UNIVERSITY OF BALTIMORE SCHOOL OF LAW

Charles Tiefer *3904 Woodbine Street*

Professor of Law *Chevy Chase, MD 20815*

CTIEFER@ubalt.edu

TESTIMONY BEFORE

THE HOUSE COMMITTEE ON RULES

by Professor Charles Tiefer

A "Speaker's Suit" Against the President Will Be

An Embarrassing Loser

Thank you for the opportunity to provide this. I served in the House General Counsel's office in 1984-1995, becoming General Counsel (Acting).. Before then I was in the Senate Legal Counsel's office 1979-1984. (Since 1995, I have been Professor at the University of Baltimore School of Law,)[1] So, I have 15 years of full-time Congressional litigating experience, including many, many experiences conducting cases in federal court. I have had more experience than anyone else, focused on what kinds of House roles in litigation do or do not get accepted by the courts as legitimate.

I might note that I have kept my hand in, in a bipartisan way, in hearings involving matters like those on which the House Counsel would opine. I was Chairman Issa's (R-Cal.) lead witness at his hearing on the issues that became the House's contempt case against Attorney

[1] In 2008-2011, I served as Commissioner on the statutorily chartered Commission on Wartime Contracting in Iraq and Afghanistan holding 25 televised hearings and conducting three missions to Iraq and Afghanistan.

General Holder.[2] And, I was Chairman Sensenbrenner's (R-Wis.) lead witness at his hearing on the FBI raid on a Member's office.[3] In other words, in recent years I have testified supportively for House Chairs, and, fully expect to do so in years to come.

I. The Speaker never told the House Counsel's office to sue the President about anything remotely like this "faithful execution" case, for very good reason – there is no standing and it is a bad idea for a Speaker to file such an embarrassing loser.

What we learned in the House Counsel's office, and in my own 15 years experience, is that the House does not have any standing for anything remotely like this "faithful execution" case because the courts know the House has no "injury in fact."[4] When the President does something allegedly violating "faithful execution" the House does not lose one penny. No one in the House goes to the hospital. Its property does not go down in value. The House does not suffer divorce or lose child custody. Focusing on the issue to be cited in the Speaker's complaint, a delay in providing federal health insurance, the Speaker's office does not itself need the insurance sooner, does not have to procure substitute insurance, does not pay more to buy the insurance, or otherwise does not experience a dime's worth of real injury-in-fact difference.

This memo focuses on providing my experience, which the Congress generously gave me, rather than reciting the formal printed judicial opinions. The House Counsel's office gathers a wealth of experience beyond written opinions, up close and personal in courtroom arguments and consultations among lawyers. We know that in cases remotely like this one, the Justice Department encourages judges, with much success, to flail someone like a House Counsel (i.e., like me) in oral argument with pointed and decisive questions about a complaint like the Speaker's:

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[2] "Congressional Committee Conducting Oversight of ATF Program to Sell Weapons to Smugglers, Notwithstanding Pending Cases," in Hearing on Justice Department Response to Congressional Subpoenas: Hearing Before the House Committee on Government Oversight. June 13, 2011.

[3] "The Search Warrant Raid Was an Unnecessary and Radical Step ," in Reckless Justice: Did the Saturday Night Raid of Congress Trample the Constitution?, Hearing Before the House Committee on the Judiciary (May 30, 2006)

[4] The type of cases showing this were the long string of cases brought by Congressmen objecting that Presidents had engaged in hostilities in violation of the Declaration of War Clause and the War Powers Resolution. The courts never found War Powers Resolution standing. The House Counsel's office never --not once -- brought or joined any of those cases. Speakers often disagreed with Presidents on such matters --- that includes, after my own time in the House Counsel's office, the disagreements of Republican Speakers with President Clinton about Bosnia and Kosovo -- but, Speakers never sued.

--where is the solid, real, injury in fact to the Speaker?

--wouldn't there be a more real case if we waited for a real live individual plaintiff with real out-of-pocket losses, real hurts, and real personal burdens?

--what's your best precedent that a Speaker ever filed a complaint like this? Do you have any at all?

--the "faithful execution" clause has to do with the President, not the House. Where in the clause does it say expressly that the House has its own right to vindicate by suit?

-- if you don't like what the President does, don't you belong, not in their courtroom, but back in the Capitol or the House Office Buildings doing what the House does

> – hearings, oversight, critical reports, bills, votes, appropriation riders, (the Senate holding nominees captive,) and so on? (That was always a Justice Department and judicial favorite, asking why the House Counsel doesn't go back, with his complaint, to the House where he belongs)

--we judges can read the newspaper, the House has plenty of political fights and frustrations with the President about whether he enforces laws, but, without descending into tawdry politics, how can we, the Court, address your problems in our purely non-political forum?

--where's the limiting principle -- can't you take the court roaming through the entire 12 annual appropriations for riders that the President isn't, in your view, obeying, and then, the dozens of volumes of the U.S. Code for provisions that the President isn't, in your view, obeying?

