Statement of

Walter Dellinger*

Hearing before the House Rules Committee
Concerning

A Draft Resolution Authorizing the Speaker of the House
to Sue the President of the United States

Chairman Sessions, Ranking Member Slaughter, and Members of the Committee—

The draft resolution that is the subject of this hearing provides in essential part that the Speaker of the House may initiate civil actions in federal court on behalf of the House seeking declaratory or injunctive relief "regarding the failure of the President" (or any other federal officer) to act "in a manner consistent with that official's duties under the Constitution and laws of the United States." The resolution is limited to duties "with respect to the implementation" of the Patient Protection and Affordable Care Act. H.R. Res. ___ (Comm. Disc. Draft).

The House of Representatives lacks authority to bring such a suit. Because neither the Speaker nor even the House of Representatives has a legal *concrete, particular and personal stake* in the outcome of the proposed lawsuits, federal courts would have no authority to entertain such actions. Passage of the proposed resolution does nothing to change that. If federal judges were to undertake to entertain suits brought by the legislature against the President or other federal officers for failing to administer statutes as the House desires, the result would be an unprecedented aggrandizement of the political power of the judiciary. Such a radical liberalization of the role of unelected judges in matters previously entrusted to the elected branches of government should be rejected.

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* I am a partner in the law firm of O'Melveny & Myers, LLP, on leave from serving as the Douglas B. Maggs Emeritus Professor of Law at Duke University. From 1993 to 1996, I served as Assistant Attorney General and head of the Office of Legal Counsel and as acting Solicitor General of the United States from 1996 to 1997. In that capacity I argued *Raines v. Byrd,* 521 U.S. 811 (1997) before the United States Supreme Court. I filed a brief on the issue of standing in *Hollingsworth v. Perry*, 133 S. Ct 1521 (2013).

In the early days of the Republic, *Marbury v. Madison*, 5 U.S. 137 (1803), established the proposition that federal courts could resolve issues of the lawful authority of executive officials – and issue directives to such officials to comply with the law -- only because such injunctions are a necessary incident of a job the Constitution entrusts to federal courts: namely the task of resolving actual legal disputes between parties who have a personal and particular stake in the outcome of the litigation.

Recently, in *Hollingsworth v. Perry* (June 24, 2013) in an opinion by Chief Justice Roberts, the Court confirmed this understanding of *Marbury*: "To have standing, a litigant must seek relief for an injury that affects him in a personal and individual way. . . . This is an essential limit on our power: It ensures that we act as judges, and do not engage in policymaking properly left to elected representatives." *Hollingsworth v. Perry*, 133 S. Ct at 2659, 2662.

The House merely asserts an interest in the proper administration of a law passed by a previous Congress, the ACA. This has never been enough to establish Article III standing. See *Lujan v. Defenders of Wildlife*, 504, U.S. 505, 576 (1993) (rejecting the notion that an interest in the proper administration of the law can give rise to Article III standing); *see also* Brief for Walter Dellinger at *9, *Hollingsworth v. Perry*, 133 S. Ct 1521 (2013) (No. 12–144) (citing *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997)).

When government takes action that burdens a citizen, the citizen can rightly seek redress in the courts for his or her "personal, particularized" and "concrete" injury. The courts of this country do not exist, however, for the purpose of intruding into disputes between the elected branches of government on the proper interpretation and implementation of statutes. As Justice Scalia put it in his opinion in *Windsor v. United States*, the framers of the Constitution emphatically rejected a "system in which Congress and the Executive can pop immediately into court, in their institutional capacity, whenever the President …implements a law in a manner that is not to Congress's liking." 133 S. Ct. 2675, 2704 (2013) (Scalia, J., joined by the Chief Justice and Justice Thomas and questioned in part only by Justice Alito).

The notion that representatives of the legislative branch suffer an injury redressible by the courts when they disagree with the legality of an action taken by the President was firmly rejected in *Raines v. Byrd,* 521 U.S. 811 (1997). As Justice Scalia recently noted, although the opinion in *Raines* did not formally decide whether one House would have standing that individual members lacked, its reasoning certainly does. *Windsor*, 133 S. Ct. at 2704.

