever terms we want. But I cannot see how what is clear acts of circumvention of Congress can simply be forgiven in the name of prosecutorial discretion.

Mr. LABRADOR. Thank you very much. I yield back my time.

Mr. GOODLATTE. The Chair thanks the gentleman and recognizes the gentleman from Iowa, Mr. King, for 5 minutes.

Mr. KING. Thank you, Mr. Chairman. I thank the Chairman for holding this hearing. I would point out as I observed the first four witnesses, they are Republicans, and I had also observed that likely there was an offer made to the minority party to bring a Member forward that might have had some legislation to protect this Constitution. But I am sure they would have voiced that concern if they had had someone to offer.

But here as I listen to each of the presenters of the Members who have drafted legislation to fix this issue, I was engaged by each one of their testimony and their presentation. But when I got down to the end of it, I had to kind of do an exhale of despair be-

cause it circled back around to Congress passes another law that tells the President to now follow and obey a new law.

And so, it should be obvious to all of us by now that there is unlikely any law that we could possibly pass here in the Congress that is going to compel the President to enforce it unless it is to his political interest to do so. And I will say that is one thing that we can count on the President to do with regard to keeping the portions of his oath, and that is if it is in political interest and his philosophical interest, he will enforce it. If it is not, then he will look at the consequences, which might be a public pushback of great enough magnitude that it could be embarrassing.

I think one of those points would be when in Obamacare, the conscience protection did not adequately protect, especially the Catholic church, but our religious institutions, and he was compelling them to provide contraceptive, abortafacients, and sterilizations, which was a direct violation of the principles of not just the Catholic church, but many other religious institutions. And individuals should stand in the same shoes, by the way.

And so, the President did a press conference at noon on a Friday and he said, well, now I am going to make an accommodation to the religious institutions, and I am now going to require the insurance companies instead to provide these services—he called them services—for free. He repeated himself, for free. And if you scoured the rule that was written by Sebelius' HHS, there was not a letter changed in that rule. The President had spoken orally in a press conference, and the insurance companies lined up to do his will and his bidding. That was a chilling thing to witness as a sworn to oath to protect the Constitution Member of Congress.

So all of this that we might do to pass legislation is not the answer. Things we might to do to cut off funding leaves us vulnerable to, oh, intradepartmental transfers of appropriations or even interdepartmental transfers of appropriations. That threshold is the patience of the public. And now we are talking about going to court and figuring out how to get standing because maybe Article 3 will save us. Well, they are the creatures of Congress. We could abolish them, I suppose, if they do not do the will and the bidding of Congress, everybody but the Supreme Court.

But in the end, what if the President has the same level of disrespect for Article 3 as he does for Article 1? What if he wraps himself in the cloak of "I have spoken and there is nothing you can do about it?" And we have used the "I" word here, and we know that it is an impractical tool in this room. I was not a Member of Congress, but I know exactly where I sat back there behind David Schippers when he delivered the summary of the prosecution in the impeachment of Bill Clinton. And it went over to the United States Senate where we did not get constitutional justice out of the Senate. What we got instead was one vote that wrapped up all questions of whatever kind of violations the President might have had. And then into that question was should he be removed from office.

We have Harry Reid as a shield in the Senate, so now all of these provisions that our founding fathers have laid out, if they did anticipate the circumstances, they could neither come up with a solution that they could write into the Constitution to offer to us.

So I want to ask this question and go down to the line, first with Professor Turley. And that is, if the President shows the same level of disrespect for the judicial branch as he does for the legislative branch of our government, and refused to abide by a court, should we grant ourselves standing and somehow maybe overturn the veto of a President that would refuse to give us standing? What next is our recourse? And I think that is the question we should ask, but bleep through that. I know we are linear thinkers here, but we need to leap to what is our recourse if the legislative and the judicial branches of government are disrespected to an equal level, and the President is wrapped completely in the cloak of "I am President; therefore, I can do what I want?"

Mr. TURLEY. Well, what you are describing would be tyranny if it went that far. Then we would have issues of removal. But I do think that you have avenues which you can pursue. I complement those that are focusing on standing and focusing, for example, on litigation abandonment issues of defending statutes.

I do not believe that the book is closed on Member standing, and I do not agree that it is so clear that Members do not have standing. Having litigated this issue for Members, I think there is room that can be expanded upon. That is the reason I think these are good ideas.

But when you are talking about, well, what happens if all the safeties go off, you know, do we have the sort of meltdown. And the answer is that the framers, I think, assumed that there would always be two branches aggrieved by any aggregation of power in the third branch; that in the desperation of the separation of powers, you find alliances. What I think they never anticipated was the degree to which the judicial branch would be absent without constitutional leave on this issue. But I am hoping that that will change.

Mr. KING. Thank you. Professor Schroeder? Mr. Schroeder?