--can't you just express your views by filing amicus briefs or otherwise take part in the real cases before us -- like suits challenging Obamacare?

When the Justice Department has done its work, the judges will be encouraged to indicate to House Counsel (like me), just what a vulgar political brawl the Speaker is creating, by suggesting that we should go away promptly rather than to pollute further their courtroom with unseemly politics. The Article III reasons against a suit by Speaker Boehner may not get juices flowing on Capitol Hill but the Justice Department is licking its chops at how judges will disdain the House suit as an invitation to a distastefully political grudge-match.

The judges do not like us dragging them away from real injury-in-fact lawsuits and into what they will angrily view as the vulgar political cockpit. I might add that perhaps you might imagine the judges are diverse in their attitudes, and maybe the appointees of Republican Presidents would have one view of such a lawsuit even if the appointees of Democratic Presidents have another.

Like so much self-delusion about this embarrassing loser, that would be a flight of fantasy. The courts give the same hostile “get out of here –we judges have real injury in fact case to decide” reaction from judges from the left to the right in terms of judicial philosophy. Their view of Congress bringing a case ourselves, without personal out-of-pocket losses, comes from far deeper than their differences in judicial views -- when they get appointed, when they

serve with other judges, when they sit up on that bench in a black robe to decide cases, yes, they will decide real cases brought by real plaintiffs, but they don't want to have anything to do with Capitol Hill politics.

Do not imagine that the reason no case like this was ever brought, was because no House ever felt provoked as the House does today. For example, we had experience during the George H.W. Bush administration, which you may look back upon as not controversial or less partisan compared to today, but which at the time was quite full of contentious legal issues. It was right after Iran-Contra. The first Bush attorney general, wrote a very controversial memorandum about "faithful execution" and the President's right not to enforce laws. Chairman Jack Brooks, in the post now of Chairman Issa, fought that position tooth and nail. There was a Council on Competitiveness, chaired by Vice President Dan Quayle, which stifled environment, health, and safety administrative actions. The House fought that tooth and nail, too.

Yet no one in the House proposed to file such a Congressional suit. Indeed, the three Speakers under which was my own service never filed any Speaker suits. They knew it was an embarrassing loser without asking me, and, if they had asked, I would have told them, as I say here now, the courts make it an embarrassing loser.

Some may think that the suit will not be embarrassing, even when it does lose. They are whistling past the graveyard. Imagine this measure does pass Congress – a subject we may put aside. First, the case cannot possibly be started in the Supreme Court. That's a layman's naivete. The case starts in district court. After a while, it loses. Maybe it is appealed, but maybe not. For the Speaker to appeal it, is doubling down on a bet that has already been lost.

The next time constituencies get revved up by this President, or the next time it looks like there is political value to put on this type of display of action, the House will pass another of these. The House will resist the constituencies the second time less than the first. Even if a lower court wrote a nasty opinion, so what, the Speaker would be told, that is not the Supreme Court. So, the constituencies will say, let's file again. Once the taboo against filing is broken, you have a series of embarrassing losers.

Why embarrassing? Every time from the first such suit through the rest, that the House majority tries arguing -- in the course of ordinary floor and committee debate and in press interviews -- that President Obama is above the law, an embarrassing loss in this case will be thrown back at them in the press. The press will remind: "They lost." "They tried and lost." "The court harshly condemned them." "They were told they were besmirching the judicial robe."

House members may think they are used to a diet of some few wins and many frustrations and failures, and, this one case will not vary the diet that much. But, those with either legal training, or more dignity, or both, will know that the kind of scrapping that occurs in political forums is different from, and less unseemly than, when your Congressional leader goes into court himself and gets a dressing-down himself. It is a new level of undignified, awkward embarrassment. Members can stick their heads in the sand, and just think about how a measure like this makes a good press release and a good sound bite. But look ahead to the outcome. This complaint starts off grandly, but it ends in unseemly, tawdry embarrassment for the House and for the party that pushes it.

It is also just a bit more embarrassing because the Congressional party that is losing is the Speaker. There is a special dignity and stature surrounding the Speaker, regardless of his role as head of the majority party. He is in the line of succession. He only rarely votes. He is in a long line of Speakers with stature going back through American history to the pre-1800s centuries of the Speakers of the English House of Commons. He is named in the Constitution, as no Senator is. There is a special dignity. It is not seemly to bring him into court just to be told off.

Apart from that kind of embarrassment, there is another, which a Speaker should care about for caring about the institutional stature. Such losing cases and opinions tend to get thrown in the House's face in wide and diverse cases for years to come. The Senate lost a subpoena case during Watergate in the mid-1970s. It was a suit for which the Senate asked Congress to pass a special statute, and Congress did, and, the Senate lost anyway. *Senate Select Committee v. Nixon*, 408 F.2d 723 (D.C. Cir. 1974) That opinion is still thrown in the House's face forty years later. For those 40 years, the House and Senate counsels have said, "we wish the Senate had listened to wise counsel and not brought that losing suit."