Chief Justice Rehnquist's opinion in *Raines* (for seven members of the Court) rejected the notion that members of Congress could file suit to challenge the President's exercise of a line item veto power they believed to be unconstitutional. The Court held that to meet the requirements of Article III of the Constitution, "[a] plaintiff must allege *personal injury* fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." 521 U.S. 811, 818–19 (1997). The court reaffirmed earlier decisions holding that "[t]he necessity that the plaintiff who seeks to invoke judicial power stand to profit in some personal interest remains an Art. III requirement." Thus, because the House only asserts a generalized interest in the proper administration of the ACA and fails to assert a personal stake in the litigation, it will fail to establish Article III standing here.

This requirement, the Supreme Court has emphasized, is no mere "technicality." *See* Brief for Walter Dellinger at *15, *Hollingsworth v. Perry*, 133 S. Ct 1521 (2013). It implements *Marbury v. Madison's* bedrock understanding of the judicial role, and reflects our constitutional system's "overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere." *Raines,* 521 U.S. at 820. In his *Raines* opinion, Chief Justice Rehnquist took note of the many occasions during our history in which the President and Congress had sharp disagreements. In none did the Congress believe the remedy was for Congress – let alone one house of Congress--to sue the President; nor did any of the Presidents believe that the remedy was for them to sue Congress.

This is as it should be. Administering the law is not part of the legislative power. "[O]nce Congress makes its choice in enacting legislation, its participation ends." *Bowsher v. Synar*, 478 U.S. 714, 733 (1986). Congress has no judicially cognizable interest in the "execution of the Act" it has enacted. *Id.* at 734. That is an "executive function,"

which Congress may affect only "indirectly," namely, "by passing new legislation."

In his opinion for the Court in *Raines*, Chief Justice Rehnquist did note that

> There would be nothing irrational about a system granting standing [for the President and Congress to sue one another]; some European constitutional courts operate under one or another variant of such a regime. . . . But it is obviously not the regime that has obtained under our Constitution to date.

521 U.S. at 828. The European model has never been the American way, and it would be a fundamental alteration to our system of government to adopt it now, as this Resolution would do.

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Some have suggested that the House should be allowed to litigate when four conditions are met: (1) there is formal authorization for the suit; (2) no private person has suffered any harm; (3) there is no feasible political remedy; and (4) there has been a "nullification" of the power of the legislature. *See* Memorandum of John Boehner to House Colleagues (June 25, 2014); *see also* Written Statement of Professor Elizabeth Price Foley, Committee on the Judiciary, February 26, 2014 at 1–2.

These criteria, even if they were satisfied, would not suffice to provide authority for the federal courts to hear an interbranch dispute. None of these conditions, taken singly or together, supplies the critical missing element required for federal litigation to proceed: a personal injury to a party. As Professor Tiefer (former acting General Counsel to the House) observes in his written testimony,

> 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.

Written Testimony of Professor Charles Tiefer to the House Committee on Rules at 2. That absence of a personal injury is itself fatal to the proposed litigation.

The first condition apparently refers to passage of a formal authorization of *one* House of Congress for the Speaker (or House Counsel) to sue an executive official. But even if we had a system in which the *legislature* could sue to complain about executive enforcement of the law—and as explained above, we do not, since disagreement over how a law is implemented would create no legal injury that would support litigation between the branches--we do not have a unicameral legislature. The House is not the Congress. And the House that would bring the lawsuit is not even composed of the same members of the House that voted for the law in question.

Even if it is impossible for a private plaintiff to demonstrate harm, and the House authorizes a lawsuit, the House will still fail to establish Article III Standing. In a memo to the House of Representatives, Speaker Boehner indicated that the House would have Article III standing to sue the President because, among other reasons, "there is no one else who can challenge the president's failure, and harm is being done to the general welfare"; and there is "explicit House authorization for the lawsuit[.]" Memorandum of John Boehner to House Colleagues (June 25, 2014). Even if this were true, it would not establish Article III standing for the House.

The fact that no private person has suffered any harm from the challenged administrative action might mean that the matter may be one on which no court will have an opportunity to opine. But that is by no means a vice. The courts have no business declaring constitutional meaning, or, as here, resolving disputes about the scope of a statute, outside of the actual lawsuits it is the judiciary's responsibility to resolve. As Justice Scalia put it, "We perform that role [declaring constitutional law] incidentally—by accident, as it were—when that is necessary to resolve the dispute before us." *Windsor*, 133 S. Ct. at 2699 (Scalia, J., joined by the Chief Justice and Justice Thomas and questioned in part only by Justice Alito).