Mr. SCHROEDER. Congressman, thank you. As you can imagine, I part company with you at the articulation of the problem. I think if you look at the President's actions that are being controverted, one by one, you will see that each and every one of them is justified argumentatively by application of statutory law. So I do not accept the proposition that the President is disrespecting this body.

He came into office trying to distance himself from President Bush, who did say on some notable national security-related questions that he had the ability to override——

Mr. KING. You are not going to contemplate my hypothetical then, Mr. Schroeder?

Mr. SCHROEDER. Because I do not think we are in that situation. Were we——

Mr. KING. Since we are actually out of time then, I would just thank you and ask if Ms. Foley could respond. Thank you.

Mr. SCHROEDER. Yes, thank you.

Ms. FOLEY. Yes. I mean, it is a great and scary question. You know, if the President does not appreciate Congress' constitutional prerogative to make the law, and if courts are not willing to defend that constitutional prerogative because of standing or whatever issues, or maybe Congress itself is too hesitant to even challenge the President in court——

Mr. KING. Or if the President does not honor a judicial decision.

Ms. FOLEY. Or if the President goes even further and does not even honor judicial decision, you know, the bottom line—Jonathan is actually right—we are in tyranny. We do not have a constitutional republic anymore.

Mr. KING. Thank all the witnesses. And, Chairman, I yield back.

Mr. GOODLATTE. The Chair thanks the gentleman and recognizes the gentleman from Florida, Mr. DeSantis, for 5 minutes.

Mr. DESANTIS. Thank you, Mr. Chairman. So just following up, Professor Schroeder, you said that the President's actions are justified by the applicable statutes. So for the Dream Act administrative amnesty, I think that is beyond prosecutorial discretion. You disagree. But where does the President get the authority to issue work permits for people who are in the country illegally when Congress has not even agreed to grant them legal status?

Mr. SCHROEDER. Part of the regulations that the DHS has with respect to deferred action that have been on the books for a while, my understanding is, authorizes people who have been deferred to apply for work——

Mr. DESANTIS. So the regulation basically would trump the statute, which said they are not lawfully in the country. You would have to do that, correct?

Mr. SCHROEDER. Well, in steps. Step one, what DHS is saying it has got longstanding authority, going back to 1975, to defer deportation actions. So that is step one. They claim they have that authority under the general discretionary statutes.

Mr. DESANTIS. But they are making a categorical determination.

Mr. SCHROEDER. And then at step two, once you are in that category authorized by discretionary judgment, there are regulations, and if you looked at the regulations, they would back those up with references to the statute, authorized work authorization. So it is a two-step process.

Mr. DESANTIS. There is a distinction between regulations being asserted by an agency and what Congress has actually legislated definitely. But I take your point on that.

You agree that this idea of if someone makes a criticism of the President acting one way to say, well, Reagan did 200 more executive orders, the number of executive orders tells us nothing about their quality, correct?

Mr. SCHROEDER. Yes.

Mr. DESANTIS. Okay. And, two, most of the disputes that we are discussing are not formal executive orders. You can go to whitehouse.gov and look up executive orders—the mandate delay, the keep your plan, DACA. Those are not formal EOs with a number, correct?

Mr. SCHROEDER. Correct.

Mr. DESANTIS. Okay. Professor Foley, well, first of all, part of the problem, I think, here is with respect to Obamacare particularly, these suspensions and delays are really designed for the President to help his political party in an upcoming election. I mean, this is not a notion of, oh, the statute is so complicated. They have had 4 years to impose these penalties. They obviously could do that. They are not doing it because they know if they were to do that there would be a political price to pay because the mandate would mean businesses would not expand or have a disincentive to ex-

pand. There would be an incentive to put people to 29 hours. And there was a cook who confronted the President directly about this at a Google town hall not too long ago.

And so, that, to me, is why it is so problematic. I mean, it is not like they are just trying to kind of do it. They are doing it in a way to lessen the pain before this election and spread it out so they can evade political accountability for the decisions that they have made. And I just think that that is wrong.

Let me play devil's advocate with you, Professor Foley, because, look, I mean, I am supporting kind of trying to do whatever we can. But in terms of enlisting the courts with this, you know, Hamilton said that the judiciary is beyond comparison, the weakest of the three departments. So the idea that they would kind of sit as a Mount Olympus and referee all these political disputes, I do not know that the Federalist Papers would necessarily justify that.

And I would quote from Justice Scalia's dissent in the Windsor case, which concerns standing. It was a different issue, but he frames it like this, and I would just get your response. "Congress must care enough to act against the President itself, not merely enough to instruct its lawyers to ask us," meaning the Court, "to do so. Placing the Constitution's entirely anticipated political arm wrestling into permanent judicial receivership does not do the system a favor. And by the way, if the President loses the lawsuit but does not faithfully implement the Court's decree, just as he did not faithfully implement Congress' statute, what then? Only Congress can bring him to heel by, what do you think, yes, directly confronting the President."