II. This is not like seeking subpoena enforcement

Some may cite cases where the House has filed a proceeding to enforce a House subpoena. The courts have never confused such cases with a case like this. There is Article III injury in fact in a subpoena enforcement case, because a House committee has a concrete right – unique to that committee—to the testimony or documents.. It is injured because it needs that material for its investigation. The courts know this is real injury because they handle the same proceedings for administrative agencies seeking information.

To be sure, the Justice Department (or other defendant) makes threshold arguments against subpoena enforcement cases. But, the injury in fact has concreteness in such a case that it does not in this. Congress has had a recognized concrete right to obtain documents and testimony from witnesses since President George Washington. There have been court cases and statutes about that right, since at least the mid-1800s. The precedent-books are filled with cases, from the Supreme Court down, on Congress's right to information.

The President does not have a general duty to the people to respond to subpoenas, he has a specific and particularized duty to respond to the single committee that issues the subpoena and to that single subpoena. The courts are doing that subpoena case, not as part of becoming a roving commission to review the execution of any or every law, but because the focused single enforcement action passes the tests of all other subpoena enforcement actions. There is every precedent for the House to investigate, there is no precedent for the House to use courts to make Presidents "faithfully execute."

III. Courts Disdain Measures Making Congress the Plaintiff.

That gambit was tried before, in *McClure v. Carter*, 513 F. Supp. 265 (D. Idaho 1981). Congress questioned whether Judge (and former distinguished Representative) Abner Mikva's appointment conformed to a constitutional provision. So Congress passed a measure much like the one for this Speaker's suit. The statute authorized a Member to sue the President (Carter). (The Member who did was Senator McClure.)

The case went statutorily before a three-judge panel. The panel of judges found the statute did not provide Congress with Article III standing. It is not an opinion from the Supreme Court, but to those in the House and Senate counsel's offices, it has stood since then as a potent reminder that it is an embarrassing loser to try, with a measure, to create an Article III case with Congress as the complainant. That does not work.

The opinion noted the special concern with Congress filing the suit:

> The statute is, however, problematic at quite another level, for under article III of the Constitution federal courts may decide only cases and controversies properly brought before them, by parties with sufficient stake in the dispute to ensure that a decision by the courts is not inconsistent with the limited role the courts must play within our tripartite federal system of government. The fact that the statute makes senators and members of the House, and no others, "enforcers" of the Constitution in the judicial forum implicates special concerns regarding the separation of powers.

Moreover, the court made the statute and the Congress as plaintiff a special issue:

> if Senator McClure does not have a sufficient personal stake . . ., has Congress, by the statute under which Senator McClure seeks to sue, properly conferred a sufficient "right" upon him to give him standing and to satisfy the case or controversy requirement of article III?

The three-judge panel emphatically denounced the statute as granting standing:

> We must therefore consider the effect, if any, of the jurisdictional statute under which Senator McClure seeks to sue. It is difficult to see how this statute may, consistent with article III, confer upon a senator or member of the House of Representatives a "right" to seek a decision from a federal court that such a senator or member of the House would otherwise be powerless to procure. .....

To make the message loud and clear, the three-judge panel went out of its way to tell Congress not to try giving itself standing by statute, which sought a "dangerous precedent":

> Thus, we hold that Senator McClure, even with aid of the special jurisdictional statute on which he seeks to rely, does not have standing to bring this suit.. . . . Members of Congress are the democratically-elected representatives of the people, chosen by them to enact the laws of the United States, to advise and consent to the appointment of policy-makers in the executive branch and judges in the judicial branch, and to perform certain other functions prescribed by the Constitution. The statute under which Senator McClure brings this suit casts members of Congress in the role of special attorneys general. . . .. To allow members of Congress to change hats, as it were . . ., would, we suggest, set a dangerous precedent. We find that this court does not have jurisdiction, and we accordingly dismiss

No doubt, enthusiasts for this measure will attempt to claim support from Supreme Court opinions, and, this is not a Supreme Court opinion. But, I challenge them to find another opinion higher than this three-judge panel dealing with a statute that specifically conferred on Congress -- not on citizens whether in Congress or not, but, specifically Congress -- the right to sue the President. Opinions about Article III in general that do not address special Congressional rights, by some measure, to sue, and do not communicate this special scorn heaped on Congress for trying, as this measure about a Speaker's suit does, to confer standing upon itself.

Conclusion

The Court considering the Speaker's complaint under this measure will dismiss this case. But, that is only the half of it. The surrounding circumstances, the Justice Department's position, the oral argument, as well as the final judicial dismissal, will all tend to make the Speaker's suit much worse than just a defeat. For the House and its majority, it will end as an unseemly episode of being denounced for soiling the judicial robe with vulgar political brawling.