Where there is no cognizable harm to a citizen, there is no proper role for the courts and the issue is left to the branches elected by the people, where it belongs.

An additional criterion suggested by those who would support litigation is whether there is a feasible political remedy that could serve as an alternative to litigation. Again, the central inquiry is whether the Speaker or the House has suffered a personal injury in fact, and the absence of political means for the House to address that disagreement cannot somehow create that injury. So there is no reason to think that satisfaction of this criterion would justify litigation. But it is not satisfied. Congress has ample political remedies if it disagrees with the President's implementation of a law.

First of all, if Congress concludes that the Treasury Department's interpretation of the ACA is wrong, or otherwise simply concludes that there should be no administrative flexibility whatsoever in extending certain statutory effective dates, it can simply expressly so provide by legislation. Importantly, the President and the Treasury Department here are not asserting any constitutional prerogative to disregard, suspend, or "dispense with" statutory directives: They are merely construing the ACA in a way that some members disagree with. There is no reason at all to think that the executive would not comply with a statute that established an inflexible deadline.

In addition to denying administrative flexibility by express provision, members of Congress possesses a variety of other powers they can exercise when they disagree with how a presidential administration is interpreting a statutory provision, including denying funds for other matters which the administration supports, making confirmation of relevant officers difficult, and engaging in aggressive oversight by committees. Again, Justice Scalia puts it well:

> If majorities in both Houses of Congress care enough about the matter, they have available innumerable ways to compel executive action without a lawsuit—from refusing to confirm Presidential appointees to the elimination of funding. (Nothing says "enforce the Act" quite like ". . . or you will have money for little else.") But the condition is crucial; Congress must care enough to act against the President itself, not merely enough to instruct its lawyers to ask us to do so.

Windsor, 133 S. Ct. at 2704–05 (Scalia, J., joined by the Chief Justice and Justice Thomas and questioned in part only by Justice Alito).

It has also been suggested that legislative suits should be permissible, but only when the executive is engaged in some sort of "nullification" of the institutional power of the legislature. Foley Judiciary Testimony at 2. But no such thing is happening here.

The dispute in question involves the executive's deferral of certain requirements of the Affordable Care Act. This is a dispute about whether the law enacted by Congress confers upon the executive the discretion to provide for a delay of the full implementation of some provisions in order to facilitate an orderly transition to the new requirements.

The President and his officers believe that such discretion is permitted by the legislation enacted by Congress. Of course, everyone agrees that when there is an effective date, an agency does not have authority to impose the requirement *before* that date. But does the law permit executive branch officials to postpone imposing a particular provision and its penalties? Here there is *at most* a disagreement over how to read the law, in light of background principles of administrative practice.

The administration argues that a there is nothing remarkable about postponing administrative enforcement of new provision in order to effectuate a smoother transition. A prior history of transition deferrals would suggest that Congress writes laws on the background understanding that there is such discretion inherent in implementing many, if not most, complex laws. And nothing in the statute expressly precludes a sensible transition period. See the testimony of Simon Lazarus submitted today to this Committee.

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The point here is not who has the better reading of the law on this particular question. The critical fact is that the debate is merely about the best way of construing legislation. And as to that sort of dispute—the kind that engenders debate between the political branches as a regular course of business--Congress has a full panoply of remedies at its disposal to pressure the executive branch to conform to the House's view of the correct interpretation, not least of which is the power to amend the law to limit executive discretion.

In addressing the question before the House, history should be your guide. In *Raines v. Byrd,* the Court emphasized the absence of any history of judicial resolution of disputes between Congress and the Executive Branch brought by one of the branches against the other. *See* 521 U.S. at 826–28. That historical silence speaks volumes. The legal issue here is nowhere near the magnitude of those that have never been thought proper for triggering litigation by the President against Congress or Congress against the President.

To be sure, the substance of the matter in dispute is not insignificant. In providing health insurance to 30 million Americans, there are many transition issues to be considered and the deferral of regulatory burdens on some small businesses may be of genuine importance to the practical implementation of the law. But the legal question is itself quite modest: is it proper to assume, in the process of implementing a new law, that an agency has the authority to delay certain requirements in order to facilitate an effective transition to the new provisions?

Whatever the right answer, it is safe to say that never in our history has such a radical change in the role of the judiciary been proposed to deal with such a routine question of administrative process.