So I guess my unease with it is it kind of seems like we are not really willing to do anything in Congress. I mean, we could withhold funding. The Senate could deny the President any appointments. They could say we are not going to consider any of these nominations until you start enforcing the law. So we have not really done anything in Congress, but yet we are kind of going to the courts basically hoping that they will bail us out.

And again, like I said, I want to try whatever could be effective because I think we need to do checks, but I do not think from what Justice Scalia said that he would necessarily agree with going to the courts in this instance. So what is your response?

Ms. FOLEY. Yes. I think you may be over reading Justice Scalia a bit because, first of all, the basic procedural posture of the Windsor case would be very different from a lawsuit that we are hypothesizing here.

Mr. DESANTIS. Absolutely.

Ms. FOLEY. A couple of things. First, the only thing that is required constitutionally for a Member of Congress or Members of Congress to bring a lawsuit against the President would be the injury-in-fact, right? It also has to be redressable, you know, in causation. Those are the other two elements. I am assuming those would be satisfied by this kind of lawsuit. So it is injury-in-fact that we have to focus on, which is the constitutional possible impediment to Congress bringing a lawsuit.

And when it comes to injury-in-fact, the Court has made clear that it is looking for in an institutional injury lawsuit nullification, some act by the President that is tantamount to nullifying what

Congress has done. And if you are confident that you could pick a test case where it would be sort of the best poster child, right, for this fact pattern where Congress has declared X, and the President effectively said not X, then you can have confidence that you will satisfy the injury-in-fact requirement.

Now, the next level of analysis is, frankly, what I think Professor Turley has been emphasizing, which is the Court also very briefly mentioned, like in *Raines*, some prudential factors that it also is concerned about in institutional injury lawsuits by Members of Congress, things like the availability of self-help, which is what I think you are highlighting here, things like the possibility of explicit congressional authorization.

So you would have to make sure that you had the best case, again, for checking those prudential boxes as well. When it comes to a lawsuit alleging presidential failure to faithfully execute the laws, you have to ask yourself, what would Congress be able to do to help itself? It cannot repeal the law, right, because it wants the law faithfully executed. It cannot reenact the law because what is it going to do, reenact the same law and say we really, really mean it this time?

The other possibility is impeachment. And so you have to say, well, would a court actually go to the drastic step of saying we are going to require that Congress actually try to impeach the President or actually impeach the President before we will even consider a lawsuit challenging the President's failure to faithfully execute? I do not think a court would go that far because impeachment actually is not a remedy in the failure to faithfully execute scenario. Impeachment goes well beyond what Congress is seeking. Congress is simply seeking to faithfully execute the law, not get the guy out Congress.

Mr. DESANTIS. Well, what about the funding? I mean, could they not say you guys could just defund the deferred action program? No funds shall be used to implement a deferral of adjudication. Would that not be self-help?

Ms. FOLEY. I do not think so for this reason: it depends on what case you pick, right? But, for example, let us take Obamacare. Most of Obamacare is self-funding. There are some things that are not self-funding that maybe you could toy with. But you again have to ask yourself, okay, say I am a judge. Would I say that I would demand that Congress go to the lengths of defunding all kinds of things that have nothing to do with Obamacare just so Congress can get leverage against the President to force the President to faithfully execute? That seems a little bit like overkill to me. There is not a tight means end fit there. I do not think that is what the courts mean when they reference self-help.

So, for example, in the court where they first reference self-help, and this is the only Supreme Court where they reference self-help is in *Raines v. Byrd*, they mention it at the very end of the opinion in a separate section, Section 4, after they have already decided that the members failed constitutional injury-in-fact. So they are tacking this on at the end as prudential factors. And when they mention it very quickly in one sentence, you can immediately see the wheels turning, and you can say, well, what could Congress have done in *Raines v. Byrd* to provide self-help? That answer is

clear. They simply could have repealed the Line Item Veto Act. When we are talking about President Obama's failure to faithfully execute, that option is not available.

Mr. DESANTIS. Great. Well, thank you. I yield back the balance of my time, if any.

Mr. GOODLATTE. The Chair thanks the gentleman. The Chair thanks all the Members, and most especially thanks all the witnesses for their valuable contribution, and our first panel for their ideas with regard to the legislative initiatives they have offered. This is an issue that concerns a great many people in the country and a great many of us in the Congress. So we will continue to work on this in a legislative fashion to try to make sure that any president is held within the authority that the Constitution grants him, and does not stretch the meaning of prosecutorial discretion and other clauses that, in my opinion, were never meant in statutes to be as elastic as this President has found them to be.

I thank you all for your participation.

Without objection, Members will have 5 legislative days to submit additional written questions for the witnesses, and we would ask that you answer those questions promptly, or additional materials to be submitted for the record.

And this hearing is adjourned.

[Whereupon, at 1:08 p.m., the Committee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Material submitted by the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary

The Washington Post

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Republicans flip-flop on 'judicial activism'

By Dana Milbank, Published: February 26

There was a time not too long ago when Republicans decried "activist judges." Now they're lamenting that judges are not being activist enough.

"Unfortunately, the courts have been reluctant to exercise their constitutionally conferred power," House Judiciary Committee Chairman Bob Goodlatte (R-Va.) proclaimed at a hearing Wednesday. He called on the courts "to check the president's overreach," and he complained that "the federal courts have read their own powers much more narrowly" than they should.

This newfound love of activist judges is the latest manifestation of what has been called Obama Derangement Syndrome: The president's opponents are so determined to thwart him that they will reverse long-held views if they believe that doing so will weaken his stature.

Republicans have, for example, long deplored the filing of "frivolous lawsuits." But at Wednesday's hearings, they were contemplating legislation that would authorize either chamber of Congress to file lawsuits against President Obama — even though legal experts, including one of the Republican committee members' own witnesses, have said the efforts would fail.

After law professor Elizabeth Price Foley presented the panel with "a road map of how the House can establish standing to sue the president," the committee's ranking Democrat, John Conyers (D-Mich.), pointed out that earlier this month she penned an article for the Daily Caller titled, "Why not even Congress can sue the administration over unconstitutional executive actions."

Foley replied, "I did not pick that title."

Conyers pointed out that "you did say in there, though, that Congress probably doesn't have standing."

"I said most people think Congress probably wouldn't," the witness answered. "I'm not one of them."

No? She wrote: "Congress probably can't sue the president, either. The Supreme Court has severely restricted so-called 'congressional standing,' creating a presumption against allowing members of Congress to sue the president merely because he fails to faithfully execute its laws."

It's perhaps a sign of progress that the House Republicans are now focusing on suing Obama rather than impeaching him, which was discussed at an earlier meeting of the committee. But if they weren't talking much about the "I-word," as Rep. Steve King (R-Iowa) put it Wednesday, it's only because "it's an impractical tool," as long as "we have Harry Reid as a shield in the Senate."

But suing the president isn't any more practical because the courts have long refused to settle such

disputes between the elected branches. This means the proposed bills, and Wednesday's hearing, were really about the GOP effort to delegitimize Obama.

"President Obama's actions have pushed executive power beyond all limits and created what has been characterized as an uber-presidency," Goodlatte inveighed.

"We have witnessed an unparalleled use of executive power," said Rep. Jim Gerlach (R-Pa.).

Rep. Tom Rice (R-S.C.) accused Obama of "trampling our Constitution and our very freedom," Rep. Diane Black (R-Tenn.) said that "this administration's lawlessness" included the appointment of an "illegal alien lobbyist" as an immigration official, and Rep. Ron DeSantis (R-Fla.) reminded the panel that "the president is not a king."

There are legitimate questions to be asked about the long-term shift of power from the legislature to the executive, but it's suspicious that Republicans are alarmed about abuses of power by Obama that are relatively minor compared to those undertaken by George W. Bush. Republicans are irritated by Obama's refusal to deport children of illegal immigrants and his delaying implementation of parts of Obamacare. Back when Democrats controlled the House and the Judiciary committee was looking into Bush's military tribunals, Guantanamo Bay, torture and warrantless wiretapping, Republicans on the panel said Democrats were "criminalizing differences of political opinion."

At Wednesday's hearing, Rep. Luis Gutierrez (D-Ill.) made a similar complaint as he defended the legality of Obama's immigration policy. But as he spoke, Rep. Darrell Issa (R-Calif.), who had temporarily taken over the chairman's gavel, began to laugh loudly.

"This is not a laughing matter," Gutierrez said angrily, slamming a hand on the table as he continued. Issa stopped laughing but soon cut off Gutierrez, saying his "time has expired by a minute and a half."

Issa then recognized himself as the next questioner and exceeded his allotted time by $3^1/_2$ minutes.

The Republicans and their witnesses filled three hours with accusations and wild hypotheticals: "Tyranny." "Dangerous and scary moment." "Imperial presidency." "Magisterial power." "Effectively having a monarch." "Alarming." "Constitutional tipping point." "Reeks of arrogance and conceit."

"Neither the president nor the attorney general have the constitutional right to make or change laws themselves," declared Rep. Lamar Smith (R-Tex.). "That is what happens in a dictatorship or a totalitarian government."

But with one crucial difference: You can't file a frivolous lawsuit against a dictator.

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